RECORD NO. 15-2597

In The

United States Court Of Appeals
For The Fourth Circuit

AMERICAN HUMANIST ASSOCIATION; STEVEN LOWE; FRED EDWORDS; BISHOP MCNEILL,

Plaintiffs – Appellants,

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Defendant – Appellee,

THE AMERICAN LEGION; THE AMERICAN LEGION DEPARTMENT OF MARYLAND; THE AMERICAN LEGION COLMAR MANOR POST 131,

Intervenors/Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT GREENBELT

RESPONSE TO PETITIONS FOR REHEARING AND REHEARING EN BANC

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I. Introduction

Using a Christian cross as a war memorial does not make the cross secular. It makes the war memorial religious. Numerous courts, including the Third, Seventh, Ninth, Tenth, and Eleventh Circuits, have considered the constitutionality of crosses and have been virtually unanimous in finding them unconstitutional, irrespective of how old they are, whether they are accompanied by other symbols or monuments, or have independent historical significance.

An "en banc hearing or rehearing is not favored and ordinarily will not be ordered." Fed. R. App. P. 35. En "banc courts are the exception, not the rule," *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 689 (1960), and are warranted only "in the rarest of circumstances." *Bartlett v. Bowen*, 824 F.2d 1240, 1244 (D.C. Cir. 1987) (Edwards, J. concurring). Disagreement with a panel decision is not sufficient. *United States v. Foster*, 674 F.3d 391, 409 (4th Cir. 2012) (Wynn, J., dissenting); *Mitchell v. JCG Indus., Inc.*, 753 F.3d 695, 699 (7th Cir. 2014) (Posner, J., concurring).

Appellees and Intervenors (collectively "Appellees" unless otherwise noted) failed to demonstrate such necessity here. The panel's decision is in accord with Supreme Court and Fourth Circuit jurisprudence and every circuit court decision on this subject.

II. Factual Background

The government[1] owns, funds, maintains, and displays an enormous Christian cross ("Bladensburg Cross" or "Cross"), to the exclusion of all other religious symbols, in the middle of one of the county's busiest intersections.[2] Bladensburg Cross is a Latin cross, standing 40-feet high, and arms extended 5-feet from the center.[3] *See ACLU v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986) ("the Latin cross (a cross whose base stem is longer than the other three arms) is a symbol of Christianity"). The Cross is the only monument on the traffic island, exclusively dominating the visual field of passersby.[4]

In 1919, the Town of Bladensburg ("Town") approved a massive concrete Christian cross to be placed on Town property. [5] The Cross was originally referred to as the "Calvary cross," signifying the crucifixion of Jesus Christ.[6] A 1919 article declared: "A mammoth cross, a likeness of the Cross of Calvary, *as described in the Bible*, will be built."[7]

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[1] Maryland-National Capital Parks and Planning Commission ("M-NCPPC" or "Commission").
[2](Op.8)(J.A.1372)(J.A.1583)(J.A.1626)(J.A.1639)(J.A.1730).
[3] (J.A.287)(J.A.1098-1112)(J.A.1115)(J.A.1155)(J.A.1159)(J.A.1450)(J.A.1458)(J.A.1583)(J.A.2508).
[4] (J.A.30)(J.A.44)(J.A.111)(J.A.1858)(J.A.1872).
[5] (J.A.1115-18)(J.A.1206-07)(J.A.1925)(J.A.2504)(J.A.3427-28).
[6] (J.A.211)(J.A.288-89)(J.A.1114-15)(J.A.1118-25)(J.A.1130-34).
[7] (J.A.1115)(emphasis added).

Fundraising was led by the "Calvary Cross Memorial" committee. (J.A.1117-18). Donors signed a contribution pledge referencing "God," "Supreme Ruler" "Faith" "Godliness," and "One God."[8] Bladensburg Cross was modeled off of a local Catholic Shrine.[9]

At its dedication ceremony in 1925, Maryland Representative Stephen Gambrill delivered the keynote address proclaiming: "by the token of this cross, *symbolic of Calvary*, let us keep fresh the memory of our boys who died for a righteous cause."[10] Both a Roman Catholic priest and a Baptist minister took part in the ceremony, which included prayers.[11] Frank Mountford, lauded as a leading evangelist, reportedly held three "Sunday services" at the Cross in 1931.[12]

In 1975, the Cross's 50th anniversary ceremony was held at the site. The guest speaker was a Christian chaplain, who delivered the closing prayer. The Rector of St. Luke's Episcopal Church also delivered a prayer. [13]

In 1984, the Town held a ceremony at the Cross. Prayers were delivered by Father Chimiak of St. Matthias Catholic Church.[14] In 1985, M-NCPPC and the

[8] (J.A.36)(J.A.1939)(J.A.3446).
[9] (J.A.2486)(J.A.3310-13).
[10] (J.A.211)(J.A.288)(J.A.339)(J.A.1876)(J.A.1891)(J.A.1936)(J.A.2508).
[11] (J.A.212)(J.A.1129-36)(J.A.1225)(J.A.2508).
[12] (J.A.292)(J.A.347)(J.A.1228).
[13](J.A.150)(J.A.331)(J.A.351)(J.A.1263)(J.A.1922)(J.A.1963)(J.A.1998)(J.A.2549-52).
[14] (J.A.377-78)(J.A.1347-53).

