IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

AMANDA KONDRAT'YEV, ANDREIY KONDRAT'YEV, ANDRE RYLAND, and DAVID SUHOR,	)	
Plaintiffs,	)	
v.	)	CASE NO. 3:16-cv-00195-RV-CJK
CITY OF PENSACOLA, FLORIDA, ASHTON HAYWARD, in his official capacity as Mayor of the City of Pensacola, and BRIAN COOPER, in his official capacity as Director of the City of Pensacola Parks & Recreation Department,	)	
Defendants.	)	

Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment

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I. Introduction[1]

Precedent is dispositive in Plaintiffs' favor. *See ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983). The Eleventh Circuit in *Rabun* decidedly held that the "maintenance of the cross in a state park violates the Establishment Clause." *Id.* Every cross challenged within the Eleventh Circuit has been found unconstitutional. *Id*; *Am. Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512 (M.D. Fla. 2007); *Mendelson v. St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989). Indeed, Plaintiffs cited at least 25 cases finding crosses unconstitutional (P.Br.9-15), even when the cross was:

- A tourist attraction[2]
- A roadside memorial for fallen troopers[3]
- Historically or culturally significant[4]

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[1] Plaintiffs incorporate by reference their memorandum ("P.Br."), along with their record of evidence ("P.R."). The City's memorandum is cited as ("D.Br.").

[2] *Rabun*, 698 F.2d at 1111; *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980).

[3] *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010), *cert. denied*, 132 S.Ct. 12 (2011).

[4] *Rabun*, 698 F.2d at 1111; *Trunk v. San Diego*, 629 F.3d 1099, 1108 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2535 (2012)("historically significant war memorial"); *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004)(longstanding war memorial), *rev'd on other grounds*, 559 U.S. 700 (2010); *Carpenter v. San Francisco*, 93 F.3d 627, 629-32 (9th Cir. 1996)("'cultural landmark'"); *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995)(longstanding historical cross in insignia); *Gonzales v. North Twp. Lake Cnty.*, 4 F.3d 1412 (7th Cir. 1993)(landmark); *Ellis v. La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993)("historical landmark"); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991)(seal with cross

- A navigational aid to pilots or fishermen[5]
- Artwork[6]
- Not the dominant or central part of the display[7]
- Outnumbered by surrounding secular symbols or text[8]
- A commemorative war memorial[9]

The City, by contrast, is unable to point to a single binding or even persuasive case upholding the constitutionality of a freestanding Latin cross on government property, let alone one as flagrantly sectarian as Bayview Cross. Instead, the City attempts to create the appearance of ambiguity in the law by questioning firmly established legal principles. (D.Br.18-19). In fact, it isn't until

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unchallenged for 89 years reflecting the unique history of the city); *Friedman v. Bd. of Cnty. Comm'rs*, 781 F.2d 777 (10th Cir. 1985)(seal with cross reflecting history of city that was unchallenged for 60 years); *Mendelson*, 719 F. Supp. at 1069.

[5] *Mendelson*, 719 F. Supp. at 1070; *Ellis v. La Mesa*, 990 F.2d 1518, 1520-21 (9th Cir. 1993).

[6] *Gonzales*, 4 F.3d at 1421 (7th Cir. 1993); *Carpenter*, 93 F.3d at 631-32.

[7] *Harris*, 927 F.2d 1401, *Friedman*, 781 F.2d 777; *Robinson*, 68 F.3d 1226; *Am. Humanist Ass'n v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014); *ACLU v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998)

[8] *Davenport*, 637 F.3d at 1111; *Trunk*, 629 F.3d at 1117; *Harris*, 927 F.2d 1401, *Friedman*, 781 F.2d 777; *Robinson*, 68 F.3d 1226; *ACLU v. St. Charles*, 794 F.2d 265, 267 (7th Cir. 1986); *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180; *Stow*, 29 F. Supp. 2d 845.

[9] *Trunk*, 629 F.3d at 1124-25; *Buono*, 371 F.3d 543; *Eugene*, 93 F.3d at 619; *Gonzales*, 4 F.3d at 1419-21; *Ellis*, 990 F.2d at 1528; *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180; *Jewish War Veterans v. U.S.*, 695 F. Supp. 3 (D.D.C. 1988); *Greater Houston Chapter ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984), *reh'g denied*, 763 F.2d 180 (5th Cir. 1985).

page 39 of the City's brief that its actual "Argument" starts.

In an extended memorandum, the City unnecessarily elected to provide an extended discussion of well-settled principles that even the City recognizes are beyond refute. For instance, after dedicating an entire section to "Incorporation," the City later concedes that by 1963, the Supreme Court decided it was "firmly established" that "the Establishment Clause applied to the states." (D.Br.22). At the same time, the City's brief fails to mention, let alone distinguish, directly applicable and binding decisions finding religious symbols unconstitutional, including *Rabun*, *McCreary*, and *Allegheny*.

II. The City does not dispute material facts.

Notably, the City concedes material facts that overwhelmingly contribute to the Cross's unconstitutional religious purpose and effect such as:

- Bayview Cross is a Christian symbol[10]
- Bayview Cross was erected for Easter Sunrise Services purposes[11]
- Easter Sunrise Service is a distinctly Christian service[12]
- Bayview Cross has consistently been used for religious purposes since its inception[13]

[10] (D.Br.3,16-17)(Ans.¶24).
[11] (D.Br.13).
[12] (Ans.¶54,57).
[13] (P.R.398)(D.Br.11-17).

- The City owns, maintains, and funds Bayview Cross[14]
- The City displays Bayview Cross on City property in the City's most popular park[15]
- Bayview Cross is approximately 30-feet tall[16]
- Bayview Cross is the only religious monument in the City's park[17]
- Bayview Cross is one of only two monuments in the entire park[18]
- The City has invested approximately $2,000 of taxpayer money into the Cross and its maintenance, has installed lights for the Cross, and pays its electricity bills[19]
- The City sponsored, facilitated, and participated in the Easter Sunrise Services held at the Cross[20]

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[14] (P.R.397).
[15] (Ans.¶¶37-39)(D.Br.4).
[16] (Ans.¶25).
[17] (D.Br.5-7).
[18] *Id.*
[19] (P.R. 397-398)(D.Br.16).
[20] (D.Br.13)(P.R.225)(P.R.227)(P.R.366)(P.R.380). Oddly, the City asserts that it has not "endorsed" the Easter Sunrise Services. (D.Br.15). It is undisputed, however, that the City was an official "co-sponsor" of the Easter Sunrise Services in 2008, 2009, and 2010. (R.258-65)(R.278)(R.284)(R.366) (R.380). Moreover, the City helped arrange bus transportation for the first Easter Sunrise Service in 1941. (Ans.3). The City also erected "a stand for speakers and singers" in 1944 for the Easter Sunrise Services. (R.92)(R.415). In 1945, the Jaycees' president reportedly "expressed appreciation of the excellent job done by city officials in having the grounds [of Bayview Park] cleared of all brambles and high grass. 'Everything is perfect, even to foot bridges having been put across the concrete open drains...'" (R.103)(R.415). "The City of Pensacola" and "City of Pensacola personnel" were listed as "participating in the service" in 1974 and 1974, respectively. (R.225)(R.227).

III. The City ignored *Rabun* even though it is binding precedent directly on point.

Astonishingly, the City outright ignored binding Eleventh Circuit precedent holding that a Latin cross erected in a public park for Easter Sunrise Services violated the Establishment Clause notwithstanding "'historical acceptance.'" *Rabun*, 698 F.2d at 1111 (citation omitted). Plaintiffs scrupulously demonstrated that *Rabun* is controlling and cannot be meaningfully distinguished. (P.Br.9-12). Given the uncanny factual similarities, and the fact that *Rabun* is binding, it would behoove the City to at least try to distinguish the case. Its failure to even mention *Rabun* is noteworthy in its own right. *See DeSisto College, Inc. v. Line*, 888 F.2d 755, 766 (11th Cir. 1989)(holding that the district court did not abuse its discretion for imposing sanctions on counsel for violating its duty to disclose binding adverse precedent).

