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' Reply Memorandum in Support of their Motion for Summary Judgment

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I. This Court cannot abandon the *Lemon* test. [1]

The City's opposition to Plaintiffs' Motion for Summary Judgment utterly fails to demonstrate the constitutionality of the gigantic freestanding Christian monolith prominently displayed by the City in a popular city park. The City effectively concedes that its Cross cannot pass constitutional muster under traditional Establishment Clause jurisprudence. (D.Opp.2,11-18). It also effectively concedes that its Cross cannot pass constitutional muster under Eleventh Circuit precedent —specifically, *ACLU v. Rabun Cnty. Chamber of Commerce, Inc*., 698 F. 2d 1098 (11th Cir. 1983) — which held a cross unconstitutional in virtually identical circumstances. (D.Opp.25-28)(P.Br.9-12)(P.Opp.5).

Instead, the City continues to implore this Court to abandon the *Lemon* test entirely and adopt Justice Breyer's "legal judgment test" from his concurrence in *Van Orden v. Perry*, 545 U.S. 677, 698-706 (2005), even though the *Lemon* test has not been overruled and remains binding on this Court. (D.Opp.12-18)(P.Opp.6-10). And in support of this baseless argument, the City continues to rely on the inapt legislative prayer exception and *dicta* from dissents and concurrences. (P.Opp.7-11).

To reiterate, *Van Orden*'s disregard of *Lemon* is not the test for cross cases

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

and is not even the test in Ten Commandments cases because a majority could not be reached on the applicable standard. 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). *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*).

Again, 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 the decisions of the Courts of Appeals, which have adhered to *Lemon* in Ten Commandments cases. *See e.g. Felix v. City of Bloomfield*, 841 F.3d 848, 856-57 (10th Cir. 2016); *ACLU of Ohio Found. v. Deweese*, 633 F.3d 424, 430-35 (6th Cir. 2011); *Green*, 568 F.3d at 789-91, 804-805 n.14; (P.Opp.13).

The Eleventh Circuit has not adopted *Van Orden*'s disregard of *Lemon*, Justice Breyer's legal judgment test, or even the reasoning from *Van Orden*. The only time it mentioned *Van Orden* was in *Pelphrey v. Cobb Cnty.*, where it *reiterated* that "religious monuments" are *not* exempt from *Lemon*. 547 F.3d 1263, 1276 (11th Cir. 2008). And the Eleventh Circuit's opinion in *Selman v. Cobb Co. Sch. Dist.*, 449 F. 3d 1320 (11th Cir. 2006) implicitly (if not explicitly) affirmed

the district court's application of *Lemon* to a sticker display after *Van Orden.* (P.Opp.14-15).

If *Van Orden* is the test, then every single court in the country evaluating cross cases since *Van Orden* has used the wrong test. Every single court. It would also mean that every single court that has applied *Lemon* in Ten Commandments cases since *Van Orden* is wrong as well. That would include this Court, which adhered to *Lemon* in *Dixie.*

The Second, Ninth, Tenth Circuit Court of Appeals have all found *Lemon* controlling in cross cases. Additionally, U.S. District Courts in Florida, California, Indiana, and North Carolina found *Lemon* controlling in cross cases post-*Van Orden*:

- *Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010), *cert. denied*, 132 S.Ct. 12 (2011)
- *Starke*, 2007 U.S. Dist. LEXIS 19512
- *Am. Humanist Ass'n v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014)
- *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 City faults Plaintiffs for "never mentioning" *Van Orden* in their motion for summary judgment. (D.Opp.2). But the U.S. District Court of Florida in *Starke*

did not mention *Van Orden* at all, even though the case involved a longstanding cross that stood unchallenged for nearly 40 years. 2007 U.S. Dist. LEXIS 19512, at *5. In its reply, the City states that in *Starke*, the city "failed to even respond to the Atheists' motion for summary judgment and the Atheists failed to bring to the district court's attention the *Van Orden* opinion." (Reply at 4). The City is wrong. The plaintiffs in *Starke* expressly made the court aware of *Van Orden* on pages 14 and 15 of its motion for summary judgment and thoroughly discussed and distinguished the case. (P. Reply Exhibit 1). Fully aware of *Van Orden*, the court in *Starke* explicitly declared, contrary to the City's argument: "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.* at *15-16.

The Second Circuit in *Port Authority* never mentioned *Van Orden* either, even though the facts in that cross challenge were far more akin to the facts in *Van Orden* and presented a much more "borderline" case than that presented here. (P.Opp.18-19). The Tenth Circuit in *Weinbaum* did not mention *Van Orden* either, despite the fact that the challenge was to longstanding cross displays in various forms on public property with independent historical significance. (P.Opp.19).