Town held a "Rededication" ceremony for the Cross after M-NCPPC spent $100,000 on renovations.[15] M-NCPPC invited Father Chimiak to deliver the prayers.[16] Since 1984, the Town and the American Legion have co-sponsored services at the Cross, which almost always include prayers led by Christians. (Op.6).[17]

The Cross was constructed in isolation, and was the only memorial in the entire vicinity for much of its history. Decades later (1960, 1983, and 2006, respectively), three smaller memorials were placed in a separate area across the street.[18] During litigation, a fourth was added one-half mile away.[19] The Cross remains the tallest and most prominent memorial in the region. (Op.22).

III. There is no conflict with any Circuit Court precedent.

This case does not merit en banc consideration to promote uniformity of decisions. The overwhelming weight of jurisprudence recognizes that government cross displays are unconstitutional. *See Trunk v. San Diego*, 629 F.3d 1099 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2535 (2012) (historic war memorial cross); *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 12 (2011) (individualized roadside memorial crosses); *Buono v. Norton*, 371 F.3d 543

[15] J.A.137-38)(J.A.360-65)(J.A.374-75).
[16](J.A.137-38)(J.A.1271-81).
[17] (J.A.740)(J.A.834-40)(J.A.1282-1353)(J.A.1777-1818)(J.A.1846-50)(J.A.2536-40).
[18] (J.A.30)(J.A.37-40)(J.A.44)(J.A.111)(J.A.734)(J.A.1830-39).
[19] (Op.8)(J.A.707-08)(J.A.1866)(J.A.2024).

(9th Cir. 2004) (7-foot war memorial cross); *Carpenter v. San Francisco*, 93 F.3d 627 (9th Cir. 1996) (landmark cross in remote park); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) (American Legion war memorial cross); *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995) (longstanding cross on insignia); *Ellis v. La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (memorial crosses 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); *St. Charles*, 794 F.2d 265 (holiday cross); *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) (large cross in state park); *Gilfillan v. Philadelphia*, 637 F.2d 924 (3d Cir. 1980) (platform containing cross); *Kondrat'yev v. City of Pensacola*, No. 3:16-cv-00195-RV-CJK, Dkt-41 (N.D. Fla. June 19, 2017), *appeal docketed*, No. 17-13025 (11th Cir. July 6, 2017) (longstanding cross in public park); *Freedom from Religion Found. v. County of Lehigh*, 2017 U.S. Dist. LEXIS 160234 (E.D. Pa. Sep. 28, 2017) (insignia); *Davies v. County of Los Angeles*, 177 F. Supp. 3d 1194 (C.D. Cal. 2016) (insignia); *Am. Humanist Ass'n v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, *26, *40-42. (C.D. Cal. 2014) (6-foot-tall war memorial slab depicting "a historic European military cemetery of the World War II era" with "the image of 'row upon row of small white crosses,'" surrounded by secular symbols); *Cabral v. City of Evansville*, 958 F.

Supp. 2d 1018 (S.D. Ind. 2013), *app. dism.*, 759 F.3d 639 (7th Cir. 2014) (temporary 6-foot crosses in veterans' park); *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 cross); *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) (4-inch cross on temporary sign); *Mendelson v. St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989) (water tower cross); *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988) (war memorial cross on military base); *ACLU v. Mississippi State Gen. Servs. Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987) (holiday cross); *Libin v. Greenwich*, 625 F. Supp. 393 (D. Conn. 1985) (5-foot 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 in local park).

Significantly, every decision involving a *memorial* cross found the cross unconstitutional, whether it was "longstanding,"[20] "created to be a veterans memorial,"[21] or "consistently used and regarded by the community as a veterans memorial."[22] (Legion-Pet.7). In the face of 27 cases finding crosses unconstitutional, and 8 finding memorial crosses unconstitutional, Appellees only point to 3 cases in

[20] *Trunk, Buono, Eugene, Gonzales, Jewish War Veterans*
[21] *Eugene, Gonzales, Lake Elsinore, Jewish War Veterans, Eckles*
[22] *Trunk, Buono, Eugene, Jewish War Veterans*

which displays containing crosses were upheld, and they are readily distinguishable. (Legion-Pet.12)(Commission-Pet.15-16).

In *Am. Atheists, Inc. v. Port Auth., Port Authority*, the Second Circuit upheld "a particular artifact recovered from World Trade Center debris, a column and cross-beam" in a September 11 museum. 760 F.3d 227, 232 (2d Cir. 2014). The rubble was donated along with "more than 10,000 artifacts." *Id.* at 234-36. The court concluded a reasonable observer would view the effect of it, "amid hundreds of other (mostly secular) artifacts, to be ensuring historical completeness." *Id.* at 236, 243-44. Bladensburg Cross is not an *artifact.* It was purposefully designed as a Christian cross.