Although *Rabun* renders unnecessary a detailed *Lemon* analysis, Plaintiffs amply demonstrated that the Bayview Cross failed all three prongs of *Lemon* (P.Br.16-35) and incorporate that analysis by reference herein. Significantly, the City does not contend that Bayview Cross would pass muster under governing Establishment Clause jurisprudence but instead asks this Court to abandon *Lemon* altogether. (D.Br.23,33-38).

IV. The *Lemon* test has not been overruled and is controlling in cross cases.

A. This Court is not free to abandon *Lemon.*

Even more astonishing than the City's failure to disclose and address binding adverse precedent is the fact that it eschewed the controlling *Lemon* test entirely. The City is justified in its fear of *Lemon*. Bayview Cross, just like the *Rabun* cross, cannot pass muster under *any* of its prongs. (P.Br.9-35); *Rabun*, 510 F. Supp. 886, 891-92 (N.D. Ga. 1981), *aff'd*, 510 F. Supp. 886 (11th Cir. 1983). Hoping to avoid the inevitable, the City grasps onto every slight aberration in Establishment Clause jurisprudence to try and convince this Court to disregard *Lemon*.

To be sure, the *Lemon* test "has not been overruled." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 n.7 (1993). The City accepts this fact, citing recent Eleventh Circuit precedent reaffirming the vitality of the *Lemon* test. (D.Br.34). *See Smith v. Governor for Ala*., 562 F. App'x 806, 816 (11th Cir. 2014). The *Lemon* test remains controlling in all Establishment Clause cases except for cases challenging "legislative prayer." *Hunter v. Corr. Corp. of Am*., 2016 U.S. Dist. LEXIS 105035, at *12-13 (S.D. Ga. Aug. 9, 2016).[21]

Against the legion of cases applying *Lemon* to crosses and holding them

[21] Some practices may be evaluated under strict scrutiny if there is overt religious discrimination, *Larson v. Valente*, 456 U.S. 228 (1982), or the Coercion Test if coercion is alleged. *Lee v. Weisman*, 505 U.S. 577 (1992). But if a practice survives these tests, *Lemon* must be applied.

unconstitutional (P.Br.9-15), the City relies solely on dicta and inapt Establishment Clause jurisprudence to persuade this Court to disregard *Lemon*:

1. The legislative prayer exception (D.Br.27-30,34)[22]

2. Dissents and concurrences by Justices Thomas and Scalia expressing personal distaste for *Lemon* (D.Br.26,29-33,37)

3. Justice Breyer's concurrence in *Van Orden*, which upheld a nondenominational Ten Commandments display where (i) there was a secular purpose, (ii) it was part of an array of numerous secular displays, (iii) the secular aspects predominated, and (iv) there was no religious usage (D.Br.36-38)

4. *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984), which applied *Lemon* and upheld a crèche that was a small part of an array of numerous secular holidays symbols on private property. (D.Br.24-25,40-45)

5. *Dicta* from Justice Kennedy's opinion in *Salazar*, which pertained not to the constitutionality of a cross on government property but to a land transfer statute that would permit a small cross in the desert to remain on *private property* (D.Br.2,3,17,25,31)

None of these cases remotely resemble the facts in this case. This case does not challenge legislative prayer (*Marsh*, *Greece*), Ten Commandments dominated by an array of secular monuments in a museum-like setting (*Van Orden*), a statute conveying land to a private entity (*Salazar*), or a temporary holiday display where the secular elements dominate (*Lynch*).

Nor do these cases even support the City's overarching argument that this

[22]*E.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Marsh v. Chambers*, 463 U.S. 783 (1983).

Court can disregard *Lemon*. For one, *Lynch* applied *Lemon* to a religious display, thus directly contradicting the City's position. 465 U.S. at 680-84. And although the *Van Orden* plurality upheld a Ten Commandments display without a discussion of the *Lemon* factors, *infra*, on the very same day, the Supreme Court in *McCreary* held that *Lemon* applied to a Ten Commandments display and held that it failed *Lemon*'s purpose prong. 545 U.S. at 863-65.

The City acknowledges that the Supreme Court applied *Lemon* in its first case involving a religious display, *Stone v. Graham*, 449 U.S. 39 (1980), but contended that in "subsequent cases the Supreme Court has found the *Lemon* test not appropriate for passive monuments." (D.Br.23). This is inaccurate. After *Stone*, the Supreme Court in *McCreary*, *Allegheny*, and even *Lynch* applied *Lemon* to passive displays challenged under the Establishment Clause, *supra*. The *Van Orden* plurality is the only exception, and as discussed below, no court is bound by its disregard of *Lemon*.

Undeterred by the lack of precedent, the City quotes extensively from dissents and concurrences by Justices Scalia, Thomas, and Rehnquist regarding their aversion for *Lemon*. (D.Br.20-22,26,29-33,37). But the Eleventh Circuit in *Glassroth* explicitly held that *Lemon* remains controlling in "religious display" cases notwithstanding the exact *dicta* quoted in the City's brief. The court admonished: "What the Supreme Court said ten years ago remains true today:

'*Lemon*, however frightening it might be to some, has not been overruled.'" 335 F.3d at 1295-96 (quoting *Lamb's Chapel*, 508 U.S. at 395 n.7). Acknowledging Scalia's concurrence and Rehnquist's dissent (both quoted in the City's brief (D.Br.20,37)), the Eleventh Circuit observed that the "the *Lemon* test is often maligned." *Id.* But it quickly retorted: "it is even more often applied." *Id.* The court stressed: "We applied the *Lemon* test in another religious display case just days before this one was orally argued." *Id.* (citing *King*).

In *King*, the Eleventh Circuit likewise held that "even though some Justices and commentators have strongly criticized *Lemon*, both the Supreme Court and this circuit continue to use *Lemon's* three-pronged analysis." 331 F.3d at 1276 (footnote omitted). *Accord Am. Humanist Ass'n v. City of Ocala*, 127 F. Supp. 3d 1265, 1280 n.9 (M.D. Fla. 2015)("there is no dispute that the *Lemon* Test is the applicable standard here"); *Rich v. City of Jacksonville*, 2010 U.S. Dist. LEXIS 143973, at *43-44 (M.D. Fla. 2010)(adhering to *Lemon*).

B. Cross cases are governed by the traditional *Lemon* test.

It is apodictic that *Lemon* controls cross displays in the Eleventh Circuit. The Eleventh Circuit applied *Lemon* in *Rabun* in nearly identical circumstances. (P.Br.9-35). The City does not assert that *Rabun*'s application of *Lemon* was abrogated by *Van Orden*, because it wasn't. The U.S. District Court of Florida already determined that *Lemon* is binding in cross cases and not *Van Orden*. *See*

Starke, 2007 U.S. Dist. LEXIS 19512, at *15-16. In *Starke*, the court applied *Lemon* to a cross displayed on a water tower for roughly forty years declaring: "Even though some Justices and commentators have strongly criticized *Lemon*, both the Supreme Court and this circuit continue to use *Lemon's* three-pronged analysis." *Id.*

C. The legislative prayer exception does not apply to religious monuments.

Contrary to the City's argument (D.Br.28-30), the legislative prayer exception enunciated in *Marsh* and *Greece* is inapplicable to display cases. *E.g.*, *McCreary*, 545 U.S. at 860 n.10; *Allegheny*, 492 U.S. at 604 n.53. The Eleventh Circuit in *Glassroth* explicitly held that the legislative prayer exception did not exempt religious monuments from *Lemon.* 335 F.3d at 1297-98. The court reasoned: "That there were some government acknowledgments of God at the time of this country's founding" does "not justify under the Establishment Clause a 5280-pound granite monument placed in the central place of honor in a state's judicial building." *Id.* The legislative prayer exception is even inapplicable to *prayer* in other governmental settings.[23]

[23] *See Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 590 (11th Cir. 2013)(the "Supreme Court has not extended the *Marsh* exception" to non-legislative prayer practices). *See also Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 828 (11th Cir. 1989)(inapplicable to school prayer); *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1147-49 (4th Cir. 1991)(inapplicable to judge prayers).

