

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

AMANDA KONDRAT'YEV, et al.,

Plaintiffs,

Case No. 3:16cv195-RV/CJK

vs.

Pensacola, Florida
June 14, 2017
1:04 p.m.

CITY OF PENSACOLA, FLORIDA, et al.,

Defendant.

TRANSCRIPT OF **MOTION FOR SUMMARY JUDGMENT** PROCEEDINGS
BEFORE THE HONORABLE ROGER VINSON
SENIOR UNITED STATES DISTRICT JUDGE
(Pages 1-57)

APPEARANCES

FOR THE PLAINTIFF:

MONICA L. MILLER, ESQUIRE
American Humanist Association
1821 Jefferson Place, NW
Washington, DC 20036

MADELINE ZIEGLER, ESQUIRE
Freedom From Religion Foundation
P.O. Box 750
Madison, Wisconsin 53701

FOR THE DEFENDANT:

JAMES NIXON DANIEL, III, ESQUIRE
TERRIE DIDIER, ESQUIRE
BEGGS & LANE
501 Commendencia Street
Pensacola, Florida 32502

P R O C E E D I N G S

(Court called to order at 1:04 p.m.)

01:04:18 3 **THE COURT:** Pursuant to notice, we have a hearing on
01:04:20 4 the Motion for Summary Judgment in Case 3:16cv0195.

01:04:30 5 The Plaintiff ready?

01:04:32 6 **MS. MILLER:** Yes, Your Honor. Do you want us to come
01:04:34 7 up to the podium?

01:04:36 8 **THE COURT:** No, not yet, just I want to know if you're
01:04:36 9 ready.

01:04:38 10 Is this Ms. Miller?

01:04:39 11 **MS. MILLER:** Yes.

01:04:40 12 **THE COURT:** And Ms. Ziegler; is that right?

01:04:44 13 **MS. ZIEGLER:** Yes.

01:04:44 14 **THE COURT:** And the Defendant, Mr. Daniel and
01:04:47 15 Ms. Didier?

01:04:48 16 **MR. DANIEL:** We're ready, Your Honor.

01:04:48 17 **THE COURT:** All right. Well, we're in this courtroom
01:04:49 18 because Judge Rodgers has a criminal jury trial still going on
01:04:53 19 upstairs in the big courtroom. And if I've got my real time
01:05:02 20 court reporter working down here, we'll see if it works.

01:05:06 21 Preliminarily, I'm contemplating dividing the time up,
01:05:11 22 counsel. Since we're talking about the same thing, giving each
01:05:18 23 side half an hour, 30 minutes for direct and 15 minutes for
01:05:22 24 rebuttal. So we'll go Plaintiff 30 minutes, Defendant 30
01:05:28 25 minutes, and then Plaintiff 15 minutes for rebuttal, and

01:05:31 1 Defendant 15 minutes for rebuttal. I think that's enough time
01:05:35 2 in this case. The facts are not in dispute, so we're really
01:05:39 3 talking about the law. And the Supreme Court gives you a total
01:05:42 4 of 30 minutes, so this ought to be enough for you to do this.

01:05:46 5 Anything you need to take up preliminarily before we
01:05:53 6 get started, either side?

01:05:54 7 **MR. DANIEL:** No, sir.

01:05:56 8 **MS. MILLER:** No, sir.

01:05:56 9 **THE COURT:** Let me say I'm familiar with the site. I
01:06:00 10 walk by it usually several times early in the morning every
01:06:03 11 week. As a matter of full disclosure, let me say that I was
01:06:08 12 also an active member of the Pensacola Jaycees back in the
01:06:12 13 early '70s and actually served as the president I think for one
01:06:16 14 of those years, '74, '75. So, again, I'm familiar with the
01:06:22 15 cross, I'm familiar with the location, and I'm pretty familiar
01:06:25 16 with most of the facts.

01:06:27 17 With that, let me begin. And we'll recognize the
01:06:30 18 Plaintiff for purposes of your Motion for Summary Judgment.
01:06:36 19 Ms. Miller, you may use the podium for that, please.

01:06:40 20 **MS. MILLER:** Good morning, Your Honor.

01:06:42 21 **THE COURT:** Good morning -- afternoon.

01:06:45 22 **MS. MILLER:** That's right, it is the afternoon now.

01:06:47 23 This cross is unconstitutional under decades of
01:06:51 24 established jurisprudence established by both the Supreme
01:06:55 25 Court, as well as the Eleventh Circuit, as well as sister

01:06:58 1 circuit courts.

01:06:59 2 Almost every court that has evaluated a cross case has
01:07:02 3 found it unconstitutional, but I want to focus specifically on
01:07:07 4 the *Rabun Chamber of Commerce* case where the Eleventh Circuit
01:07:12 5 held a virtually identical cross unconstitutional under
01:07:17 6 virtually identical circumstances.

01:07:21 7 That case is not overruled, as the Defendants have
01:07:25 8 argued. It remains good law. And the Defendants have not
01:07:26 9 shown how that cross is distinguishable from the case here.

01:07:29 10 Both of the crosses were installed for the purposes of
01:07:31 11 Easter Sunrise Services, which the Eleventh Circuit recognized
01:07:34 12 is a distinctly religious service and, because it was installed
01:07:38 13 for this reason, reflects an unambiguous religious purpose,
01:07:41 14 thus failing the first prong of the three-prong *Lemon* test.

01:07:41 15 Second, the cross cannot withstand the second prong of
01:07:47 16 the *Lemon* test, which is that it must have a secular effect.
01:07:49 17 The effect cannot be to endorse or promote religion. So
01:07:55 18 clearly a religious symbol that's placed on city property so
01:07:59 19 prominently as this has the effect of endorsing the message
01:08:01 20 that it's --

01:08:01 21 **THE COURT:** Well, now, *Rabun County* was 1983. That's
01:08:05 22 a long time ago in terms of First Amendment law and
01:08:10 23 particularly Establishment Clause law, right?

01:08:14 24 **MS. MILLER:** That's correct. But subsequent courts
01:08:16 25 have cited *Rabun County* as authoritative since then, and

01:08:20 1 there's no indication that it's been overruled. In fact, the
01:08:22 2 District Court of Florida has relied on it in two cross cases:
01:08:25 3 one in 1989 -- that was in *Mendelson* case -- as well as the
01:08:30 4 *Starke* case, which was in 2007. Both of those cases -- or,
01:08:32 5 sorry. The *Starke* case actually came after the *Van Orden*
01:08:35 6 decision, which is the case that the Defendants are relying
01:08:38 7 upon.

01:08:38 8 **THE COURT:** But those were both watertank cases, which
01:08:40 9 are different in some respects, right?

01:08:43 10 **MS. MILLER:** They're different in terms of one is on a
01:08:46 11 watertank and one is in a public park, one is an
01:08:48 12 installation --

01:08:48 13 **THE COURT:** And the watertank had the city's name on
01:08:51 14 it, I believe, right?

01:08:51 15 **MS. MILLER:** That's correct. But this is also clearly
01:08:52 16 a city park. Everyone knows it is the City's park, and the
01:08:56 17 City is using this symbol in its park, and it's the only
01:08:57 18 religious symbol.