The other two cases involved small crosses integrated into government insignia based on exceptionally "unique" facts related to those governments, rather than a massive concrete cross on a highway median. *See Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1035 (10th Cir. 2008) (city's name literally means "The Crosses" and crosses in seal reflected "unique history," namely, city's founding at site where crosses marked graves of settlers killed in Apache attack); *Murray v. Austin*, 947 F.2d 147, 155 (5th Cir. 1991) (upholding Stephen Austin's coat of arms in Austin insignia). *But see Trunk*, 629 F.3d at 1111 & n.11 (finding *Weinbaum* and *Murray* unpersuasive, noting that even a city with "a unique history" may "not honor its history by retaining [a] blatantly sectarian seal") (citing *Robinson* and *Harris*).

IV. There is no conflict with controlling precedent.

A. Reversal would create deep tensions with Supreme Court and Fourth Circuit precedent.

Appellees failed to demonstrate any conflict with Supreme Court or Fourth Circuit precedent. Conflict would only result from reversal.

The Court in *County of Allegheny v. ACLU*, made clear that "the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross." 492 U.S. 573, 606-07 (1989). Justice Kennedy agreed that "such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.* at 661 (concurring and dissenting). The Court went on to hold that a privately-donated, temporary crèche had the unconstitutional "effect of endorsing a patently Christian message." *Id.* at 597, 601-02. This was so despite a disclaimer and other secular decorations in the courthouse. *Id.* at 598, 601-02.

Similarly, in *Smith v. County of Albemarle*, this Court held that a privately-donated crèche, which involved "no expenditure of County funds" and bore a "disclaimer" sign sent the "unmistakable message" of religious endorsement. 895 F.2d 953, 955-58 (4th Cir. 1990).

Bladensburg Cross "brings together church and state" far "more ardently than the unconstitutional crèche." *Harris*, 927 F.2d at 1412. Christmas is celebrated by "many non-Christians" but "the Latin cross has not lost its Christian identity." *St.*

Charles, 794 F.2d at 271. Furthermore, the Cross "is not displayed once a year for a brief period." *Friedman*, 781 F.2d at 782. *Accord Gonzales*, 4 F.3d at 1423; *Eckels*, 589 F. Supp. at 235.

B. The panel's effect prong analysis is consistent with precedent.

Appellees devote most of their petitions discussing facts related to the Cross's purpose and origins. But the Cross's purpose was never at issue on appeal. Appellants set aside purpose to focus the Court's attention sharply on the overwhelming authority holding, as common sense dictates, that a huge Christian cross has the effect of endorsing Christianity. (Appellants' Br.1,27-29) (Reply Br.1,7-11).

The "effect prong asks whether, irrespective of government's actual purpose," *N.C. Civ. Liberties Union Leg. Found. v. Constangy*, 947 F.2d 1145, 1151 (4th Cir. 1991), the display "has the *appearance* or effect of endorsing religion." *Smith*, 895 F.2d at 956 (emphasis added). The "cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be." *St. Charles*, 794 F.2d at 271. *See Allegheny*, 492 U.S. at 599; *Trunk*, 629 F.3d at 1118 (memorial failed effect prong, despite secular purpose); *accord Duncan*, 637 F.3d at 1124; *Jewish War Veterans*, 695 F. Supp. 3.

Not only does a government-owned cross convey a "government endorsement of religion," it "does not convey any secular message, whether remote, indirect, or

incidental." *Gonzales*, 4 F.3d at 1423. *Accord Duncan*, 637 F.3d at 1122. A government's display of "exclusively religious symbols, such as a cross" will almost always be unconstitutional. *King v. Richmond Cnty.*, 331 F.3d 1271, 1285 (11th Cir. 2003). Because "of the Latin cross's strong ties to Christianity, even when a cross occupies only one part of a larger 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) (crosses occupied 1/3 of display). *E.g.*, *Harris*, 927 F.2d at 1412-13; *Robinson*, 68 F.3d at 1228; *Friedman*, 781 F.2d at 779; *St. Charles*, 794 F.2d at 267.

Federal courts have *unanimously* held that displaying a cross for *commemorative* purposes unconstitutionally endorses Christianity. In *Trunk*, the Ninth Circuit concluded that a "'historically significant war memorial'" cross "'dedicated to veterans of World Wars I & II,'" surrounded by *thousands* of "secular elements" and plaques 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, 1111-12, 1118.

In *Duncan*, the Tenth Circuit held that 12-foot roadside memorial crosses for individual highway troopers sent a "governmental message endorsing Christianity" despite a number of "contextualizing facts." 637 F.3d at 1111-12, 1121-22. The crosses were privately owned and adorned with the trooper's name, picture, and

detailed biographical information. *Id.* They were "clearly intended as memorials," and "located in areas where similar memorials have long been displayed." *Id*.

In *Gonzales*, the Seventh Circuit ruled that a longstanding, privately-funded war memorial cross unconstitutionally advanced religion. 4 F.3d at 1412-14. Similarly, in *Eugene*, the Ninth Circuit concluded it was "simple" and "straightforward" that a longstanding war memorial cross, erected by American Legion without the city's permission and accompanied by a plaque showing its war memorial status, "clearly" unconstitutionally advanced religion. 93 F.3d at 617-20 n.5, & 625-26 & n.9 (O'Scannlain J., concurring).