In another recent cross case, the court in *Cabral* also eschewed *Van Orden,* declaring that "the three-pronged test set forth by the Supreme Court in *Lemon v. Kurtzman* 'remains the prevailing analytical tool for the analysis of Establishment

Clause claims.'" 958 F. Supp. 2d at 1026 citation omitted).

Surely, just like the court in *Starke*, the Tenth Circuit, Second Circuit, and U.S. District Court of Indiana would have been aware of *Van Orden*. These courts simply did not find *Van Orden* remotely relevant to the constitutionality of cross displays. Indeed, in *Davenport*, the Tenth Circuit had explicitly distinguished *Van Orden*, finding 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 court recognized that unlike the Ten Commandments, the cross does not have a "secular meaning that can be divorced from its religious significance." *Id.* at 1122. *See also id.* at 1121, 1123 (*Van Orden* was further inapplicable because "the crosses stand alone.").

In its reply, the City nonetheless misleadingly asserts: "There has been no cross case decided in this jurisdiction in which *Van Orden* has been considered." (Reply at 4). Beyond the fact that *Starke* deemed *Van Orden* irrelevant to a cross challenge (P.Opp.10), this Court in *Dixie* explicitly held that *Van Orden* did not apply even to a Ten Commandments display, *supra*. In sum, just like in *Dixie*, this Court is not "free to ignore *Lemon*." *Green*, 568 F.3d at 797 n.8.

In any event, *Van Orden* would only even be relevant, if at all, to borderline Ten Commandments cases where the religious aspects of the display do not predominate. (P.Opp.15-22). *Van Orden*, 545 U.S. at 701 (Breyer); *Davenport*, 637

F.3d at 1123. It is irrelevant to cases involving a freestanding exclusively Christian display such as the cross here. It is not even applicable to freestanding Ten Commandments displays. *See McCreary v. ACLU*, 545 U.S. 844 (2005). The Court in *McCreary* made this abundantly clear: "When the government initiates an effort to place this statement *alone* in public view, a religious object is unmistakable." *Id*. at 869 (emphasis added).

Once again, there is no "nonreligious aspect" to a Latin cross, 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. *See also Rabun*, 698 F.2d at 1103; *Allegheny*, 492 U.S. at 602-03 (distinguishing "a specifically Christian symbol" from "more general religious references"); *Buono v. Norton*, 371 F.3d 543, 544-45 (9th Cir. 2004) ("'It is exclusively a Christian symbol, and not a symbol of any other religion.'").

II. *Rabun* has not been overruled by *Van Orden* and is indistinguishable from the facts in this case.

Whereas *Van Orden* is irrelevant, *Rabun* is relevant, analogous, and binding, and yet conspicuously missing from the City's motion for summary judgment. Plaintiffs comprehensively demonstrated that Bayview Cross cannot pass muster under *Rabun* (P.Br.10-13). The City seems to agree that under *Rabun*, Bayview

Cross cannot stand. (D.Opp.25-28). Thus, rather than distinguish the cases (which would prove futile), the City argues that *Van Orden* overruled *Rabun*. (D.Opp.25-28). This argument has no traction. Again, the *Lemon* test has continued to be employed after *Van Orden* even in passive monument cases such as *Dixie* and *Starke*, *supra*. (P.Opp.10,13).

The City nonetheless continues to assert that the "Supreme Court subsequently stated in *Van Orden* that the *Lemon* test is inappropriate in evaluating passive monuments." (D.Opp.2,26). This is glaringly false. Clearly, the Supreme Court did not hold that the *Lemon* test is inappropriate in evaluating all passive monuments because on the very same day it applied *Lemon* to a passive monument display in *McCreary*. 545 U.S. at 863-65. The *Van Orden* plurality merely upheld a Ten Commandments display without a discussion of the *Lemon* factors. As discussed in Plaintiffs' previous memoranda, no court is bound by its disregard of *Lemon*. Moreover, Justice Breyer suggested that an evaluation under *Lemon* might lead to the same result. *Van Orden*, 545 U.S. at 700. Justice Rehnquist's plurality also relied in part on *Lemon*'s purpose prong. *Id.* at 686.