Nothing in *Pelphrey*, *Lakeland*, *Marsh*, or *Greece* suggests that the Supreme Court or the Eleventh Circuit would exempt crosses from traditional Establishment Clause jurisprudence. Much to the contrary, the Eleventh Circuit in *Pelphrey v. Cobb County*, rejected this very argument:

> The [Supreme] Court has recognized that there are "[i]nherent differences" between public schools and legislative bodies. [*Lee*, 505 U.S. at 596]. …*The same is true about decisions regarding religious monuments*. In *Allegheny*, the Supreme Court refused to apply the same test for a religious display that the Court applied to legislative prayer. []. For that reason, we too have distinguished between legislative prayers and religious monuments. *See Glassroth[]*

547 F.3d 1263, 1276 (11th Cir. 2008)(emphasis added).

Relying on the inapt legislative prayer cases, the City further maintains that Bayview Cross is constitutional because there is no evidence of any official coercion. (D.Br.29). In particular, the City cites *Greece* for the notion that "[b]oth Justice Kennedy and Justice Thomas make clear that coercion is central to the analysis." *Id*. Of course, the "analysis" the City refers to is the *legislative prayer* analysis. 134 S. Ct. at 1825 (Kennedy, J., plurality).

But coercion is not a requirement for an Establishment Clause violation. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963). In *Allegheny*, the Court held that a crèche had "the effect of endorsing a patently Christian message" and that "nothing more is required to demonstrate a violation of the Establishment Clause." 492 U.S. at 601-02.

D. *Van Orden* is neither binding nor relevant to the constitutionality of a freestanding Christian cross used for religious worship.

1. Lower courts cannot be bound by *Van Orden*'s disregard of *Lemon*.

The City implores this Court to disregard *Lemon* and apply the "'legal judgment test' formulated by Justice Breyer in his concurrence in *Van Orden*" instead. (D.Br.34-38). The Ten Commandments in *Van Orden* was six-feet tall displayed as one of "17 monuments and 21 historical markers" of similar size on Texas capital grounds as part of a historical presentation of various legal and cultural texts. 545 U.S. at 681. Justice Breyer declared that in difficult "borderline cases" involving longstanding Ten Commandments displays placed among an array of secular displays in a museum-like setting, where the secular aspects of a display clearly "predominate," there is "no test-related substitute for the exercise of legal judgment." *Id.* at 699-702 (concurring). However, Breyer suggested that an evaluation under *Lemon* might lead to the same result. *Id.* at 700. Moreover, Justice Rehnquist's plurality relied in part on *Lemon*'s purpose prong. *Id.* at 686 (plurality).

To be clear, while "'the Supreme Court may be free to ignore *Lemon*, this court is not.'" *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 797 n.8 (10th Cir. 2009)(citation omitted). Although the plurality and Breyer eschewed *Lemon*, the Supreme Court has never overruled it, and in fact applied it to a Ten Commandments display the same day. *See McCreary*, 545 U.S. at 859-64. Unlike

McCreary, *Van Orden* is not binding on *any* court because a majority could not be reached on the applicable standard. *See ACLU v. Mercer Cnty*., 432 F.3d 624, 636 & n.11 (6th Cir. 2005)(applying *Lemon* to Ten Commandments because no rule could be discerned from *Van Orden*).[24]

Even in cases challenging Ten Commandments displays similar to *Van Orden*, "'[m]ost courts of appeals have concluded that the *Lemon* tripartite test…still stands after *Van Orden.*'" *Green*, 568 F.3d at 797 n.8 (citations omitted).[25] Therefore, this Court "cannot do as [the City] wishes…and be guided…by the *Van Orden* plurality's disregard of the *Lemon* test." *Id.*

More importantly, this Court has already determined that *Lemon* is controlling even in Ten Commandments cases post-*Van Orden. See ACLU of Fla. Inc. v. Dixie Cty*., 797 F. Supp. 2d 1280, 1287-88 (N.D. Fla. 2011), *vacated on standing grounds*, 690 F.3d 1244 (11th Cir. 2012). *Dixie* is consistent with *Green*, where the Tenth Circuit held that it was bound to apply *Lemon* even though "the [Ten Commandments] Monument was one of numerous other monuments and displays on the courthouse lawn" just like in *Van Orden*. 568 F.3d at 789-91, 804-

[24] *See also* John E. Nowak, CONSTITUTIONAL LAW 1570 (8th ed. 2010)("it is difficult to understand how anyone other than Justice Breyer could apply his analysis, which contains neither any formal tests nor any clear guideposts for how lower courts could anticipate [his] 'judgment.'").

[25] *See*, *e.g.*, *ACLU v. McCreary Cnty.*, 607 F.3d 439, 445 (6th Cir. 2010)("the governing standard…remains *Lemon.*"); *Green*, 568 F.3d at 797; *Mercer*, 432 F.3d at 636 & n.11.

805 n.14.

The Eleventh Circuit has not adopted the test or the reasoning from *Van Orden*. The only time it even mentioned *Van Orden* was in *Pelphrey* where it reiterated that "religious monuments" are *not* exempt from *Lemon*. 547 F.3d at 1276 (2008). The City nonetheless argues that "*Selman v. Cobb Co. Sch. Dist.*, 449 F. 3d 1320 (11th Cir. 2006), supports the argument that the Eleventh Circuit likely would adopt the reasoning in *Van Orden*." (D.Br.35). *Selman*, however, supports the opposite conclusion.

Selman involved a challenge to a school district's practice of embellishing students' biology textbooks with a warning sticker disclaiming evolution. 390 F. Supp. 2d 1286, 1311-12 (N.D. Ga. 2005). The district court declared that "Supreme Court and Eleventh Circuit precedent direct the Court to apply the three-prong test articulated in *Lemon*." *Id.* at 1289 (citations omitted). The court went on to hold that the sticker failed *Lemon*'s effect prong. *Id.* at 1311-12. The Eleventh Circuit reversed —*not because the court applied the incorrect legal standard* — but merely because of "unfilled gaps in the record" and some issues with "court's factfindings." 449 F.3d at 1322. The court thus remanded "to the district court in order for it to conduct new evidentiary proceedings and enter a new set of findings based on evidence in a record that we will be able to review." *Id.* Rather than suggest that it would abandon *Lemon* and adopt some nebulous "legal judgment

standard" in display cases, the court upheld the district court's use of *Lemon* to evaluate a sticker display. *Id.* at 1325, 1327. It had every opportunity to instruct the court not to apply *Lemon* on remand but did not. *Id.* at 1334-35. Furthermore, this Court in *Dixie*, *supra*, did not read the Eleventh Circuit's cases, including *Selman*, as authorizing it to abandon *Lemon*. 797 F. Supp. 2d at 1287-88.

2. Bayview Cross is a standalone Christian display, unmitigated by any secular features.

Even if this Court were free to abandon *Lemon*, Justice Breyer's so-called legal judgment test would only be applicable, *if at all*, if this were a difficult borderline case. To be considered such a case, at least two elements must be present: (1) the display must possess a dual secular meaning; and (2) the secular meaning must predominate. Neither is met here, *infra.*

i. A Christian cross is exclusively religious and cannot be divorced from its religious meaning.