1. The panel's decision does not conflict with *Buono*.

In alleging that the panel "misapplied" *Lemon*'s effect test, Appellees rely on Justice Kennedy's opinion in *Salazar v. Buono*, 559 U.S. 700 (2010) (plurality) (Legion-Pet.2,7,11-12)(Commission-Pet.12-14). Nothing in the panel's decision conflicts with *Buono*. That case did not even address the merits of an "Establishment Clause challenge," but rather "a later procedural development." *Duncan*, 637 F.3d at 1113 n.5 (citing *Buono*).

Buono initially involved a challenge to a WWI cross on federal land. *Id.* at 705-06, 723-24. The Ninth Circuit held the cross unconstitutional. *Id.* at 708-09. That decision *is still good law*.[23] As a curative measure, Congress enacted a statute

[23] *See Trunk*, 629 F.3d at 1111; *Duncan*, 637 F.3d at 1120.

transferring the property to private ownership. *Id.* at 706. The plurality merely held that the lower court improperly modified the injunction without a hearing as to the changed facts (the transfer). *Id.* at 721-22 (Kennedy). Two other justices concurred in the remand because they concluded the plaintiff lacked standing. *Id.* at 728. Consequently, anything Justice Kennedy said about crosses and *Lemon* not only failed to garner a majority, but was clearly *dicta* as well. *Id.* at 716-18. Indeed, he expressly admonished that his opinion should not be cited for "sweeping pronouncements" or "categorical rules." *Id.* at 722.

Yet even as *dicta*, his pronouncements have no *factual* relevance here. First, Justice Kennedy alluded to the conceivable constitutionality of a land transfer *statute* allowing a war memorial on *private* property. *Id.* at 706. The statute did not even require the continued presence of the cross. *Id*. at 727 (Alito, J., concurring). Second, Bladensburg Cross stands 40-feet tall in a busy intersection, whereas the small cross in *Buono* was in the middle of the desert. It "was seen by more rattlesnakes than humans." *Id.* at 725. Justice Kennedy emphasized that it was "less than eight feet tall." *Id.* at 707. In contrast to the small "cross in the desert," the "size and prominence of the Cross evokes a message of aggrandizement and universalization of religion, and not the message of individual memorialization and remembrance that is presented by a field of gravestones." *Trunk*, 629 F.3d at 1116 n.18.

Instructively, seven other courts found crosses unconstitutional after *Buono*, *supra* at III. Justice Kennedy's reference to "thousands of small crosses" (Legion-Pet.12) "serve as individual memorials to the lives of the Christian soldiers," not as "generic symbols of death." *Id. See also id.* at 1108, 1113-14 (citing *Buono*). The Tenth Circuit in *Duncan* likewise concluded that despite Justice Kennedy's *dicta*, 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." 637 F.3d at 1113 n.5, 1122.

2. The effect test does not consider purpose or history.

Appellees contend that the panel "misapplied" *Lemon*'s effect prong, listing five allegedly "profound errors, all contrary to precedent." (Legion-Pet.10-15). Yet the "precedent" they rely upon is not precedent at all. Both rely on *Weinbaum*, 541 F.3d at 1031, stating "the reasonable observer also considers the 'purpose, context, and history.'" (Legion-Pet.11)(Commission-Pet.13). But the Tenth Circuit applied its own "hybrid *Lemon*/endorsement test." *Id.* at 1030. Other than *Weinbaum*, Appellees rely on *Buono* citing Justice O'Connor's concurrence in *Capitol Square Review & Adv. Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (Legion-Pet.11,13)(Commission-Pet.12-13). Neither *Weinbaum* nor Justice O'Connor's concurrence are valid authority on *Lemon*'s effect prong.

Rather, this Court has made clear that: "Prong two thus looks to the effect of the display itself, not to the display's origin." *Lambeth v. Bd. of Commrs*, 407 F.3d 266, 272 (4th Cir. 2005). In *Lambeth*, this Court rejected the argument that the reasonable observer would be "aware of the religious comments made in favor of the display at the Board meeting where [the display] was authorized." *Id.* The Court reasoned: "the Board's intent [is] inapplicable to the *Lemon* test's second prong." *Id.* In *N.C. Civil Liberties Union Legal Found. v. Constangy*, the Court reiterated: "under the second prong of *Lemon*, Judge Constangy's intent is irrelevant. Rather, we must focus on how his prayer was perceived." 947 F.2d 1145, 1150-51 (4th Cir. 1991). *See Summers*, 669 F. Supp. 2d at 658, 663 ("the overtly Christian design . . . is, alone, sufficient[.]'") (citing *Lambeth*).

Nonetheless, the panel extensively considered the Cross's purpose and origins, going far beyond the necessary inquiry, and still found it unconstitutional. (Op.20-21). There was nothing remotely "myopic" (Legion-Pet.11) about its *fifteen*-paragraph effect analysis. *See id.* (two-paragraph effect analysis); *Hall v. Bradshaw*, 630 F.2d 1018, 1020-21 (4th Cir. 1980) (one-paragraph analysis).