If any Ten Commandments case were relevant here, it would be *McCreary* rather than *Van Orden* for several reasons. First, both cases involve standalone religious displays. In *McCreary*, the Court made clear that standalone religious displays violate the Establishment Clause:

> The point is simply that the original text viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. *When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable.*

545 U.S. at 869 (emphasis added). This is in contrast to *Van Orden* where the display was one small part of an exhibition on the Texas State Capitol grounds, "contain[ing] 17 monuments and 21 historical markers commemorating the 'people, ideals, and events that compose Texan identity.'" 545 U.S. at 681. Second, as in *McCreary*, the purpose for erecting Bayview Cross was objectively religious. (P.Br.16-23). In *Van Orden*, by contrast, the Ten Commandments was intended to depict "the state's political and legal history." *Id.* at 691. Third, like Bayview Cross and unlike the display in *Van Orden*, the *McCreary* display had a history of religious usage. The Court emphasized:

> What is more, at the ceremony for posting the framed Commandments in Pulaski County, the county executive was accompanied by his pastor, who testified to the certainty of the existence of God. The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments' religious message.

545 U.S. at 869.

The City cites no authority to support its position that *Rabun*'s application of *Lemon* has been overruled. The Eleventh Circuit precedent is decidedly against the City's position. In addition to *Selman*'s implicit holding that *Lemon* applied to a sticker display, in *Pelphrey*, the Eleventh Circuit's only post-*Van Orden* case

mentioning *Van Orden*, the court reiterated what it held in *Glassroth* and *King*: that "religious monuments" are not exempt from *Lemon*. 547 F.3d at 1276 (citing *Glassroth* and *King*). In *King*, the Eleventh Circuit had 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).

Not only did the City fail to establish that *Rabun* has been overruled by *Van Orden*, but it failed to distinguish *Rabun*. The City merely provided an extended discussion of *Rabun*'s holding that the plaintiffs had Article III standing, seeming to conflate the issue of standing with the merits of an Establishment Clause violation. (D.Opp.25-28). In a single sentence, the City's muddled discussion of standing transforms into an even more muddled discussion of the legislative prayer exception and its "coercion" analysis enunciated in *Town of Greece.* (D.Opp.27). Plaintiffs cannot decipher what Article III standing or legislative prayer have to do with the constitutionality of Bayview Cross or with the vitality of *Rabun.*

To reiterate, *Greece*'s "coercion" analysis only applies to the legislative prayer exception. 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.* 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. Nor is there any question that the Plaintiffs in this case have Article III standing.[2]

III. The City's reliance on *Salazar dicta* is misplaced.

Originally, the City argued that the Supreme Court's opinion in *Salazar* was a "cross case" and relied extensively on Justice Kennedy's *dicta* about certain crosses to argue that Bayview Cross is constitutional on public land. (D.Br.2,3,17,25,31). But now it concedes that the plurality in *Salazar* did not rule on any substantive matters and did not uphold the constitutionality of a cross monument. (D.Opp.25). To reiterate, the Ninth Circuit's holding that the cross was unconstitutional when it was on government property is still good law. *Buono*, 371

[2] All that is required for Article III standing under the Establishment Clause is direct unwelcome contact. *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987). There is no question Plaintiffs have met this threshold. (P.R.418-423). In *Saladin*, the plaintiffs claimed that the city seal with the word "Christianity" denigrated them. *Id.* at 689. Even though some of the plaintiffs lived outside the city, the Eleventh Circuit found standing because they merely received city stationery with the seal and were "directly affronted by the presence of the allegedly offensive word." *Id*. at 693. If one plaintiff has standing, the Court need not even consider whether the others have standing as well. *See Rabun*, 698 F.2d at 1108-09 ("Because we have determined that at least these two individuals have met the requirements of Article III, it is unnecessary for us to consider the standing of the other plaintiffs in this action.").

F.3d at 550. *See Trunk v. San Diego*, 629 F.3d 1099, 1111 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2535 (2012); *Davenport*, 637 F.3d at 1120.

IV. The religious nature of the Easter Sunrise Services held at Bayview Cross is relevant to the Cross's unconstitutionality.

The City dedicated a significant portion of its motion for summary judgment discussing the annual Easter Sunrise Services held at Bayview Cross. (D.Br.11-16). Though in doing so, it omitted critical facts relevant to the overwhelming religious nature of these events, focusing instead on extraneous details such as the attendance rate and floral arrangements. (*Id.*).

Despite its own extended discussion of these events, the City argues that "Plaintiffs make a feature of the fact that Easter sunrise services are religious events" and that this "is a red herring." (D.Opp.5). Much to the contrary, the religious nature of the events held at Bayview Cross is germane and significant under *Rabun* and other cross cases. In evaluating the purpose prong of the *Rabun* cross, the Eleventh Circuit found,

> the selection of an Easter deadline for completion of the cross, the decision to dedicate the cross at Easter Sunrise Services, and the several inspirational statements contained in the Chamber's press releases all point to the existence of a religious purpose.