01:08:57 19 **THE COURT:** But this is in the far corner of the park.
01:09:00 20 It's not anywhere close to any of the buildings.

01:09:02 21 **MS. MILLER:** The prominence of the cross or the
01:09:07 22 location of the cross hasn't been a huge factor in the various
01:09:10 23 court cases. In fact, in the *Rabun* case it was a very remote
01:09:15 24 location up on a mountaintop, and the Eleventh Circuit pointed
01:09:18 25 out that you would have to go out of your way to go see it. If

01:09:21 1 you were at the park you would see it, but it wasn't, you know,
01:09:24 2 near a highway or anywhere that was in a constant flow of
01:09:24 3 traffic.

01:09:25 4 Other cases that has involved crosses have also been
01:09:28 5 in sort of remote areas. The Ninth Circuit decided one where
01:09:31 6 the cross was also up on a hilltop but one couldn't see it from
01:09:35 7 the city of San Francisco, they'd have to go take a hike to see
01:09:40 8 it.

01:09:40 9 So the distance -- or the amount of people that see
01:09:42 10 this cross doesn't really have any bearing on whether it's
01:09:42 11 religious and whether it's City-endorsed, and that's what the
01:09:44 12 Establishment Clause --

01:09:45 13 **THE COURT:** In one of the Supreme Court cases I think
01:09:46 14 the cross was out in the desert.

01:09:50 15 **MS. MILLER:** There was the Mojave Desert case. And to
01:09:50 16 be clear, the Ninth Circuit had found that cross
01:09:52 17 unconstitutional: one, it was located on government property,
01:09:54 18 and that decision was not appealed by the defendants in that
01:09:56 19 case, and that case, *Buono*, remains good law, and again, has
01:10:01 20 also been cited by subsequent circuit court cases affirming its
01:10:06 21 validity.

01:10:06 22 When it came up to the Supreme Court, the only issue
01:10:08 23 was the validity of an injunction that had not considered the
01:10:13 24 changed circumstances, which was the land transfer putting it
01:10:16 25 now in private property. And so it was actually a very

01:10:19 1 unremarkable case, and I think some of the jurists on the case
01:10:22 2 had commented on how it was not very -- you know, maybe they
01:10:24 3 shouldn't have even granted cert because it was a standard, you
01:10:27 4 know -- or should a hearing have been regranted for the changed
01:10:30 5 circumstances.

01:10:30 6 So the Defendants' reliance on that as a cross case
01:10:35 7 is, I think, misplaced, because it's not a cross case, and any
01:10:39 8 of the dicta regarding the constitutionality of the cross
01:10:44 9 pertained to its placement on private property.

01:10:46 10 Other facts distinguish that case as well. Not only
01:10:49 11 was it in a remote location, far more remote than here, but
01:10:54 12 also it was commemorative of World War -- I think it was a
01:10:58 13 World War I memorial, but ether way it was unequivocally a war
01:11:02 14 memorial, whereas this one has no memorializing function
01:11:04 15 whatsoever. It's --

01:11:04 16 **THE COURT:** The war memorial was, what, the *City of*
01:11:08 17 *Eugene*?

01:11:08 18 **MS. MILLER:** *City of Eugene* also was a war memorial
01:11:11 19 case, and so was *Trunk*, so was -- again, the *Salazar* case also
01:11:14 20 involved a war memorial. And even in these war memorial cases
01:11:16 21 the courts have recognized that, even if it served some secular
01:11:21 22 commemorative function, it still doesn't negate its otherwise
01:11:24 23 religious effect.

01:11:24 24 Here we have both a religious purpose to commemorate
01:11:29 25 Easter Sunrise Services as well as an unambiguous religious

01:11:32 1 effect of the cross, thus failing both prongs of the *Lemon*
01:11:36 2 test.

01:11:36 3 The third prong is also violated. Even though only
01:11:39 4 one prong actually needs to be violated for the cross to be
01:11:43 5 unconstitutional, in this case all three prongs are violated,
01:11:47 6 the first with the purpose prong, the effect prong, and the
01:11:52 7 entanglement prong.

01:11:53 8 **THE COURT:** Well, you're assuming the *Lemon* test still
01:11:56 9 applies, though.

01:11:57 10 **MS. MILLER:** I am, indeed, and that is established in
01:11:58 11 our brief as to why that is.

01:12:00 12 **THE COURT:** It's been severely criticized.

01:12:03 13 **MS. MILLER:** Yes, it has been criticized, and the
01:12:06 14 courts have recognized that, and they still --

01:12:07 15 **THE COURT:** By both sides of the argument, in fact.

01:12:11 16 **MS. MILLER:** Yeah, that is true. But ultimately this
01:12:14 17 Court is bound by it because it hasn't been overruled yet, and
01:12:14 18 until it is, lower courts are bound to apply the three-part
01:12:17 19 *Lemon* test. Unless, of course, it's a case that involves
01:12:19 20 coercion in the public school context, then the coercion test
01:12:24 21 might apply, or something that's even more rigorous than *Lemon*.
01:12:28 22 *Lemon* is sort of the baseline test or, of course, if it's a
01:12:30 23 legislative prayer case, which this decidedly is not.

01:12:32 24 So, once we've accepted that *Lemon* applies, the
01:12:34 25 Defendants really can't get around the *Rabun* case, they can't

01:12:37 1 get around --

01:12:38 2 **THE COURT:** I think in Georgia they call that
01:12:42 3 [ray-bun].

01:12:42 4 **MS. MILLER:** [Ray-bun], okay. I apologize. We were
01:12:45 5 actually discussing how to pronounce that earlier today. Rabun
01:12:45 6 County, all right, thank you.

01:12:47 7 The *Rabun* case the Defendants simply can't distinguish
01:12:51 8 because the facts are so similar. And so if this Court accepts
01:12:55 9 that *Lemon* applies, then I think it has to accept that it's
01:12:55 10 unconstitutional under *Rabun* and under the three-prong *Lemon*
01:12:55 11 test.

01:12:58 12 Even if this Court were to consider *Van Orden* as
01:13:01 13 controlling, the facts in *Van Orden* are so different than the
01:13:05 14 facts here that you couldn't find that this cross satisfies
01:13:08 15 whatever Justice Breyer calls his legal judgment test.

01:13:12 16 **THE COURT:** Well, what is the holding of *Van Orden*?
01:13:16 17 Is it the four votes or is it Justice Breyer's concurrence?

01:13:23 18 **MS. MILLER:** I think the appellate courts that have
01:13:25 19 looked at it have considered it to be Breyer's concurrence as
01:13:29 20 the fifth vote as what the holding is, but I can't -- it's not
01:13:36 21 certainly clear. But what is clear is that Breyer ended up
01:13:40 22 going a different way on the very same day in the *McCreary*
01:13:44 23 *County* case, indicating that he wasn't intending to overrule
01:13:48 24 *Lemon* in subsequent cases, but was simply saying in this
01:13:50 25 particular case -- and he kept reiterating, "This Texas

01:13:54 1 monument that's on Texas Capitol grounds, we don't need to look
01:13:58 2 to *Lemon* for this case."