The wide recognition of the Latin cross as an exclusively religious symbol distinguishes it from the *Van Orden* display. In *Van Orden*, the plurality found that "the Ten Commandments have an undeniable historical meaning" tied to the foundations of lawmaking in the United States. 545 U.S. at 690. It reasoned: "Moses was a lawgiver as well as a religious leader." *Id*. Justice Breyer found that because the display was one small part of a historical presentation of various legal and cultural texts, the "nonreligious aspects of the tablets' message []

predominate[d]." *Id.* at 701 (concurring).[26]

There is no "nonreligious aspect" to a Latin cross, however, making *Van Orden* inapposite. Unlike the Ten Commandments, the cross does not have a "secular meaning that can be divorced from its religious significance." *Davenport*, 637 F.3d at 1122. The Eleventh Circuit acknowledged that the cross is an "*exclusively* religious symbol," *King*, 331 F.3d at 1285, and is inherently sectarian. *See Rabun*, 698 F.2d at 1103. *See also Buono*, 371 F.3d at 544-45 ("'It is exclusively a Christian symbol, and not a symbol of any other religion.'")(citation omitted). The Supreme Court in *Allegheny* also distinguished "a specifically Christian symbol" such as a cross from "more general religious reference." 492 U.S. at 602-03, 606-07.

Notably, the Eleventh Circuit in *King* recognized that in contrast to a cross, the Ten Commandments can be divorced from their religious meaning. The court emphasized that "*exclusively religious symbols, such as a cross*, will almost always render a governmental seal unconstitutional, no matter how small the religious symbol is." 331 F.3d at 1285 (emphasis added)(citing *Robinson*, *Harris*, and *Friedman*). But it found that a small depiction of a Ten Commandments on a seal

[26] *See also id.* at 688-89 (plurality)(providing examples showing that "acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America"); *id*. at 701 (Breyer, J., concurring)(noting that in certain contexts the Commandments can convey "a secular moral message…about proper standards of social conduct" or a message "about a historic relation between those standards and the law").

displayed in a legal historical context did not endorse religion. *Id.* at 1286. This was due in part to the fact that "the text of the Commandments does not appear on the Seal." *Id.* at 1285-86. The absence of "religious aspects" coupled with the tablets' placement adjacent to a symbol of law made it such that a reasonable observer would "infer that the government is using the Ten Commandments to symbolize the force of law." *Id* at 1285-86.

The City maintains that the plurality in *Van Orden* "cautioned that simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." (D.Br.40)(citing *Van Orden*, 545 U.S. at 690). A large Christian cross does not "simply" have "religious content" or promote a secular message "consistent with a religious doctrine." It is an "exclusively religious symbol." *King*, 331 F.3d at 1285.

Instructively, courts evaluating cross cases since *Van Orden* have continued to adhere to *Lemon* exclusively, as evidenced by:

- *Davenport*, 637 F.3d 1095
- *Starke*, 2007 U.S. Dist. LEXIS 19512
- *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180
- *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013), *app. dism.*, 759 F.3d 639 (7th Cir. 2014)
- *Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227, 238 (2d Cir. 2014)
- *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008)

The Tenth Circuit in *Davenport* applied *Lemon* alone to a cross case, holding that "the memorial crosses at issue here cannot be meaningfully compared to the Ten Commandments display…in *Van Orden*." 637 F.3d at 1123. The U.S. District Court of Florida also properly concluded in *Starke* that *Lemon* alone is controlling in cross cases. 2007 U.S. Dist. LEXIS 19512, at *14.

Even in ostensible "borderline" cross cases, the Courts of Appeals have uniformly applied *Lemon* post-*Van Orden*. The Ninth Circuit in *Trunk*, for instance, refused to abandon *Lemon* and adopt *Van Orden* in its place to a longstanding war memorial cross. 629 F.3d at 1106. It reasoned that "the Supreme Court has never overruled [*Lemon*], and in fact applied the *Lemon* test to a Ten Commandments display in an opinion issued the same day as *Van Orden*." *Id.* (citing *McCreary*). The court added that the "wide recognition of the Cross as a religious symbol…distinguishes the Memorial from…*Van Orden*." *Id*. at 1120. The court ultimately concluded that the result would be the same under *Lemon*'s effect prong and Justice Breyer's concurrence and thus considered both to illustrate this point. *Id.* at 1107.

The Second Circuit in *Port Authority* held that "the three-prong analysis set forth in *Lemon*" alone governed an artifact shaped as a cross in an actual museum. 760 F.3d at 238. Specifically, the court upheld "a particular artifact recovered from World Trade Center debris, a column and cross-beam" displayed in the

"September 11 Memorial and Museum Foundation" amid "hundreds of other (mostly secular) artifacts." *Id.* at 232-36, 243-44.[27]

The Tenth Circuit in *Las Cruces* also applied *Lemon* to a borderline case involving three crosses in a city seal, which were shorthand for the entity itself. 541 F.3d at 1035 (because Las Cruces means "The Crosses," "it is hardly startling that [the city] would be represented by a seal containing crosses."). The court in *Trunk* subsequently found *Weinbaum*'s holding unpersuasive, contending that *Harris* and *Robinson* were far more convincing. 629 F.3d at 1111 & n.11 (noting that even a city with "a unique history" may "not honor its history by retaining [a] blatantly sectarian seal"). Nonetheless, it remains significant that even in borderline cases, Courts of Appeals have adhered to *Lemon* and not *Van Orden.*

ii. The Bayview Cross is a freestanding Christian display.

Even if the this Court reached the unprecedented conclusion that the Christian cross — and particularly one used for Christian worship services — possesses a dual secular meaning, the secular meaning must predominate. *Van Orden* is inapplicable if the religious aspect "predominates." *Davenport*, 637 F.3d at 1123. A standalone *Ten Commandments* display does not even qualify as a "borderline" case. The Supreme Court in *McCreary* made this abundantly clear: "When the government initiates an effort to place this statement *alone* in public

[27] *Port Authority* is thus readily distinguishable; Bayview Cross is not an *artifact.* It was purposefully designed as a Christian monument.

view, a religious object is unmistakable." 545 U.S. at 869 (emphasis added). Necessarily then, a standalone Christian cross does not constitute a "borderline" case either. *See Davenport*, 637 F.3d at 1121, 1123 (*Van Orden* was further inapplicable because "the crosses stand alone.").

Bayview Cross is a freestanding Latin cross with no mitigating secular features. It manifestly is not a part of a unified exhibit in a "typical museum setting" like the display in *Van Orden*.[28] The imposing 30-foot Christian cross in one of only two monuments in the entire park and is by far the largest and most prominent of the two displays.[29] In *Van Orden*, the reverse was true. The display was a mere 6-feet tall and placed in line with numerous equal-sized, similarly themed monuments, suggesting that the government intended the non-religious aspects of the tablets' message to predominate. 545 U.S. at 701. But again, there are no non-religious aspects of a Latin cross.

Consequently, the courts, including the Eleventh Circuit, have made clear that the Latin cross need not dominate to send a religious message. *King*, 331 F.3d at 1285. "Because of the Latin cross's strong ties to Christianity, even when a cross occupies only one part of a lager [sic] display, courts have almost unanimously

[28] *See Green*, 568 F.3d at 805.

[29] The courts "have not looked beyond the immediate area of the display." *Ellis*, 990 F.2d at 1526. *See Allegheny*, 492 U.S. at 581 ("[t]he creche, with its fence-and-floral frame, however, was distinct and not connected with any exhibit in the gallery forum [near the staircase].").