3. The panel did not focus solely on the display's religious attributes.

The panel's first alleged "error" was focusing "solely on the display's religious attributes." (Legion-Pet.11)(Commission-Pet.14). But the panel dedicated two paragraphs to the "History of the Cross," finding it "does not clearly support one

party over the other," and then *five* paragraphs to "Secular Elements." (Op.20-21, 22-25). Appellees merely disagree with the panel's conclusion that "the historical meaning and physical setting of the Cross overshadows its secular elements." (Op.24).

4. The Cross's purpose as a war memorial compounds its impermissible effect.

Appellees' second contention, that the panel "failed even to acknowledge that, in addition to their religious significance, crosses were and are a well-recognized secular symbol of the lives lost in WWI" (Legion-Pet.12-13)(Commission-Pet.15), is meritless. The panel found that "a reasonable observer would know that the Cross is dedicated to 49 World War I veterans." (Op.25). It simply rejected Appellees' argument that this association is a *secular* one. (Op.18-19).

The fact that Bladensburg Cross is a war memorial actually *magnifies*, rather than mitigates, its religious message. The use of a Christian symbol to honor "veterans sends a *strong* message of endorsement and exclusion." *Trunk*, 629 F.3d at 1124-25 (emphasis added). The court in *Buono*, citing *Eugene*, recognized that despite a sign designating the cross as a war memorial, and "indeed perhaps *because of it*," observers could reasonably "believe that the City had chosen to honor only Christian veterans." 371 F.3d at 549 n.5 (emphasis added). *See also Allegheny*, 492 U.S. at 615 n.61 (noting that a "war memorial containing crosses and a Star of David unconstitutionally favored Christianity and Judaism") (citation omitted).

Whether a reasonable observer would be aware of the Cross's war memorial status is dubious, however, considering that its only physical indication has been concealed by bushes for much of its history, and the plaque remains illegible to motorists. (Op.7). Appellees disagree, asserting that the observer "would not be deterred by limited parking, weathered plaques and symbols, and the limited information gleaned from a passing glance as one drives by." (Commission-Pet.13)(citing *Buono*). The post-*Buono* cases directly contradict their argument. *Trunk*, 629 F.3d at 1123 (for "these drivers, the Cross does not so much present itself as a war memorial."); *Duncan*, 637 F.3d at 1121 ("a motorist . . . may not notice, and certainly would not focus on, the biographical information.").

Appellees' third contention, that the panel "failed to consider the 90-year history of the community's use and reception" (Legion-Pet.13), is neither relevant (*Lambeth*, *supra*), nor true. (Op.4-6, 20-23). Appellees' fourth contention contradicts their third, as they concede that the panel conducted a "historical analysis" but faults it for considering probative evidence of the Cross's *religious* meaning. (Legion-Pet.13-14).

Appellees wanted the panel to rely instead on "soundbites," and "snippets from private sponsors' fundraising." (Legion-Pet.13). In particular, they rely upon a single quote of a single mother, Mrs. Redman, as the *exclusive* evidence of the Cross's purpose. (Legion-Pet.1-2,4)(Commission-Pet.7). Quoting Redman,

Appellees allege that "the 'memorial cross [was], in a way, [their sons'] gravestone.'" (Legion-Pet.1)(Commission-Pet.7). Setting aside its irrelevance under *Lemon*'s effect prong, this avowed purpose is unsupported by the record.

Most "mourners were able to visit the grave of their fallen son or husband at a nearby private graveyard or national cemetery." (J.A.296). In fact, only three soldiers named on the Cross were buried in overseas cemeteries.[24] And significantly, a secular WWI memorial was erected in 1919 at the County Courthouse bearing a plaque with the very *same names* on the Cross.[25] According to government records, "many citizens, aware the county already had a war memorial, deemed it unnecessary to support further attempts to complete the Peace Cross."[26]

Nor is there *any* evidence the Committee "chose a cross to mirror the cross-shaped gravemarkers in the foreign cemeteries" or lacked "religious motivations." (Legion-Pet.1,4,8)(Commission-Pet.5,16). To the contrary, they intended to construct a "Calvary" cross, "as described in the Bible."[27] The Cross's Christian character, and its likeness to "Calvary," was stressed at its dedication ceremony.[28] John Earley was chosen as the designer.[29] In 1919, Earley finished the interior of the

[24] (J.A.294-95)(J.A.1749-51).
[25] (J.A.206-08)(J.A.295)(J.A.997)(J.A.1186)(J.A.1992)(J.A.2095).
See also http://dcmemorials.com/index_indiv0002991.htm (last viewed 4/27/15).
[26] (J.A.1186)(J.A.1992).
[27] (J.A.288)(J.A.312-13)(J.A.1113-15)(J.A.1117-18)(J.A.1171-74).
[28] (J.A.213)(J.A.288)(J.A.928).
[29] (J.A.2483)(J.A.2486)(J.A.3310-13).