Rabun, 698 F.2d at 1110.

The history of religious services is also relevant to the message of government endorsement of religion under *Lemon*'s effect prong (and even *Van*

Orden). In *Trunk*, the Ninth Circuit held a war memorial cross unconstitutional and found the religious usage of the cross relevant to the effect analysis:

> The wide recognition of the Cross as a religious symbol and its long "and stormy" history of religious usage distinguishes the Memorial from the displays in *Van Orden* and *Card*. The Ten Commandments monuments at issue in those cases passed muster in part because they were *not* used as religious objects—they simply adorned the grounds of their respective government buildings in the company of other monuments.
>
> By contrast, a reasonable observer of the Memorial would be aware of the long history of the Cross, and would know that it functioned as a holy object, a symbol of Christianity, and a place of religious observance. The Cross's religious history heightens, rather than neutralizes, its "undeniably ... religious message." *See id.* (finding that although the text of the Ten Commandments "undeniably has a religious message," that message did not predominate in the display because the text was not used in a sectarian manner); *see also Eckels,* 589 F.Supp. at 235 ("[T]hat the effect of the symbols' presence is religious is evidenced by what the site has been used for since the [cross was] constructed [including Easter sunrise services]. There is nothing remotely secular about church worship.").

629 F.3d at 1120-21. Conversely, the City's prolonged discussion of the attendance rate and the fact that the first event occurred six months before America entered a war are not in any way relevant to the constitutionality of Bayview Cross.

And contrary to the City's argument, the religious nature of the events held at the cross is relevant even if the City had no involvement in these events at all. For instance, in *Rabun*, there was no evidence of any government involvement in the Easter Sunrise Services but the events were still relevant to the purpose analysis. 698 F.2d 1098. The fact that the City here has actively endorsed, supported, and

sponsored the Easter Sunrise Services simply makes this case far more egregious than *Rabun*. (P.Br.6-7).[3]

Finally, it bears emphasis that the City's suggestion that it did not receive any complaints about the cross from non-plaintiffs is incorrect. (D.Opp.11). Pensacola resident Bill Caplinger voiced his objection to the cross to then-Director of Leisure Services William Vickrey in or around 1999 or 2000. (Caplinger Declaration at ¶¶6-9).

V. Conclusion

Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment and deny the City's Motion in its entirety.

Respectfully submitted,

May 19, 2017

/s/ Monica L. Miller
MONICA L. MILLER
American Humanist Association
1821 Jefferson Place NW
Washington, DC, 20036
Phone: 202-238-9088
Email: mmiller@americanhumanist.org
CA Bar: 288343 / DC Bar: 101625

MADELINE ZIEGLER
Freedom From Religion Foundation
PO Box 750, Madison, WI 53701
Phone: 608-256-8900

[3] (R.92)(R.103)(R.225)(R.227)(R.258-65)(R.278)(R.284)(R.366)(R.380).

Email: mziegler@ffrf.org
WI Bar Number: 1097214

DAVID A. NIOSE
American Humanist Association
1821 Jefferson Place NW
Washington, DC, 20036
Phone: 202-238-9088
Email: dniose@americanhumanist.org
MA Bar: 556484/ DC Bar 1024530

REBECCA S. MARKERT
Freedom From Religion Foundation
PO Box 750, Madison, WI 53701
Phone: 608-256-8900
Email: rmarkert@ffrf.org
WI Bar Number: 1063232

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF COMPLIANCE

Pursuant to Northern District of Florida Local Rule 7.1(F), the undersigned hereby certifies that this memorandum, excluding case style, signature block and certificate of service and certificate of compliance, contains 3,123 words.

Dated: May 19, 2017

/s/ Monica L. Miller
MONICA L. MILLER
American Humanist Association
1821 Jefferson Place NW
Washington, DC, 20036
Phone: 202-238-9088
Email: mmiller@americanhumanist.org
CA Bar: 288343 / DC Bar: 101625

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2017, the foregoing Reply Memorandum in Support of the Plaintiffs' 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:

J. Nixon Daniel, III,
Terrie L. Didier
Beggs & Lane, R.L.L.P.
501 Commendencia St.
Pensacola, FL 32502
jnd@beggslane.com
tld@beggslane.com

Jack Wesley Gay
Allen Norton & Blue
906 Monroe St. Ste.100
Tallahassee, FL 32303
wgay@anblaw.com

/s/ Monica L. Miller

MONICA L. MILLER
American Humanist Association
1821 Jefferson Place NW
Washington, DC, 20036
Phone: 202-238-9088
Email: mmiller@americanhumanist.org
CA Bar: 288343 / DC Bar: 101625