01:13:59 3 But other courts of appeal, including the Ninth
01:14:02 4 Circuit and the Tenth Circuit, as well as this court in the
01:14:04 5 *Dixie County* case, have all recognized that, even though
01:14:06 6 Justice Breyer and the --

01:14:07 7 **THE COURT:** Tell me what Justice Breyer's standard is.
01:14:14 8 Because it's -- "good legal judgment," I think is what he
01:14:14 9 called it.

01:14:15 10 **MS. MILLER:** It is, it's the legal judgment test. And
01:14:18 11 to be honest, Your Honor, I don't know what he means by that.
01:14:21 12 I think that's why it poses an unworkable standard in future
01:14:25 13 cases. Because what is legal judgment?

01:14:26 14 The whole point of the *Lemon* test is to give the Court
01:14:31 15 guidance on how to apply the Establishment Clause. And if it
01:14:32 16 were to just exercise legal judgment in every case, you'd
01:14:33 17 probably come up with -- you know, it would just -- it's an
01:14:37 18 unworkable standard, and commentators have recognized that.

01:14:40 19 But more importantly, lower courts have recognized --
01:14:44 20 the Tenth Circuit has recognized, Ninth Circuit has recognized
01:14:47 21 that lower courts can't be bound by Justice Breyer's disregard
01:14:52 22 for the *Lemon* test in that case, because the *Lemon* test hasn't
01:14:55 23 been overruled and has consistently been applied in other cross
01:14:58 24 cases as well as -- again, in *McCreary County* the very same day
01:15:04 25 the court said we're not overruling *Lemon*, in fact, the purpose

01:15:05 1 test is very applicable when a religious monument is
01:15:08 2 challenged.

01:15:09 3 And as in *McCreary*, this case also involves a
01:15:13 4 standalone religious display, not one that's part of a
01:15:17 5 multifaceted array in a museum-like context, which was the case
01:15:19 6 in *Van Orden* where the small Ten Commandments was situated
01:15:23 7 among 21 other markers and --

01:15:23 8 **THE COURT:** The three prongs of the *Lemon* test are:
01:15:28 9 Whether it has a secular purpose;

01:15:30 10 **MS. MILLER:** That's right.

01:15:31 11 **THE COURT:** whether the principal or primary effect is
01:15:34 12 one that neither advances nor inhibits religion; and whether
01:15:38 13 the challenged action fosters excessive government entanglement
01:15:38 14 with religion.

01:15:38 15 **MS. MILLER:** That's correct.

01:15:47 16 **THE COURT:** And you're saying this one violates which
01:15:49 17 of those?

01:15:49 18 **MS. MILLER:** Well, Your Honor, we're submitting that
01:15:51 19 it actually violates all three, although one is sufficient.
01:15:54 20 For instance, in the *Rabun* case one was sufficient. It was the
01:15:56 21 secular purpose prong was violated because of the inherently
01:16:00 22 religious symbolism conveyed by the cross as well as the
01:16:04 23 selection of the Easter Sunrise Service as the date for it to
01:16:07 24 be dedicated.

01:16:09 25 Those two factors ultimately caused the Eleventh

01:16:12 1 Circuit to hold that it failed the purpose prong. Even though
01:16:15 2 it was donated by, I think it was, the chamber of commerce in
01:16:18 3 that case, it still found that there was no secular purpose for
01:16:18 4 the cross.

01:16:22 5 And the exact same is true here except to a much
01:16:22 6 greater degree. Because in that case the Department of Natural
01:16:25 7 Resources at least asked that the cross be removed, and they
01:16:29 8 had evidence of that, whereas here the City didn't even make
01:16:32 9 any attempt to have it removed, but in fact stood strong for
01:16:35 10 the cross and said they would defend it in court, and so that's
01:16:39 11 why we're here.

01:16:40 12 The Plaintiffs don't object to the Easter Sunrise
01:16:43 13 Services, they don't object to private citizens coming and
01:16:45 14 using the property for those purposes. The problem is that the
01:16:48 15 City has provided them with the cross, an enormous religious
01:16:53 16 symbol to use for these annual religious holidays, and has also
01:16:56 17 provided them with a platform for these religious holidays
01:17:00 18 that, combined with the cross, make it very clear that this is
01:17:03 19 for Easter Sunrise Services. And to non-Christian citizens
01:17:06 20 it's a very alienating --

01:17:06 21 **THE COURT:** If the cross were on wheels and was
01:17:09 22 wheeled in for an Easter Sunrise Service, that would be okay?

01:17:13 23 **MS. MILLER:** As long as the City wasn't paying for it
01:17:17 24 to be wheeled in or, you know, using its resources, absolutely.
01:17:19 25 And, in fact, one of the Plaintiffs in this case proposed that

01:17:21 1 solution to, I think it was, the mayor, and said, *Why can't*
01:17:24 2 *they bring in a temporary cross each year?* I think they had
01:17:28 3 done that actually before this permanent one was the installed.

01:17:33 4 The Plaintiffs have absolutely no problem with that.
01:17:35 5 The problem is that this is a permanent Christian display
01:17:37 6 owned, maintained, and funded by the City, and everyone knows
01:17:41 7 this is the City's cross. And to the non-Christians of the
01:17:41 8 city it sends a strong message, and to the county as well, that
01:17:45 9 this public park is not really for them or that this isn't --
01:17:47 10 you know, it's a constant reminder that they're not as favored
01:17:51 11 by the government as their Christian counterparts.

01:17:51 12 **THE COURT:** Well, what if it's wheeled in several
01:17:54 13 times? What if it's wheeled in during the Christmas season?

01:17:57 14 **MS. MILLER:** You'd have to look at the public forum
01:18:00 15 requirements and if the government is treating everyone
01:18:02 16 equal-handedly. If, you know, the atheists want to come in
01:18:04 17 with a similar symbol for their convictions and the City says
01:18:09 18 you can't come in, but you can come it, then we'd have a
01:18:12 19 problem. But if it's an open forum and they're complying with
01:18:15 20 the permitting laws, absolutely that would be allowed.

01:18:19 21 It's just about the City's treatment of Christians
01:18:22 22 versus non-Christians and the Christian symbols versus other
01:18:22 23 symbols. But absolutely that would be fine. It's, again, the
01:18:27 24 permanency and the fact that it's City-sponsored that
01:18:31 25 Plaintiffs take issue with.

01:18:33 1 **THE COURT:** And if the City didn't spend a penny on
01:18:35 2 it, would that make any difference, if the City didn't have a
01:18:39 3 light, if it didn't spend any maintenance money?

01:18:42 4 **MS. MILLER:** No, Your Honor. I mean, those facts
01:18:44 5 aggravate or compound this problem here, but it's still the
01:18:48 6 City's cross. We know it owns it and it adopted the cross as
01:18:51 7 its on, it's on City property, and so those two factors are
01:18:51 8 beyond sufficient.