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). *See Harris*, 927 F.2d at 1412-15; *Robinson*, 68 F.3d 1226; *Friedman*, 781 F.2d 777; *St. Charles*, 794 F.2d at 267 (cross one part of "a six-acre area," accompanied by numerous secular holiday symbols); *Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, *52-54 (1/3 of display); *Stow*, 29 F. Supp. 2d 845. Likewise, the longstanding war memorial cross in *Trunk* was unconstitutional under *Lemon* and *Van Orden* even though it did "not stand alone. Instead, it [wa]s the overwhelming centerpiece of a memorial that now consists of approximately 2,100 plaques, six concentric stone walls, twenty-three bollards, and an American flag." 629 F.3d at 1117.

Bayview Cross stands completely alone. It is not just one part of a display like *Trunk*; it *is the entire display*. *Id.* at 1123 n.22. Nor does the cross itself bear any secular trappings such as the crosses in *Davenport*, which were adorned with detailed biographical details about each fallen trooper. 637 F.3d at 1111. The Eleventh Circuit in *Glassroth* distinguished a freestanding Ten Commandments display containing text from the King James Bible from the non-sectarian display upheld in *King* where "the image was in the context of another symbol of law." 335 F.3d at 1298-99. The court added that unlike in *King*, "[this] monument sits prominently and alone in the rotunda of the Judicial Building." *Id.* Bayview Cross, as a standalone sectarian display, is far more similar to *Glassroth* and *McCreary*

than *King* and *Van Orden*.

Furthermore, Bayview Cross was proposed, approved, and installed in isolation. Conversely, in *Van Orden*, the Ten Commandments was donated in 1961, long after other secular monuments were already present on the grounds. 351 F.3d 173, 175-76 (5th Cir. 2003). *See Trunk*, 629 F.3d at 1103 (*Van Orden* was further distinguishable because "the Cross stood alone" for much of its history).

3. *Van Orden* is materially distinguishable in at least three additional ways.

i. Bayview Cross is used for religious worship.

Bayview Cross "is not only a preeminent symbol of Christianity, it has been consistently used in a sectarian manner." *Id.* at 1124. In *Van Orden*, Justice Breyer emphasized: "[T]o determine the message that the text [of the Ten Commandments] here conveys, we must examine how the text is *used*." 545 U.S. at 701-02. He deemed it critical that "[t]he setting does not readily lend itself to meditation or any other religious activity." *Id.* The City itself acknowledges that the "absence of any indication that Texas was making any religious use of it" was a pivotal factor in Breyer's concurrence. (D.Br.30).

By sharp contrast, Bayview Cross originally and continually has been used for "religious activity." (P.R.53,55-246). Accordingly, unlike in *Van Orden*, a reasonable observer would know that it "functioned as a holy object" and a "place of religious observance." *Trunk*, 629 F.3d at 1120.

ii. Bayview Cross was installed for a religious purpose.

In addition, unlike *Van Orden*, Bayview Cross has an undeniable religious purpose. (P.Br.16-23). *Van Orden* is inapplicable to displays motivated by a religious purpose. *See McCreary*, 545 U.S. at 864-67. In *Van Orden*, the record supported the conclusion that the Eagles' purpose was predominantly secular. 545 U.S. at 701-702. By contrast, Bayview Cross was intended to function as a holy object for the Jaycees' annual Easter Sunrise Services to symbolize the crucifixion of Jesus Christ. (P.R.53). This history clearly casts "serious doubt on any argument that it was intended as a generic symbol, and not a sectarian one." *Trunk*, 629 F.3d at 1124.

iii. The City has not disclaimed the Cross.

Third, albeit less relevant, the display in *Van Orden* "*prominently* acknowledge[d] that the Eagles donated the display." 545 U.S. at 701-02 (Breyer, J., concurring)(emphasis added). Breyer believed that this factor, "though not sufficient, thereby further distances the State itself from the religious aspect of the Commandments' message." *Id.* Bayview Cross has no such disclaimer. Of course, such a disclaimer would not be "'sufficient,' alone," *id.* and "could not tip the balance on these facts, given the very significant magnitude of the evidence indicating an impermissible endorsement." *Green*, 568 F.3d at 808.

In sum, the distinctions between *Van Orden* and this case are clear. The

Christian cross is an exclusively religious symbol lacking an "undeniable" secular historic meaning. In *Van Orden*, the display was six-feet tall in a museum-like context; in this case, the unavoidable thirty-foot Christian cross conspicuously stands alone in a busy city park. Whereas the *Van Orden* display was passive and not used for religious services, Bayview Cross functions as a holy object for annual Christian worship. Finally, unlike in *Van Orden*, there is an abundance of evidence that the purpose for installing the Christian cross was not secular but was instead for Christian worship. (P.Br.3-8).

4. The longevity of this Christian cross does not make it any less religiously significant today than when it was first erected.

The City disregards every material distinction between this case and *Van Orden*, and focuses myopically on a single aspect of Breyer's concurrence regarding the longevity of the display. (D.Br.38). The City asserts that the Bayview Cross "has become entwined in the consciousness of Pensacola's history." (D.Br.31).

The City's "suggestion that the longevity and permanence of the Cross diminishes its effect has no traction." *Trunk*, 629 F.3d at 1122 (holding that a cross older than Bayview Cross violated the Establishment Clause post-*Van Orden*). Controlling Eleventh Circuit precedent requires a city to remove a Latin cross installed in a public park, even notwithstanding any "'historical acceptance.'" *Rabun*, 698 F.2d at 1111.

The Supreme Court has long held that "no one acquires a vested or protected right in violation of the Constitution by long use." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970). "The rights of such citizens do not expire simply because a monument has been comfortably unchallenged for twenty years, or fifty years, or a hundred years." *Pitts v. City of Kankakee*, 267 F.3d 592, 596 (7th Cir. 2001).

In *Van Orden*, Breyer believed that the fact that the Ten Commandments had gone unchallenged for forty years — *without any religious usage* — bolstered his conclusion that the display was not perceived as religious. 545 U.S. at 701. Such logic clearly has no bearing here because Bayview Cross was conceived as a holy object for Christian worship. (P.R.53,206). That Pensacolans continue to actively use Bayview Cross as a religious symbol leaves no room for doubt that Bayview Cross is perceived as a religious rather than secular symbol. (P.R.250-290).

Moreover, whatever bearing passage of time has on a nonsectarian display with a purported dual secular meaning, it does not have for an exclusively religious symbol such as the Christian cross. "[H]istory cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." *Allegheny*, 492 U.S. at 603. In *Rabun*, the Eleventh Circuit held that a cross that went unchallenged for "many years" lacked a secular purpose, reasoning: "'historical acceptance without more' does not provide a rational basis for ignoring the command of the Establishment Clause.'" 698 F.2d at 1111 (citations omitted).

Likewise, in *Starke*, a post-*Van Orden* case, the U.S. District Court of Florida held that a cross on a water tower was unconstitutional despite going unchallenged for thirty-seven years. 2007 U.S. Dist. LEXIS 19512, at *5. In *Mendelson*, the court similarly rejected the city's proffered secular purpose that "cross has historical value to the community." 719 F. Supp. at 1070.

Indeed, many crosses have been held unconstitutional despite also going unchallenged for decades. *See Trunk*, 629 F.3d at 1102-03 (**76** years); *Gonzales*, 4 F.3d at 1415 (cross unchallenged **30** years); *Harris*, 927 F.2d 1401 (cross unchallenged for **89** years); *Friedman*, 781 F.2d 777 (**60** years); *Murphy v. Bilbray*, 782 F. Supp. 1420, 1432 (S.D. Cal. 1991) *aff'd sub nom*., 990 F.2d 1518 ("**sixty-one** years"); *Carpenter*, 93 F.3d at 631-32 (**60** years).

The Ninth Circuit in *Trunk* held that a longstanding war memorial cross violated the Establishment Clause post-*Van Orden* and rejected "the argument that a cross has a historic connection" can trump the Establishment Clause. 629 F.3d at 1111 n.11.