Shrine of the Sacred Heart, a Roman Catholic parish; the "Cross borrowed from . . . the Shrine . . . [c]onstructed concurrently with their string of church commissions." (J.A.2486-87).[30]

Again, Bladensburg Cross would be no less religious even if it were designed to mirror cross gravemarkers. *Duncan*, 637 F.3d at 1122. Appellees seize upon Dr. Piehler's observation that "'the Cross became the principal grave marker'" in foreign cemeteries (Legion-Pet.4), but omit his language indicating that the cross remained religious:

> The World War I memorials . . . witnessed an increased use of *religious* imagery - for instance, chapels were built in each of the overseas cemeteries and the Cross became the principal grave marker in them (*with a Star of David gravestone used for Jewish soldiers*).[31]

The cross does not honor the "3,500 Jewish soldiers gave their lives for the United States in World War I." *Buono*, 559 U.S. at 726-27 (Alito, J., concurring).

The Commission insists Bladensburg Cross does not honor "all" veterans but "49 particular men" and is therefore more like "cemetery crosses" (Commission-Pet.6), apparently forgetting that it explicitly "rededicated"

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[30] Oddly, Appellees claim Bladensburg Cross is a "Celtic cross" (Commission-Pet.6)(Legion-Pet.3,9), contradicting their WWI-Latin-cross-gravemarker theory, but there is no evidence the Committee intended to create a non-Christian, ethnic Irish symbol. (J.A.193)(J.A.1206)(J.A.287-88).

[31] (J.A.2239)(emphasis added).

Bladensburg Cross to "all veterans" in 1985.[32] Again though, this distinction is inconsequential. *Duncan*, 637 F.3d at 1121 (fact that individual troopers "are memorialized with a Christian symbol conveys a message that there is some connection between [the state] and Christianity"); *Trunk*, 629 F.3d at 1125 n.25 ("The Memorial appears to represent Christian veterans generally, even if non-Christian veterans can take steps to be honored specifically.").

Appellees further distort history by asserting that the Cross was constructed on private property. (Legion-Pet.1,5,8)(Commission-Pet.9). Construction initiated in 1919 on land "owned by the Town," with the approval of the Town's commissioners.[33] This in turn, controverts Appellees' other argument that the government owns the Cross solely for "highway expansion and traffic safety." (Commission-Pet.9)(Legion-Pet.5). By 1922, the Cross was erected but unfinished.[34] The Town resolved to temporarily give the Legion the "care" of the land for "completion," but it is unclear whether it legally deeded the property.[35] Regardless, in 1935, the State believed it was the owner and "the Circuit Court ruled in 1956 that the State of Maryland was the owner."[36] In 1960, the Commission acquired the Cross after traffic *concerns were no longer an*

[32] (J.A.1281)(J.A.362)(J.A.374)(J.A.380)(J.A.2563).
[33] (J.A.1925)(J.A.2504)(J.A.3427-28).
[34] (J.A.77-78)(J.A.2503-04).
[35] (J.A.3429); *see also* (J.A.78)(J.A.1873-74)(J.A.2095)(J.A.2503-04).
[36] (J.A.1874)(J.A.3431).

issue and the "Legion reportedly voiced concerns over the future repair and maintenance of the monument."[37]

Appellees' fifth contention, raising alarmist and exaggerated floodgate concerns, is addressed in Section V.

C. The panel could have ignored *Van Orden* completely.

Appellees incorrectly argue that the panel's decision "cannot be reconciled" with Justice Breyer's concurrence in *Van Orden v. Perry*, 545 U.S. 677, 699-702 (2005), and that his concurrence rather than *Lemon* "should control." (Legion-Pet.9)(Commission-Pet.4,8). Justice Breyer simply declared that in difficult "borderline cases" involving certain Ten Commandments, there is "no test-related substitute for the exercise of legal judgment." *Id*. The Supreme Court never overruled *Lemon* and has consistently applied it in display cases. Indeed, on the very same day, the Court in *McCreary Cnty. v. ACLU*, applied *Lemon* to a different Ten Commandments display and found it unconstitutional. 545 U.S. 844, 859-64 (2005).

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). Unlike *McCreary*, *Van Orden* is not binding on any court because a majority could not be reached on the applicable standard.[38] Even in *Ten*

[37] (J.A.1925)(J.A.2970-71)(J.A.3219).
[38] *See ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 & n.11 (6th Cir. 2005).

Commandments cases, "'[m]ost courts of appeals have concluded that the *Lemon* tripartite test" still applies. *Id.* (citations omitted).

More importantly, *every* court that considered a *cross* case after *Van Orden* applied *Lemon* — most finding *Van Orden* completely irrelevant — including the Second, Ninth, and Tenth Circuits (*Port Authority*, *Trunk*, *Duncan*, *Weinbaum*) and district courts in California (*Davies*, *Lake Elsinore*), Florida (*Pensacola*, *Starke*), Indiana (*Cabral*), North Carolina (*Hewett*), South Carolina (*Summers*), and Pennsylvania (*Lehigh*), *supra* at III. The Second Circuit found that *Lemon* alone governed a cross artifact in an actual museum. *Port Authority*, 760 F.3d at 232-38, 243-44. The Tenth Circuit likewise held that *Lemon* alone governed memorial crosses with secular features. *Duncan*, 637 F.3d at 1123. As the court in *Pensacola* recently concluded, *Van Orden* does not apply to crosses but only "to 'borderline' dual purpose (and arguably *only Ten Commandment*) cases." 3:16-cv-00195-RV-CJK, Dkt-41, at 20 (emphasis added).