01:18:55 9 I mean, there's been other cases, again, where the
01:18:57 10 city hasn't paid for the symbol -- *Allegheny County* is a
01:19:02 11 perfect example where a private entity came in and donated a
01:19:07 12 nativity scene. There was even a disclaimer on the base of the
01:19:09 13 nativity scene, and presumably no government funds were spent,
01:19:12 14 and the supreme court still said this is government endorsed
01:19:14 15 because it's -- and it was actually temporary, too, which makes
01:19:17 16 it, you know, more like that, but it was situated on the
01:19:18 17 government's property, it wasn't pursuant to an open forum
01:19:21 18 policy, and so it was endorsed by the government.

01:19:24 19 **THE COURT:** What about the standing of two of the
01:19:26 20 Plaintiffs that have moved away, does that have any
01:19:30 21 consequence?

01:19:30 22 **MS. MILLER:** No, Your Honor, because for standing for
01:19:33 23 these types of cases the courts have said that only one
01:19:35 24 plaintiff needs to have standing for the Court to go forward.
01:19:39 25 Those two Plaintiffs ostensibly have lost perhaps their ability

01:19:43 1 to seek for injunctive relief should they not intend to come
01:19:48 2 back, but they still have the nominal damage claim from the
01:19:50 3 past exposure to the cross. And two Plaintiffs unequivocally
01:19:52 4 have standing, so it would be sort of futile to go through the
01:19:56 5 standing analysis for those two when we have the standing for
01:19:59 6 the others. So there isn't a standing problem.

01:20:02 7 Really the Defendants' case hinges on the *Van Orden*
01:20:05 8 test. They haven't made any argument as to how this would
01:20:08 9 satisfy *Lemon*, effectively conceding, I would argue, that *Lemon*
01:20:12 10 -- it wouldn't satisfy *Lemon*, and of course, that's the case
01:20:15 11 under the *Rabun* case so, you know --

01:20:17 12 **THE COURT:** So your position is basically this: The
01:20:21 13 *Lemon* test is still good, valid Supreme Court precedent?

01:20:25 14 **MS. MILLER:** Yes.

01:20:26 15 **THE COURT:** *Rabun County* is still good law in the
01:20:30 16 Eleventh Circuit and I'm bound by that?

01:20:32 17 **MS. MILLER:** Yes, Your Honor.

01:20:33 18 **THE COURT:** And the *Van Orden* case is inapplicable or
01:20:38 19 doesn't change anything with respect to the cross at least?

01:20:41 20 **MS. MILLER:** Yes, Your Honor.

01:20:42 21 **THE COURT:** Okay.

01:20:43 22 **MS. MILLER:** I actually have no further points to
01:20:46 23 make. I think everything has been set forth in our brief. So
01:20:49 24 if you have further questions for me, I'm happy to answer them.
01:20:52 25 But otherwise, I won't take up more of the Court's time. Thank

01:20:56 1 you.

01:20:56 2 **THE COURT:** Defendant, Mr. Daniel?

01:21:01 3 **MR. DANIEL:** Please the Court. My name is Nixon
01:21:06 4 Daniel. I represent the Defendants in this case. I'd like to
01:21:09 5 start a little differently than we did in our brief to put some
01:21:13 6 of this in perspective. Because, as Your Honor has pointed
01:21:16 7 out, the real issue in this case is, first, what is the law.
01:21:21 8 And I'd like to take just a minute and go through a bit of
01:21:25 9 history both with respect to what the law is and what precedent
01:21:29 10 is in this Court versus other courts.

01:21:32 11 The issue that we're about here is the Establishment
01:21:37 12 Clause, which is very succinct. It says that Congress shall
01:21:41 13 make no law respecting an establishment of religion.

01:21:47 14 In the *Lynch v. Donnelly* case, which is a Supreme
01:21:52 15 Court case in 1984 involving a nativity scene, this is what the
01:21:54 16 Court said about the religion clauses.

01:21:59 17 It said: "The court has sometimes described the
01:22:01 18 religion clauses as erecting a wall between church and state.
01:22:07 19 The concept of a wall of separation is a useful figure of
01:22:11 20 speech probably deriving from the views of Thomas Jefferson.
01:22:14 21 The metaphor is served as a reminder that the Establishment
01:22:20 22 Clause forbids an established church or anything approaching
01:22:21 23 it. But the metaphor itself is not a wholly accurate
01:22:25 24 description of the practical aspects of the relationship that
01:22:28 25 in fact exists between church and state. No significant

01:22:31 1 segment of our society and no institution within it can exist
01:22:35 2 in a vacuum or in a total or absolute isolation from all other
01:22:40 3 parts, much less from government. It's never been thought
01:22:45 4 either possible or desirable to enforce a regimen of total
01:22:49 5 separation, nor does the Constitution require complete
01:22:52 6 separation of church and state. It affirmatively mandates
01:22:58 7 accommodation, not merely tolerance of all religions, and
01:23:02 8 forbids hostility towards any. Anything less would require the
01:23:06 9 callous indifference we've said was never intended by the
01:23:11 10 Establishment Clause. Indeed, we've observed such hostility
01:23:14 11 would bring us into war with our national tradition as embodied
01:23:19 12 in the First Amendment's guarantee of the free exercise of
01:23:23 13 religion."

01:23:23 14 And then the Court said this: "The purpose of the
01:23:26 15 Establishment Clause was to state an objective, not to write a
01:23:31 16 statute."

01:23:31 17 Now, as Your Honor has alluded to, there is great
01:23:35 18 ambiguity in the interpretation of the Establishment Clause.

01:23:39 19 **THE COURT:** Well, I think we can agree that the wall
01:23:45 20 of separation is attributable to a letter from Thomas Jefferson
01:23:52 21 many years after the adoption of the Bill of Rights to the
01:24:00 22 Danbury Baptists.

01:24:04 23 **MR. DANIEL:** Correct.

01:24:05 24 **THE COURT:** And the fact is that it was never called
01:24:08 25 wall of separation until Justice Black decided to do that in

01:24:13 1 1947.

01:24:15 2 **MR. DANIEL:** Yes, sir.

01:24:16 3 **THE COURT:** Up until that time, it had never occurred.

01:24:18 4 **MR. DANIEL:** Correct.

01:24:19 5 **THE COURT:** But the fact is that he did say it, and
01:24:22 6 that's what we've got.

01:24:23 7 **MR. DANIEL:** Well, it is, except for the fact that on
01:24:26 8 a number of occasions since then -- and Justice Rehnquist
01:24:32 9 particularly has been critical of that language and has called
01:24:36 10 it foreign to our Constitution. But apart from that particular
01:24:40 11 descriptor, a number of justices, including Justice Alito,
01:24:45 12 Justice Thomas, Justice Scalia, Justice Rehnquist and Justice
01:24:52 13 White have on a number of occasions, both in concurring
01:24:56 14 opinions with the court and also in dissenting opinions,
01:25:01 15 expressed the fact that the Establishment Clause, as Justice
01:25:05 16 Alito said in the *Mount Soledad* case, is undoubtedly in need of
01:25:10 17 clarity. Others have been much more vociferous in their
01:25:15 18 description of the -- "shambles" is a word that others have
01:25:17 19 used to describe the law with respect to the Establishment
01:25:20 20 Clause.