In *Harris*, the Seventh Circuit held that a city's seal depicting a cross in only one quadrant failed the purpose and effect tests despite going unchallenged for 89 years. 927 F.2d at 1403-04, 1414-15. Turning to the effect prong, the court acknowledged that the "City of Zion can indeed boast a unique history," and that this "religious heritage may deserve commemoration," but held that "the City may

not honor its history by retaining the blatantly sectarian seal." *Id.*

The Seventh Circuit reached the same conclusion as to Rolling Meadows's seal, which was adopted in 1960 and designed by eighth grade student. *Id.* at 1402-03. The court noted: "The images on the seal are not just neutral snapshots of the community; they are charged with endorsement…To any observer, the Rolling Meadows seal expresses the city's approval of those four pictures of city life - its flora, its schools, its industry and commercial life, and its Christianity." *Id.* at 1412.

The Tenth Circuit in *Robinson* likewise held that a county's seal with a cross unconstitutionally endorsed Christianity even though it was a historical depiction of the importance of the Catholic Church in settling the southwest. 68 F.3d at 1230. *See also Friedman*. 781 F.2d at 781.

Regardless, this Court is not free to abandon *Lemon*. And under the Eleventh Circuit's *Lemon* analysis, passage of time is simply not a factor. In *King*, after conducting a complete *Lemon* analysis, the Eleventh Circuit acknowledged the appellees' argument that the seal had also "been in use for at least 130 years." 331 F.3d at 1286 n.15. But it declined their invitation to "address what effect, if any, the 'history and ubiquity' of the Seal would have in applying the effect prong." *Id.*[30]

[30] *See also Freedom from Religion Found., Inc. v. Connellsville Area Sch. Dist.*, 127 F. Supp. 3d 283, 311 (W.D. Pa. 2015)("The Court recognizes that this monument, like the one in *Van Orden,* has apparently stood unchallenged for

Finally, Breyer's concurrence fails to recognize that "the silence of religious minorities may signal something quite different from disinterest." *Hewitt v. Joyner*, 940 F.2d 1561, 1567 (9th Cir. 1991)(citation omitted). For one, Establishment Clause violations may not be obvious "to those who share a common background." *Pitts*, 267 F.3d at 596. Second, the Establishment Clause was not even officially incorporated into the states until 1947,[31] six years *after* a cross was first placed in Bayview Park (P.R.59,63). Organizations dedicated to Establishment Clause lawsuits are much newer. Third, as Justice Souter recognized in *Van Orden*,

> Suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent. I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause.

545 U.S. at 746-47 (dissenting).

The longstanding nature of a religious display in fact exacerbates the constitutional injury because "religious outsiders [must] tolerate these practices…with the awareness that those who share their religious beliefs have endured these practices for generations." Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2164 (1996).

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decades…[W]hile this factor was dispositive in *Van Orden*, where the monument was surrounded by other monuments as part of a broader moral and historical display, it is not dispositive here….The Court must instead consider whether the monument survives *Lemon*").

[31] *Everson v. Bd. of Edu. of Ewing*, 330 U.S. 1, 13 (1947).

Such "heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause." *Allegheny*, 492 U.S. at 603-05.

E. *Lynch* is inapposite.

The City's extensive reliance on *Lynch* is equally misplaced. (D.Br.24-25,37,40-41,43-45). In *Lynch*, the Court upheld a temporary holiday display in a private park that consisted of a small crèche dominated by secular holiday items. 465 U.S. at 671, 687. Splitting five to four, the Court found that the inclusion of a single religious symbol, the crèche, did not "taint" the entire secular display. *Id.* at 686.

Five years later, however, the Court in *Allegheny* held that a privately-donated crèche in a courthouse unconstitutionally endorsed religion. 492 U.S. at 597. This was so despite a disclaimer, and despite Santa Claus figures and other Christmas decorations in the courthouse. *Id.* at 598, 601-602. The Court questioned *Lynch*'s rationale, indicating that it posed an unworkable standard. *Id.* at 594. Nonetheless, it found *Lynch* distinguishable because "unlike in *Lynch*, nothing in the context of the display detracts from the crèche's religious message." *Id.*

Assuming that the Christian cross can even be analogized to a crèche, the freestanding Bayview Cross is indisputably more like *Allegheny* than *Lynch*. The cross is the *entire* display. Moreover, like *Allegheny*, Bayview Cross is situated on government property. The "crèche in *Lynch*, although sponsored by the City of

Pawtucket, was located in a privately-owned park, a setting devoid of the government's presence." *American Jewish Congress v. Chicago*, 827 F.2d 120, 126 (7th Cir. 1987).

The Latin cross, however, cannot be likened to a "passive" symbol of a secularized holiday. *Allegheny*, 492 U.S. at 603 (distinguishing "a specifically Christian symbol" from "more general religious references"); *id.* at 599 ("surrounding the cross with traditional flowers [would not] negate the endorsement of Christianity"). Unlike a crèche, the cross cannot be "divorced from its religious significance." *Davenport*, 637 F.3d at 1122. Moreover, as a permanent display, Bayview Cross brings together church and state even more ardently than a seasonal crèche. *Allegheny*, 492 U.S. at 606-07 ("'an obtrusive year-round religious display [of the cross] would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion.'"); *Harris*, 927 F.2d at 1412. *See* (P.Br.30).

Consequently, Courts of Appeals have consistently found *Lynch* inapplicable to cross cases. The Seventh Circuit in *St. Charles* admonished the city for placing the "weight of its argument on *Lynch*." 794 F.2d at 271. It reasoned: "Christmas is a national holiday, celebrated by nonobservant Christians and many non-Christians." *Id.* But "the Latin cross has not lost its Christian identity." *Id.* The Tenth Circuit in *Davenport* likewise found: "Unlike Christmas,…there is no

evidence in this case that the cross has been widely embraced by non-Christians as a secular symbol of death." 637 F.3d at 1122. *See also Ellis*, 990 F.2d at 1524 ("a menorah is less religiously symbolic than a Latin cross.").

F. The City's reliance on *dicta* from *Salazar* is unavailing.

The balance of the City's motion hangs on selectively-harvested quotes from Justice Kennedy's opinion in *Salazar v. Buono*, 559 U.S. 700 (2010)(plurality), which garnered just two votes. (D.Br.2,3,17,25,31).

The City characterizes *Salazar* as a "cross case" but that is inaccurate. (D.Br.32). The only issue before the Court was the validity of a land-transfer statute adopted as a curative measure for a World War I memorial cross *found unconstitutional*. *Id.* at 706. *Buono* initially involved an Establishment Clause challenge to private citizens' with the VFW erecting a white cross on federal land as a war memorial. *Id.* at 705-706, 723-24. The Ninth Circuit held that the cross violated the Establishment Clause, a decision the defendants *did not appeal*. *Id.* at 708-09. *See Buono*, 371 F.3d at 545-46. That holding is still good law. *See Trunk,* 629 F.3d at 1111; *Davenport*, 637 F.3d at 1120.

The plurality did not address the merits of the Establishment Clause claim, but rather a later procedural development, considering, instead, the plaintiff's attempt to enforce the judgment he obtained against the display of the cross on public land, in light of the government's subsequent transfer of the land to a private

entity. *Id.* at 1113 n.5 (discussing *Salazar*). The plurality merely held that the lower court improperly modified an existing injunction without a hearing as to the changed facts (transfer). 559 U.S. at 721-22 (Kennedy)(remanding for hearing without "making sweeping pronouncements" because "this case is ill suited for announcing categorical rules"). Two other justices concurred in the remand because they concluded that the plaintiff lacked standing. *Id.* at 728. Consequently, anything Justice Kennedy said about substantive Establishment Clause issues not only failed to garner a majority, but was clearly *dicta* as well. *Id.* at 718, 716.