Van Orden would only be relevant, *if at all*, if this were a difficult borderline case. To be such a case: (1) the symbol itself must possess a dual secular meaning; and (2) the secular meaning must predominate. 545 U.S. at 701 (Breyer); *Duncan*, 637 F.3d at 1122-23.

1. The Cross is exclusively religious.

Unlike the Ten Commandments, the cross does not have a dual "secular meaning that can be divorced from its religious significance." *Id.* In *Van Orden*, the plurality found that "the Ten Commandments have an undeniable historical meaning" tied to the foundations of lawmaking. 545 U.S. at 688-90. (Op.14). Justice Breyer agreed. *Id.* at 701. He then concluded that because the Commandments were one small part of a presentation on the foundations of law on Texas's capitol grounds, the "nonreligious aspects of the tablets' message [] predominate[d]." *Id.*

A large Christian cross does not simply include "religious symbolism" or have "religious content." (Legion-Pet.8)(Comission-Pet.12). It is an "exclusively religious symbol." *King*, 331 F.3d at 1285. *See also Allegheny*, 492 U.S. at 602-03, 606-07, 613-14 (distinguishing "a specifically Christian symbol" such as a cross from "more general religious references.").

The cross "does not possess an ancillary meaning as a secular or non-sectarian war memorial." *Trunk*, 629 F.3d at 1116, 1120. Accordingly, even if the Cross's "commemorative context [were] impossible to miss" (Letion-Pet.10), *Van Orden* is irrelevant. Nothing in *Van Orden* indicates that *commemoration* equals secularization. A Christian cross commemorates *only* Christians. Thus, the panel could have disregarded it completely.

2. Bladensburg Cross dominates its surroundings.

Van Orden is further inapposite because Bladensburg Cross stands "four stories tall, and [is] overshadowing the other monuments" in the area. (Op.8, 22). In *Van Orden*, the 6-foot-tall slab was *added* to an existing array, positioned among "17 monuments and 21 historical markers" of *similar size*. 545 U.S. at 681, 701. By stark contrast, this 40-foot Christian monolith was proposed, approved, and installed in isolation, and stands alone in a traffic median, dominating the visual landscape. (J.A.68-69). *See Trunk*, 629 F.3d at 1103. Indeed, Bladensburg "Cross's central position" among the newer monuments "gives it a symbolic value that intensifies" its "sectarian message." *Id.* at 1123-24. (J.A.2485).

Appellees grossly exaggerate the prominence of the later-added displays, asserting "some are as tall" as the Cross, referring to the two "38-foot-tall soldier statues" added during this appeal. (Legion-Pet.4). But the soldiers are thin wooden cutouts and appear no more than 5-feet-tall, positioned atop poles.[39] Moreover, while Appellees claim that the *Van Orden* monuments "were spread out over 22 acres" (Legion-Pet.10), the Ten Commandments are situated directly in-line with at least five other equal-sized monuments.[40] *See also Green*, 568 F.3d at 789-91, 804-805 n.14.

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[39] *See* https://goo.gl/maps/QXupqkdCYGy, https://goo.gl/maps/cRroAB86QW72, and https://goo.gl/maps/urh7bXzHyN72 (last viewed 11/18/17); Fed. R. Evid. 201(b).

[40] *See* Texas Capitol Monument Guide, https://perma.cc/4SGT-N9YB (last viewed 11/15/17); *see also* https://perma.cc/FUC8-K8UN.

3. Bladensburg Cross is not a passive display.

Bladensburg Cross "is not only a preeminent symbol of Christianity, it has been consistently used in a sectarian manner." *Trunk*, 629 F.3d at 1124. In *Van Orden*, Justice Breyer deemed it critical that the display was never used for any "mediation" or "religious activity." 545 U.S. at 701-02. Significantly, the Court in *McCreary* found a Ten Commandments unconstitutional in part because of religious activity at the dedication ceremony:

> 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. Just like in *McCreary*, at the Cross's dedication ceremony, a state official delivered the keynote address, proclaiming the Cross to be "symbolic of Calvary," and was accompanied by Christian pastors who delivered prayers. [41] Government and church officials aligned again for prayers at the Cross's 50th Anniversary[42] and its Rededication Ceremony.[43]

Appellees' contention that there "is no evidence of any religious exercise whatsoever" is absurd. (Commission-Pet.17)(Legion-Pet.6). Prayers led by

[41] (J.A.211)(J.A.288)(J.A.339)(J.A.1876)(J.A.1891)(J.A.1936)(J.A.2508).
[42](J.A.150)(J.A.331)(J.A.351)(J.A.1263)(J.A.1922)(J.A.1963)(J.A.1998)(J.A.2549-52).
[43](J.A.137-38)(J.A.374-75)(J.A.1271-81).