01:25:20 21 And so, we come to this case with no fewer than five
01:25:27 22 tests that have been enunciated and articulated by the court
01:25:33 23 since the *Lemon* case in 1971.

01:25:37 24 **THE COURT:** I think Justice Scalia characterizes the
01:25:41 25 *Lemon* test as some character from a B grade haunted movie.

01:25:49 1 **MR. DANIEL:** He said this specifically: He said -- he
01:25:52 2 compares *Lemon* to "some ghoul in a late night horror movie that
01:25:57 3 repeatedly sits up in its grave and shuffles abroad, after
01:26:02 4 being repeatedly killed and buried, *Lemon* stalks our
01:26:05 5 Establishment Clause jurisdiction."

01:26:08 6 And then he said this: "I agree with the long list of
01:26:09 7 constitutional scholars who have criticized *Lemon* and bemoaned
01:26:15 8 the strange establishment clause geometry of crooked lines and
01:26:16 9 wavering shapes its intermittent use has produced." That's
01:26:21 10 Justice Scalia.

01:26:24 11 **THE COURT:** His typical understated fashion, right?

01:26:28 12 **MR. DANIEL:** Yes, sir. And so I think what that says
01:26:31 13 to us is, the Establishment Clause is not nearly so clear as
01:26:36 14 the Plaintiffs would suggest. And in fact, we have in 1971 the
01:26:42 15 *Lemon* test in a legislative action case that we'll talk about
01:26:48 16 more in a minute.

01:26:49 17 In 1983, you've got *Marsh v. Chambers*. That dealt
01:26:55 18 with prayer, which has been dealt with in a separate kind of
01:26:58 19 way by the court traditionally. In 1984, you've got *Lynch v.*
01:27:03 20 *Donnelly*, which was a nativity case that enunciated an
01:27:08 21 endorsement case, as it was then called.

01:27:13 22 In 1992, you've got *Lee v. Weisman*, which describe a
01:27:16 23 coercion test in a prayer at graduation where the Court said
01:27:21 24 that there was the possibility of indirect coercion where in
01:27:26 25 public school forums prayer was permitted even at a graduation

01:27:31 1 where it was a student led prayer.

01:27:35 2 And then, finally you've got *Van Orden* in 2005, a Ten
01:27:40 3 Commandments monument case in Texas.

01:27:44 4 And what's interesting about all of those cases is,
01:27:47 5 none of them, as they make the findings of the court, overrule
01:27:52 6 any earlier precedent. They talk about it and in some cases
01:27:58 7 don't talk about it. And in fact, in some of the cases which
01:28:02 8 I'll describe in a minute *Lemon* is ignored, it's not even
01:28:05 9 mentioned in the case. In one case it was mentioned simply by
01:28:09 10 way of history to say this is the standard that was used by the
01:28:12 11 District Court but it was not the standard that was adopted by
01:28:16 12 the Supreme Court.

01:28:16 13 One thing that is interesting about *Lemon* is that, in
01:28:24 14 its opinion the court found that there was no basis for the
01:28:28 15 conclusion that the legislative intent in that case was to
01:28:32 16 advance religion.

01:28:36 17 The court did not decide whether the particular
01:28:39 18 legislative precautions restricted the principal or primary
01:28:42 19 effect of the programs to the point where they did not offend
01:28:46 20 the Establishment Clause. And these were programs where the
01:28:49 21 state was purchasing from parochial schools educational
01:28:55 22 services pursuant to legislative action.

01:28:57 23 And the court concluded -- and this is a quote from
01:29:00 24 the court -- "that the cumulative impact of the entire
01:29:04 25 relationship arising under the statutes in each state

01:29:08 1 involves," quote, "excessive entanglement between government
01:29:13 2 and religion."

01:29:16 3 And if you look at *Lemon* -- and you can talk about the
01:29:19 4 formulaic approach as other courts have described it --

01:29:24 5 **THE COURT:** *Lemon* was '71, right?

01:29:27 6 **MR. DANIEL:** That's correct.

01:29:27 7 **THE COURT:** Who wrote that majority opinion?

01:29:32 8 **MR. DANIEL:** Your Honor, I'm not sure of the answer to
01:29:32 9 that, but I can tell you in one second, but I'm not sure who
01:29:34 10 wrote the opinion.

01:29:34 11 **THE COURT:** We'll find it.

01:29:35 12 **MR. DANIEL:** But what the Court said in that case was
01:29:37 13 that there was entanglement, and it went through a number of
01:29:42 14 factors describing the fact that only Roman Catholic elementary
01:29:46 15 schools had participated in the program, there were 30 minutes
01:29:49 16 of religious teaching each day at those schools, there were
01:29:53 17 religious symbols throughout the schools, the ideological
01:29:56 18 character of the teachers, and the Court said, not to cast any
01:30:00 19 dispersion on those nuns and others that taught there, but to
01:30:04 20 say that there's no way that they could divorce from their
01:30:08 21 teaching their background.

01:30:09 22 And in that case, it was the entanglement that the
01:30:13 23 Court made its decision on.

01:30:14 24 **THE COURT:** Does that mean the other factors are
01:30:19 25 dicta?

01:30:19 1 **MR. DANIEL:** It may mean that, frankly, Your Honor,
01:30:22 2 because they didn't consider those other factors. The court
01:30:27 3 looked to entanglement and did not consider the other factors.

01:30:31 4 Now, candidly, the argument could be made, as counsel
01:30:34 5 has made, that the failure of one of the prongs is the failure
01:30:38 6 of the test, and therefore that was the basis. But when one
01:30:43 7 looks at the Establishment Clause and its intent -- and we'll
01:30:49 8 see as these cases progress this becomes more clear -- the
01:30:53 9 issue is entanglement. The issue is not some, as the court has
01:30:58 10 said, formulaic approach to the evaluation of the Establishment
01:31:03 11 Clause.

01:31:03 12 *Marsh v. Chambers* came along, a prayer case, a
01:31:08 13 different kind of case. But one of the quotes in that case is
01:31:12 14 from Justice Goldberg in the *Abington* case, which was in 1963.
01:31:19 15 And Justice Goldberg said that "The measure of constitutional
01:31:23 16 adjudication is the ability and willingness to distinguish
01:31:28 17 between real threat and mere shadow."

01:31:30 18 And those are words that will come back later on in
01:31:33 19 others of these cases, and particularly with Justice Breyer in
01:31:38 20 the *Van Orden* case, to say we've got to be able to look at the
01:31:42 21 facts and distinguish between a real threat, what is an
01:31:47 22 Establishment Clause threat and what is simply a shadow.

01:31:50 23 *Lynch v. Donnelly* we've talked about briefly, but in
01:31:55 24 that case the court begins to move away -- and by the way, two
01:31:59 25 years after --

01:32:00 1 **THE COURT:** I asked Ms. Miller, and let me ask you:
01:32:03 2 What is the test to be applied under Justice Breyer's
01:32:08 3 controlling concurrence?

01:32:11 4 **MR. DANIEL:** I think the test is fairly clear, and
01:32:13 5 I'll move to that. Justice Breyer in his decision said that
01:32:22 6 there's no -- and I'm quoting from his opinion -- "There's no
01:32:27 7 single mechanical formula that can accurately draw the
01:32:31 8 constitutional line in every case."