The City nonetheless quotes Justice Kennedy's *dicta* stating that the "cross and the cause it commemorated had become entwined in the public consciousness." 559 U.S. at 716. It relies on this to support its contention that Bayview Cross is constitutional on City property. (D.Br.31). But the factual context here is fundamentally different from *Salazar*.

First, the cross in *Salazar* was located on private property. Justice Kennedy's remarks alluded to the conceivable constitutionality of a congressional land transfer *statute* allowing the cross to be situated on private property. 559 U.S. at 706 ("The Court is asked to consider a challenge, *not to the first placement of the cross*…but to a statute that would transfer the cross and the land on which it stands to a private party.")(emphasis added). The statute did not even require the continued presence of the cross as part of the memorial. As Alito explained,

"Congress did not prevent the VFW from supplementing the existing monument or replacing it with a war memorial of a different design." *Id*. at 727 (concurring).

Second, the Court cannot overlook the fact that Bayview Cross is 30-feet tall and conspicuously displayed in popular city park whereas the small cross in *Salazar* was literally "in the middle of the desert." 59 U.S. at 759 (Stevens, J., dissenting). Justice Alito remarked that "the cross was seen by more rattlesnakes than humans." *Id.* at 725 (concurring). Justice Kennedy further pointed out that the cross was "less than eight feet tall." *Id.* at 707. In contrast to the small "cross in the desert," the "size and prominence of [Bayview] Cross evokes a message of aggrandizement and universalization of religion." *Trunk*, 629 F.3d at 1116 n.18. Even Justice Kennedy recognized, "I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a *large* Latin cross." *Allegheny*, 492 U.S. at 661 (concurring and dissenting, emphasis added).

Third, the *Salazar* cross was erected by the VFW as a World War I memorial. Kennedy's quote refers to the "cross *and the cause it commemorated*." *Id.* at 716 (emphasis added). But Bayview Cross has no secular commemorative purpose. It has always served as a holy object for Easter Sunrise Services. (P.Br.16-23). Trying to fit a square peg into a round hole, the City attempts to imply Bayview Cross is a war memorial, citing to the fact that the current cross was erected at some point during the decades-long Vietnam War, and noting that

the inaugural Easter Sunrise Service was held in 1941, *before* the United States entered World War I. (D.Br.15,13). But the City does not claim that Bayview Cross is a war memorial and has tendered no evidence to suggest that it has been dedicated as one. The mere fact of being erected while a war is occurring or about to occur does not confer a cross status as a war memorial. Nor would war memorial status even cure Bayview Cross's constitutional defects. *E.g.*, *Trunk*, 629 F.3d at 1113-14 (longstanding cross explicitly dedicated as a war memorial held unconstitutional after *Salazar* because a Christian cross war memorial honors only Christians).[32]

Moreover, Justice Kennedy expressly admonished that the posture of the case made it particularly "ill suited for announcing categorical rules" that could be applied to future cases. 559 U.S. at 722. In other words, he did not intend for his *dicta* about crosses to be cited in cases like this.

Importantly, the Ninth and Tenth Circuits both subsequently determined, after a much more detailed review of the use of crosses in memorials, and thorough consideration of Justice Kennedy's *dicta*, that the Latin cross remains a religious symbol and possesses no secular meaning as a nonreligious memorial.

The Tenth Circuit decided *Davenport* immediately after *Salazar*. This is significant because the City relies on Justice Kennedy's dicta from *Salazar* stating

[32] The City, in passing, refers to the Bayview Cross as a "memorial" (D.Br.6) but there is no evidence of it ever being dedicated as a "memorial."

that a "cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs." 559 U.S. at 718-19. Despite such *dicta*, the Tenth Circuit held that thirteen roadside memorial crosses for fallen Utah Highway Patrol troopers unconstitutionally endorsed Christianity. 637 F.3d at 1111, 1124.

The Tenth Circuit delayed issuing its opinion "awaiting the Supreme Court's decision in *Salazar*." *Id.* at 1113 n.5. Unlike the City, however, the Tenth Circuit properly understood that *Salazar* did not involve a cross challenge but merely "a later procedural development." *Id.* (citations omitted). Also Justice Kennedy simply hypothesized that a roadside cross "*need not* be taken as a statement of governmental support," but he did not say that such crosses "could not" be taken as a statement of governmental support. 559 U.S. at 719. Hypothetically, a small roadside cross placed on a highway without the government's knowledge for a short period of time might not be understood as a governmental endorsement. But this case does not involve a small roadside cross memorial or any memorial for that matter.

And whereas Justice Kennedy was merely theorizing, the Tenth Circuit fully explored the issue and concluded after a detailed analysis that not even memorial status can 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." 637 F.3d at 1122 (emphasis in original).

Likewise, the Ninth Circuit in *Trunk* held that a longstanding "historically significant war memorial" cross surrounded by thousands of "secular elements" unconstitutionally projected "a message of religious endorsement" despite Justice Kennedy's *dicta* about war memorial crosses. 629 F.3d at 1108. The court held that the war memorial cross failed the effect prong because a "'sectarian war memorial carries an *inherently religious message*.'" *Id.* at 1101 (citation omitted, emphasis added). The City relies on Justice Kennedy's *dicta* in *Salazar* stating that: "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." 559 U.S. at 721. (D.Br.4). The Ninth Circuit considered this passage but concluded:

> while the image of row upon row of small white crosses amongst the poppies remains an exceedingly powerful one, not all soldiers who are memorialized at those foreign battlefields are honored with crosses. Jewish soldiers are instead commemorated with Stars of David. …Overwhelming evidence shows that the cross remains a Christian symbol, not a military symbol.

629 F.3d at 1113-14. *See also Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *26, *40-42 (war memorial depicting "a historic European military cemetery of the World War II era," specifically, "the image of 'row upon row of small white

crosses,'" held unconstitutional notwithstanding Kennedy's *dicta*); *Cabral*, 958 F. Supp. 2d at 1019 (display involving rows of crosses unconstitutional).

V. The Cross violates the Establishment Clause under *Lemon*.

As the City refused to apply *Lemon*, and urges this Court to do likewise, it is fair to assume that the City concedes its Cross would not pass constitutional muster under *Lemon*. The City does not even argue in the alternative that the Cross would survive *Lemon*. Thus, the City has failed to show that it is entitled to summary judgment as a matter of law.

A. The City's failure to articulate a primary secular purpose for owning, maintaining, funding, and displaying a massive Christian cross is fatal to its motion.

When "a government permits religious symbols to be constructed on public property, its ability to articulate a secular purpose becomes the crucial focus under the Establishment Clause." *Rabun*, 698 F.2d at 1110. Additionally, when, as here, the government places "'an instrument of religion'" on its property, its purpose can "presumptively be understood as meant to advance religion." *McCreary*, 545 U.S. at 867. The City tendered no evidence to overcome this presumption of a religious purpose. In fact, it proffered no secular purpose at all. It therefore failed to satisfy its burden of proving a secular purpose. *See Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993). This lack of secular purpose "is dispositive." *Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985).

B. The City's Christian cross invariably endorses Christianity.

The City's Cross unequivocally fails the second prong of *Lemon*. Under "the second prong of *Lemon*, [the government's] intent is irrelevant. Rather, [the Court] must focus on how his [display is] perceived." *Constangy*, 947 F.2d at 1151.

> 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 or from "making adherence to a religion relevant in any way to a person's standing in the political community."

Allegheny, 492 U.S. at 593-94 (citation omitted).

A city's display of the Christian cross on public property undoubtedly advances religion and conveys the message that Christianity is preferred. *Id.* at 599 (display of a cross in a government building would convey government "endorsement of Christianity"); *id.* at 661 (Kennedy, J., concurring and dissenting). "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. "When prominently displayed on [government property]…the cross dramatically conveys a message of governmental support for Christianity." *St. Charles*, 794 F.2d at 271.