Christians have been part of nearly every event held at the Cross.[44] Just like in *Trunk*, Bladensburg Cross "has a long history of religious use and symbolism that is inextricably intertwined with its commemorative message." 629 F.3d at 1118, 1121. (Appellants' Br.8-14, 59-62). But the absence of such religious usage would in no way be dispositive. *E.g.*, *Duncan*, 637 F.3d at 1120 n.11 (no religious history, usage, or purpose); *Eugene*, 93 F.3d at 617-20; *Jewish War Veterans*, 695 F. Supp. at 5-8, 13-14.

D. The Cross fosters excessive entanglement.

Appellees disagree with the panel's entanglement decision on four grounds. (Commission-Pet.16-18)(Legion-Pet.15-16). First, they contend that "[n]o case has held merely spending money to maintain a display amounts to entanglement." (Legion-Pet.16). They are wrong. In *Starke*, the court found entanglement where "the Cross has been maintained through City work orders." 2007 U.S. Dist. LEXIS 19512, at *18-19. The court pronounced: "If ever there were a clear case of 'excessive governmental entanglement' with religion, this is it." *Id. See also Mendelson*, 719 F. Supp. at 1071 (city "is entangled with religion because it funded the illumination of the cross."); *Doe v. Cty. of Montgomery*, 915 F. Supp. 32, 38 (C.D. Ill. 1996) (excessive entanglement where county "owns, finances, and maintains the [religious] sign."); *Citizens Concerned for Separation of Church &*

[44] (Op.6)(J.A.1282-1353)(J.A.1777-1818)(J.A.1846-50).

State v. City & Cty. of Denver, 481 F. Supp. 522, 530-32 (D. Colo. 1979) (same); *see also Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (funding for building maintenance and repair of a parochial school).

Second, Appellees argue that such spending is *de minimis*, using yearly "averages" to minimize the magnitude of government involvement here. (Legion-Pet.16)(Commission-Pet.16). In 1985, the Commission spent $100,000 on sizable renovations.[45] Prior to that, it spent at least $17,000 on routine maintenance. (J.A.138). The Cross is rapidly deteriorating with chunks falling off.[46] In 2008, the Commission allocated an additional $100,000 for continued renovations.[47] Appellants are not aware of any case involving such extensive government funding on a religious symbol.

Third, Appellees argue that the decision "effectively bars the government from maintaining any object with an incidental religious feature." (Commission-Pet.2)(Legion-Pet.16). Bladensburg Cross is hardly an "incidental religious feature." Moreover, the panel stressed that its ruling was contingent upon finding that the Cross unconstitutionally endorsed Christianity. (Op.28-29).

Fourth, Appellees quote the dissent's assertion regarding lack of involvement with "churches or religious organizations" (Commission-Pet.18), but such evidence is irrelevant. *Constangy*, 947 F.2d at 1152. Besides, the Commission invited a Catholic

[45] (J.A.360)(J.A.374-75).
[46] (J.A.1655)(J.A.1672)(J.A.2479-2502).
[47] (J.A.562-64)(J.A.576)(J.A.3434-35).

priest to deliver prayers at the Cross's rededication ceremony, even expressing a desire to "assimilate this relationship again." (J.A.1281). *See Gilfillan*, 637 F.2d at 931 (the "relationship between the City and the Archdiocese [for single event] constituted entanglement").

V. There is no question of "exceptional importance" because the panel's holding is highly fact-dependent and does not threaten any other crosses.

Having shown no conflict with *any* precedent, Appellees are left with the "exceptional importance" criteria, contending the case is "of substantial importance because, under the panel's opinion, no cross-shaped veterans memorial of significant size will be permissible." (Legion-Pet.3).[48] This is untenable. Establishment Clause cases are fact-dispositive, *McCreary*, 545 U.S. at 867–68, and the panel emphasized, "our decision is confined to the unique facts at hand." (Op.26). "In fact-dispositive cases, even if the controlling legal principles are of the greatest significance, rehearing en banc simply to consider a suggestion of panel error" is "not warranted." *Arnold v. E. Air Lines*, 712 F.2d 899, 915 (4th Cir. 1983) (Phillips, J., dissenting). A LexisNexis search revealed that this Court has only granted en banc review in two Establishment Clause cases in the past twenty years. *See also Trunk, reh'g and reh'g en banc denied*, 660 F.3d 1091 (9th Cir. 2011); *Duncan, reh'g en banc denied*, 637 F.3d 1095 (10th Cir. 2010).

[48] Appellees merely refer to the two "WWI memorial crosses in Arlington National Cemetery" (Legion-Pet.3), which were distinguished by the panel (Op.27) and by other Circuit Courts. *See Trunk*, 629 F.3d at 1114, 1124.

VI. Conclusion

Contrary to Appellees' argument, the majority's decision "does not represent a hostility or indifference to religion but, instead, the respect for religious diversity that the Constitution requires." *Allegheny* 492 U.S. at 612-13. Appellants respectfully request that the Court deny the petitions for rehearing en banc.

Respectfully submitted,

November 20, 2017

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I certify that this brief complies with the type-volume limitation of this Court's Order (Doc. 88) dated November 16, 2017, because this brief contains 5,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that on November 20, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

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