01:32:34 9 He says, "Where the Establishment Clause is at issue,
01:32:40 10 tests designed to measure neutrality alone are insufficient
01:32:43 11 both because it is sometimes difficult to determine when a
01:32:46 12 legal rule is neutral and because untutored devotion to the
01:32:52 13 concept of neutrality can lead to the invocation or approval of
01:32:56 14 results which partake not simply of that noninterference and
01:33:01 15 noninvolvement with the religions which the Constitution
01:33:04 16 commands."

01:33:04 17 **THE COURT:** Well, I think the other four in that
01:33:06 18 plurality would agree with that statement.

01:33:10 19 **MR. DANIEL:** Correct. And if you look at precedent --
01:33:11 20 and the Plaintiffs have suggested that other circuits, for
01:33:14 21 instance, are precedent to you, which they clearly are not in
01:33:17 22 the Eleventh Circuit. Your Honor can certainly look at those
01:33:20 23 as persuasive; they are not precedent.

01:33:23 24 You then look at what the court has said is precedent,
01:33:27 25 that is the Supreme Court has said is precedent where there are

1 plurality and concurring opinions. And in those cases the
2 court has said you look to the narrowest interpretation that a
3 majority of the justices would agree to. And what we just --
4 what I just read to you I think is a part of that in Justice
5 Breyer's opinion.

6 Then Justice Breyer makes one thing clear, *Lemon* is
7 not the test, and here is what he said. He said, "As in all
8 Constitutional cases, judgment must reflect and remain faithful
9 to the underlying purposes of the clauses, and it must take
10 account of context and consequences measured in light of those
11 purposes. While the court's prior tests provide useful
12 guideposts and might well lead to the same result the court
13 reaches today," referring to *Lemon*, "no exact formula can
14 dictate a resolution to such fact intensive cases."

15 Now, it's interesting --

16 **THE COURT:** Well, the problem you have, though, is
17 that *Van Orden* involved a determination that the monument in
18 question of the Ten Commandments was one of, what, 27 on the
19 whole grounds?

20 **MR. DANIEL:** Yes, sir.

21 **THE COURT:** And represented different things,
22 including -- but it was donated by the Eagles as one of about
23 100 or 120 that they had made and donated all around the
24 country pursuant to a plan by one of the state judges, I think,
25 in Minnesota assisted by Cecil B. DeMille because "The Ten

01:35:16 1 Commandments" was at that time the big movie and he wanted to
01:35:19 2 assist it. So there was a lot of secular associated with it,
01:35:22 3 including the development of the law, which the Ten
01:35:25 4 Commandments are routinely.

01:35:27 5 **MR. DANIEL:** Yes, sir.

01:35:28 6 **THE COURT:** In fact, Justice Rehnquist pointed out
01:35:31 7 that right in the Supreme Court building they have the Ten
01:35:35 8 Commandments in at least four, maybe five different locations
01:35:38 9 within the building itself as part of the decorative --

01:35:42 10 **MR. DANIEL:** Yes, sir.

01:35:43 11 **THE COURT:** So how do you distinguish that which has a
01:35:46 12 finding of a secular purpose as well as a religious purpose?

01:35:50 13 **MR. DANIEL:** Well, in that case, in the *Van Orden*
01:35:53 14 case, the point that Justice Breyer ultimately made -- and he
01:35:57 15 said that this is the determinative factor for him, was the
01:36:03 16 fact that it had been there for 40 years. And let me quickly
01:36:07 17 say, time alone is not enough, and I understand that.

01:36:10 18 **THE COURT:** Numerous cases have held that.

01:36:13 19 **MR. DANIEL:** Exactly. On the other hand, to say that
01:36:16 20 this is purely a religious symbol, this cross, is not itself
01:36:23 21 true as far as this case is concerned.

01:36:25 22 And here is what the court in *Salazar* --

01:36:28 23 **THE COURT:** Well, one of our writers in the local
01:36:30 24 newspapers has said that maybe it's a small "t" and stands for
01:36:38 25 "Texar."

01:36:39 1 **MR. DANIEL:** I doubt that that is true.

01:36:41 2 **THE COURT:** You're not arguing that?

01:36:43 3 **MR. DANIEL:** No, I'm not, Your Honor. And I'll
01:36:46 4 readily concede it is a Christian symbol. It is.

01:36:51 5 But here is what the *Salazar* court said about that.
01:36:53 6 It said the District Court concentrated solely on the religious
01:36:58 7 aspect of the cross divorced from its background and context.

01:37:02 8 The court said this: "But a Latin cross is not merely
01:37:04 9 a reaffirmation of Christian beliefs. It's a symbol often used
01:37:09 10 to honor and respect those whose heroic acts, noble
01:37:14 11 contributions, and patient striving help secure an honored
01:37:17 12 place in history for this nation and its people. Here one
01:37:21 13 Latin cross in the desert evokes far more than religion; it
01:37:28 14 evokes thousands of small crosses in foreign fields marking the
01:37:31 15 graves of Americans who fell in battles whose tragedies are
01:37:36 16 compounded if the fallen are forgotten."

01:37:37 17 And in the affidavit of Stephen Sutherland that was
01:37:41 18 submitted with our papers in this case, Mr. Sutherland, who was
01:37:46 19 a president of the Jaycees back in the '70s time frame, as I
01:37:51 20 recall, he --

01:37:51 21 **THE COURT:** He was a couple of years after I served.

01:37:54 22 **MR. DANIEL:** I think it was the mid to late '70s
01:37:57 23 sometime. He said that, not only was this cross and the
01:38:01 24 amphitheater there, by the way, which was dedicated in the
01:38:05 25 honor of Frazier Phelps, not only were those used for sunrise

01:38:09 1 services, which they were, but he said they were used for
01:38:13 2 gatherings on Veterans Day and Memorial Day and other secular
01:38:19 3 holidays in which veterans were honored, the fallen were
01:38:24 4 remembered, et cetera. That's Mr. Sutherland's -- that's a
01:38:28 5 fact in this record, undisputed insofar as the use of that
01:38:33 6 cross.

01:38:33 7 But if we go back -- and I want to go back and answer
01:38:36 8 Your Honor's question about the test of *Van Orden*. Because in
01:38:40 9 *Van Orden* Justice Breyer talks about purpose, and he talks
01:38:44 10 about the purpose not only of the Establishment Clause, but the
01:38:48 11 purpose of the object that's being analyzed.

01:38:52 12 And then he talks about what he calls the
01:38:56 13 determinative factor. He says that, "Forty years passed in
01:39:01 14 which the presence of this monument, legally speaking, went
01:39:06 15 unchallenged until the single legal objection raised by
01:39:10 16 petitioner."

01:39:10 17 In this case it was more like 75 years. The first
01:39:13 18 cross at Bayview was in 1941. There was another one placed in
01:39:19 19 1949. There was a hiatus in there where there's no historical
01:39:25 20 information that anyone can glean until the current cross was
01:39:27 21 placed in 1969. But if you look at just the current cross,
01:39:33 22 it's 46, 47 years since the current cross was there.