A display will fail *Lemon*'s second prong if its asserted secular effect is "indirect, remote, and incidental" to its religious effect. *Lynch*, 465 U.S. at 683. Not only does a city-owned Latin cross convey a "government endorsement of

religion," the cross "does not convey any secular message, whether remote, indirect, or incidental." *Gonzales*, 4 F.3d at 1423. *See also Am. Civil Liberties Union v. St. Charles*, 622 F. Supp. 1542, 1546 (N.D. Ill. 1985), *aff'd*, 794 F.2d at 271 ("The approval and benefit conveyed by the thirty-five by eighteen foot illuminated cross beaming over the rooftops of St. Charles is more than 'indirect, remote [or] incidental…'").

Beyond being exclusively religious, a reasonable observer would know that Bayview Cross "functioned as a holy object" and continues to be a "place of religious observance." *Trunk*, 629 F.3d at 1120. (P.Br.3-8). Puzzlingly, the City urges this Court to consider the "history" and "context" of the Bayview Cross. (D.Br.40. Yet it fails to explain how the Cross's history (erected as a holy symbol for Easter Sunrise Services) and context (a large standalone exclusively religious display) makes its Cross more acceptable, not less. The "history of this Cross only deepens its religious meaning." *Id.* at 1124. (P.Br.3-8).

C. The City's miscellaneous assertions do not establish a primary secular purpose or effect for the Cross.

1. The use of the Cross for Easter Sunrise Services reflects a religious purpose and effect.

The City offered no evidence to suggest that Bayview Cross is a *secular* symbol. Instead, the City emphasized the large attendance of certain Easter Sunrise Services. (D.Br.13-15). But all this proves is that the Cross has been a popular site

for Christians to celebrate an annual Christian service. It belies rather than supports any argument that the Cross has a secular purpose or effect. *See Allegheny*, 492 U.S. at 599 ("Nor does the fact that the crèche was the setting for the county's annual Christmas-carol program diminish its religious meaning…[B]ecause some of the carols performed at the site of the crèche were religious in nature, those carols were more likely to augment the religious quality of the scene than to secularize it."); *Rabun*, 698 F.2d at 1110-11 (cross dedicated for Easter Sunrise Services reflected a religious purpose).

"Majority support for a measure indicates simply that—majority support." *Trunk*, 629 F.3d at 1109 n.10. *See also Friedman*, 781 F.2d at 782. In *Gilfilan*, the Third Circuit held that a city violated the Establishment Clause under all three prongs of *Lemon* by funding a platform (with a cross on it) for the Pope's visit. 637 F.2d 924, 927-30 (3d Cir. 1980). "More than a million people attended." *Id.* at 939 (Aldisert, J., dissenting). The large attendance only made the religious effect more profound, as the Pope, with the aid of the City, "brought a religious message…to *millions of persons*." *Id.* at 931 (emphasis added). Similarly, in *Carpenter*, the Ninth Circuit held a cross unconstitutional even though President Franklin D. Roosevelt participated in its dedication, which was attended by 50,000 people. 803 F. Supp. at 349, *rev'd* 93 F.3d at 629-32.

Moreover, the City's extended discussion of the history and significance of

the Easter Sunrise Services is a red herring. Plaintiffs do not challenge the constitutionality of the annual services. If Plaintiffs prevail, Pensacolans are free to continue holding their services, just without a permanent City-sponsored cross. Nothing would even bar them from utilizing a temporary cross.

The City also asserts that the Cross has been the site for annual Veterans Day and Memorial Day "services," citing generally "Exhibit D" (a 170-page document) with no page reference. (D.Br.16). The City offers no relevant details about these services other than vaguely stating in an affidavit that they have occurred. (Doc.30-3,p.2). The City does not state how many have been held and whether they continue. Nor did the City mention these events in their interrogatory answers pertaining to the events held at the Cross. (P.R.365-66,367-70). The Eleventh Circuit has "consistently held that conclusory allegations without specific supporting facts have no probative value." *Leigh v. Warner Bros., Inc*., 212 F.3d 1210, 1217 (11th Cir. 2000).

Furthermore, there is no evidence that these veterans "services" are even secular. The City calls them "non-denominational remembrance services" (D.Br.16), strongly indicating that they are religious services rather than secular ceremonies. *See Hewett v. City of King*, 29 F. Supp. 3d 584, 596, 635-36 (M.D.N.C. 2014)(city's participation in American Legion's Veteran's Day "commemorative" events unconstitutionally endorsed religion because of "the religious activities that

are part of the annual ceremonies.").

Besides, the fact that other events may be held near the Cross does not in any way negate its overwhelming religious purpose or effect. *See Glassroth*, 335 F.3d at 1295 ("Use of the Ten Commandments for a secular purpose, however, does not change their inherently religious nature"). In *Trunk*, the Ninth Circuit held that the "fact that the Memorial also…serves as a site for secular ceremonies honoring veterans cannot overcome [its] religious history." 629 F.3d at 1121. *Accord Eugene*, 93 F.3d at 625 n.9 (O'Scannlain J., concurring)(cross endorsed religion even though veterans' ceremonies were conducted by the American Legion).

2. That the Cross was installed by the Jaycees with the City's authorization does not prove a secular purpose or effect.

The City places great emphasis on the fact that the Cross was donated to it (D.Br.3,4,6,16,39,43,44), but this too is irrelevant. The "Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations." *Allegheny*, 492 U.S. at 600 (crèche donated by a private entity with an accompanying disclaimer).

Significantly, the cross in *Rabun* was donated and paid for by the Chamber of Commerce and still lacked a secular purpose. 698 F.2d at 1101. The cross in *Mendelson* had also been donated to the city as a gift and failed all three of

Lemon's prongs. 719 F. Supp. at 1069-71. *See also Davenport*, 637 F.3d at 1111-12 (privately donated memorials); *Gonzales*, 4 F.3d at 1414, 1421 (Knights of Columbus); *Eugene*, 93 F.3d at 617 (private citizens without the city's permission)*; Cabral*, 958 F. Supp. 2d 1018 (crosses to be erected by private entity).

VI. Removing the Cross will restore the City's neutrality with religion.

The City has it exactly backwards when it argues that removing an exclusively Christian symbol from City property will evidence hostility towards religion. (D.Br.30,40,44). A "secular state" is "not the same as an atheistic or antireligious state." *Allegheny*, 492 U.S. at 610-11. In *Allegheny*, the Court rejected an identical argument, declaring: "It is thus incontrovertible that the Court's decision today, premised on the determination that the crèche display on the Grand Staircase demonstrates the county's endorsement of Christianity, does not represent a hostility or indifference to religion but, instead, the respect for religious diversity that the Constitution requires." *Id.* at 612-13.

Indeed, the City's argument that removal of the Cross would exhibit "hostility" toward "religion" is nothing less than an admission that the Cross *is religious* to begin with. But of course, "removal of the cross" will only "restore their neutrality." *Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1249-53 (9th Cir. 2007).

VII. Conclusion

Bayview Cross is unconstitutional and the City has failed to show otherwise. Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment and deny the City's Motion in its entirety.

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May 11, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Northern District of Florida Local Rule 7.1(F), and the accompanying consent motion for an extension of the word limit pursuant to N.D. Fla. Loc. R. 56.1(C) the undersigned hereby certifies that the word count for this document, excluding case style, signature block and certificate of service and certificate of compliance, contains 10,414 words.

Dated: May 11, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2017, the foregoing Memorandum in Opposition to the City's Motion for Summary Judgment was filed with the Clerk of Court via the CM/ECF Filing System, which will send a notice of electronic filing to:

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