01:39:37 23 And he says, "I'm not aware of any evidence suggesting
01:39:40 24 that this was due to a climate of intimidation." There's no
01:39:45 25 evidence in this case of any climate of intimidation.

01:39:50 1 "Hence," he says, "those forty years suggest more
01:39:52 2 strongly than any set of formulaic test what" -- and here is
01:39:57 3 where the test comes, he says, "they suggest that few
01:40:01 4 individuals, whatever their system of beliefs, are likely to
01:40:05 5 have understood the monument as amounting, in any significantly
01:40:10 6 detrimental way, to a government effort to favor a particular
01:40:14 7 religious sect, primarily to promote religion over nonreligion,
01:40:21 8 to engage in any religious practice, to compel any religious
01:40:25 9 practice, or to work deterrence of any religious belief."

01:40:27 10 The legal judgment test of Justice Breyer, the legal
01:40:31 11 judgment test of *Van Orden* is that. If Your Honor --

01:40:36 12 **THE COURT:** Well, what that boils down to, though, is
01:40:39 13 a test of what is the philosophy of the judge hearing the case.
01:40:44 14 And that's not what the law is supposed to be.

01:40:47 15 **MR. DANIEL:** Your Honor, I think what it --

01:40:49 16 **THE COURT:** It depends on the panel you get on your
01:40:52 17 court of appeals.

01:40:52 18 **MR. DANIEL:** It may. But if you look at, number one,
01:40:55 19 what is precedent, this is the narrowest interpretation of *Van*
01:41:00 20 *Orden* that five justices would agree to.

01:41:03 21 **THE COURT:** Has any court ever analyzed a cross case
01:41:06 22 under *Van Orden*, any reported case you can cite to me?

01:41:10 23 **MR. DANIEL:** No, sir, not that I know of, which is
01:41:13 24 itself probably instructive that -- other than -- well, no
01:41:21 25 case, to answer your question, is ever under *Van Orden*, no.

01:41:24 1 THE COURT: That's what I mean.

01:41:26 2 MR. DANIEL: No.

01:41:26 3 THE COURT: Has there ever been a court that has
01:41:29 4 upheld a Latin cross under either *Lemon* or *Van Orden* if it's on
01:41:41 5 public property? And let me exclude one case.

01:41:46 6 MR. DANIEL: *Salazar*.

01:41:48 7 THE COURT: Well, no, I'm not excluding *Salazar*.
01:41:51 8 You're saying *Salazar* was a cross case --

01:41:53 9 MR. DANIEL: Yes, sir.

01:41:55 10 THE COURT: -- that was upheld under *Lemon*.

01:41:59 11 MR. DANIEL: Well, *Salazar* was a cross case that was
01:42:01 12 upheld.

01:42:02 13 THE COURT: Yes.

01:42:03 14 MR. DANIEL: And it was a case that was decided by the
01:42:05 15 District Court in 2002 before *Van Orden*, and it went up and
01:42:11 16 back a couple of times. It was -- the Supreme Court case was
01:42:14 17 actually *Buono*, they call it, but *Salazar 3* was the case that
01:42:23 18 went up.

01:42:24 19 And in that case the Court said this: "Although, for
01:42:27 20 purposes of the opinion, the propriety of the 2002 injunction
01:42:32 21 may be assumed" -- that is the injunction that was issued prior
01:42:35 22 to *Van Orden* by the District Court that was not before the
01:42:38 23 Supreme Court in *Salazar* -- "the following discussion, though,
01:42:44 24 should not be read to suggest this court's agreement with that
01:42:47 25 judgment, some aspects of which may be questionable."

01:42:50 1 So that was an analysis of a cross case by a District
01:42:57 2 Court post-*Lemon* but pre-*Van Orden*. And when it got to the
01:43:02 3 Supreme Court of the United States in 2010, the plurality
01:43:08 4 opinion in that case said, *Don't take our judgment in this case*
01:43:11 5 *finding that the statute authorizing the transfer of the land*
01:43:14 6 *was constitutional, don't take that to mean that we agree with*
01:43:18 7 *the injunction that was issued by the District Court.*

01:43:21 8 **THE COURT:** Well, that was really the issue, though,
01:43:25 9 whether they could effectively transfer it, right?

01:43:28 10 **MR. DANIEL:** That was the issue in that case, yes,
01:43:30 11 sir. But in dicta -- and this is dicta, no doubt, but in dicta
01:43:35 12 the court said and went out of its way really to say, *Don't*
01:43:40 13 *read this to say that we agree with the propriety of the*
01:43:43 14 *injunction. We're only deciding one issue, and that is whether*
01:43:46 15 *the transfer of the land was constitutional or not, and we're*
01:43:49 16 *finding that it was, in fact, we're finding that's exactly what*
01:43:52 17 *the government ought to do in these kinds of situations.*

01:43:55 18 **THE COURT:** Well, in this case, for example, if *Lemon*
01:43:59 19 still controls and if *Rabun County* still controls, then can the
01:44:06 20 City lease this site -- fence it off and lease it to somebody
01:44:11 21 else?

01:44:12 22 **MR. DANIEL:** Well, that's a very good question, and
01:44:15 23 the answer is, that's not clear. It certainly would be -- it
01:44:20 24 would certainly suggest in *Salazar*, yes, because that's what
01:44:24 25 happened in *Salazar*. The federal government said, *We'll sell*

01:44:27 1 *this property off to a private entity and therefore maintain*
01:44:32 2 *the cross, and the court described that as an accommodation*
01:44:35 3 *that was appropriate under the law. And so I think the answer*
01:44:38 4 *to your question is, yes, that is a possibility.*

01:44:40 5 **THE COURT:** Well, they did that in my colleague Judge
01:44:44 6 Sharp's case, *City of Starke*, I guess it is -- no, the other
01:44:56 7 Florida case. But in that case, Judge Sharp decided that it
01:45:03 8 was an invalid lease, that --

01:45:05 9 **MR. DANIEL:** Subterfuge.

01:45:08 10 **THE COURT:** Yes, it was a subterfuge and really it
01:45:11 11 wasn't effective.

01:45:11 12 **MR. DANIEL:** Yes, sir.

01:45:12 13 **THE COURT:** But underlying that apparently is an
01:45:14 14 assumption that *Salazar* would authorize it if they did it
01:45:17 15 right.

01:45:17 16 **MR. DANIEL:** Yes, sir. And I think that's precisely
01:45:20 17 the issue. There is, no doubt, a challenge that would come --
01:45:22 18 if one were to lease it to some entity so that that cross could
01:45:27 19 stay there, the challenge would come that this is a subterfuge
01:45:31 20 as opposed to a *Salazar*-compliant act.

01:45:34 21 **THE COURT:** Let me ask you this: If *Lemon* is still
01:45:37 22 good law as far as the Supreme Court is concerned -- and
01:45:39 23 there's been no Supreme Court decision that overrules it, at
01:45:44 24 least even comes close to expressly doing it -- and if *Rabun*
01:45:48 25 *County* is still the law in the Eleventh Circuit, which we are,

01:45:52 1 how do you distinguish *Rabun County*?

01:45:57 2 **MR. DANIEL:** Well, the *Rabun County* case, first of
01:45:59 3 all, was decided in 1983, which was, you know, obviously 22
01:46:04 4 years before *Van Orden*.

01:46:05 5 Secondly, the -- and this goes back to the comments
01:46:09 6 that a number of justices have made about Establishment Clause
01:46:13 7 jurisprudence, that there simply is no way to explain
01:46:23 8 Establishment Clause jurisprudence by looking to a particular
01:46:26 9 standard. And in fact, you can look at a number of cases that
01:46:31 10 have ruled on Establishment Clause cases but have not applied
01:46:35 11 *Lemon*, have not even referred to *Lemon*.

01:46:38 12 And so it's one thing to say --

01:46:40 13 **THE COURT:** I may not agree with the law but I still
01:46:42 14 have to apply it.

01:46:43 15 **MR. DANIEL:** Well, but there is where the precedent
01:46:45 16 issue comes in. Because if you go -- if you look at what --
01:46:49 17 and I'll give you the cites to the cases. But the issue of
01:47:01 18 precedent is an important issue. And what does it mean?

01:47:04 19 In the *Marks* case, if my memory serves me, yeah, *Marks*
01:47:11 20 *v. United States*, the Supreme Court in 1977 said this: "When a
01:47:14 21 fragmented court decides a case and no single rationale
01:47:18 22 explaining the results enjoys the assent of five justices, the
01:47:22 23 holding of the court may be viewed as the position taken by
01:47:26 24 those members who concurred in the judgments on the narrowest
01:47:30 25 grounds." And the Eleventh Circuit in the *United States v.*

01:47:32 1 *Hughes* in 2017 -- recently -- quoted the *Marks* case.

01:47:36 2 So, then you say, if it doesn't expressly overrule

01:47:42 3 *Lemon* -- and you're correct, there's no case that expressly

01:47:45 4 overrules *Lemon* -- but yet there are cases that don't apply it

01:47:48 5 in certain factual situations, and there is the law of the

01:47:53 6 Supreme Court that says that the precedent of a case is the

01:47:58 7 narrowest ground that five of the justices would agree to,

01:48:04 8 those who have commented on *Lemon* -- and again, two years after

01:48:09 9 *Lemon* it began to be referred to as "a guideline" -- but those

01:48:14 10 who have commented on it said the narrowest is to look at

01:48:18 11 Justice Breyer's opinion, that is the one that the plurality

01:48:22 12 plus Justice Breyer agreed to, and then you ask yourself what

01:48:25 13 is that. If he didn't apply the *Lemon* test, which he didn't

01:48:29 14 do, then what did he do?

01:48:31 15 And what he did, I think, is suggest to us what the

01:48:35 16 proper standard is in a case like this where *Lemon* is not the

01:48:40 17 standard.

01:48:48 18 **THE COURT:** Well, *Rabun County* specifically says that

01:48:52 19 the *Lemon* factors apply in analysis of that case, which was a

01:48:55 20 cross case, it said it applies, and that's the law of the

01:48:59 21 circuit.

01:49:02 22 My colleague, Judge Moore, in the *City of Starke* case,

01:49:06 23 which was decided in 2007, belies the *Rabun County* and *Lemon*

01:49:15 24 factors. And, as you say, there's been no court that's tried

01:49:20 25 to analyze a cross case under *Van Orden* since *Van Orden* was

01:49:23 1 decided, and there have been a number of cases.

01:49:26 2 **MR. DANIEL:** Well, here is another distinguishing
01:49:29 3 factor about *Rabun*. *Rabun* involved a cross that was placed in
01:49:34 4 1979. There was an immediate objection. The case went to the
01:49:38 5 Supreme Court in 1983. In the space of four years there was an
01:49:44 6 objection and action that ultimately ended up in the Supreme
01:49:48 7 Court.

01:49:48 8 Now, what does that say? What that says is -- and we
01:49:53 9 would readily concede the City of Pensacola cannot go out today
01:49:57 10 and put a cross in Bayview Park. They could not do that today.
01:50:01 11 But what it does say is, if you look at *Van Orden*, the
01:50:04 12 determinative factor for Justice Breyer was, this has been
01:50:09 13 there for 40 years and no one has objected.

01:50:12 14 Look at the cases -- and there are other cases that
01:50:21 15 have described time as a factor in this analysis, and other
01:50:26 16 cases have looked at time and said that's something we look at
01:50:29 17 in terms of trying to determine the effect, that is, is this
01:50:36 18 something that is going to be seen as promoting religion,
01:50:42 19 establishing some sort of position of the government in terms
01:50:45 20 of religion. But *Rabun* can be distinguished because it all
01:50:50 21 happened immediately, I mean, there was an immediate
01:50:53 22 objection --

01:50:53 23 **THE COURT:** Well, actually, the cross originally was
01:50:58 24 finalized with lights in 1957, and then they built the cross in
01:51:03 25 1979. And the litigation didn't arise until -- what? -- this

01:51:08 1 was decided in '83, so several years. But it actually went
01:51:12 2 back -- the cross itself had been there since '57, so
01:51:19 3 twenty-something years.

01:51:19 4 **MR. DANIEL:** The cross that was the subject of the
01:51:21 5 lawsuit was the 1979 cross. That was the one that is the
01:51:24 6 subject of the lawsuit in *Rabun*. That is the one that was
01:51:28 7 objected to. And again, it was -- once that replacement cross
01:51:34 8 with the lights and all went up, that's when the objection was
01:51:37 9 made and the case went forward, and in 1983 the Supreme Court
01:51:43 10 had heard the case and written an opinion.

01:51:46 11 There are -- and I want to find these to suggest them
01:51:59 12 to Your Honor. When you look at the *Van Orden* analysis, in the
01:52:05 13 *Town of Greece*, which admittedly is a prayer case, but the
01:52:08 14 court in that case looked at time, that is, how long the
01:52:12 15 institutions of our government had opened with prayer, et
01:52:16 16 cetera, that was a factor in those cases.

01:52:19 17 And in the *Salazar* case the court -- and this is dicta
01:52:23 18 in the opinion, but the court said this: "Time also has played
01:52:27 19 its role. The cross had stood on Sunrise Rock for nearly seven
01:52:34 20 decades before the statute was enacted. By then, the cross and
01:52:39 21 the cause it commemorated had become entwined in the public
01:52:39 22 consciousness."

01:52:44 23 So time is a factor that the *Town of Greece* has looked
01:52:47 24 at, *Salazar* has looked at, certainly *Marsh vs. Chambers*, which,
01:52:52 25 again, is a prayer case, looked at time. But if the issue is

01:52:55 1 not hostility toward religion but accommodation, which is what
01:53:02 2 the Supreme Court has said is the perspective in which these
01:53:07 3 Establishment Clauses should be viewed, you have to --

01:53:09 4 **THE COURT:** Well, isn't that just a factor, at the
01:53:11 5 most, though, right? I mean, it certainly cannot be
01:53:15 6 controlling because there's so many cases that have decided
01:53:18 7 otherwise.

01:53:18 8 **MR. DANIEL:** Absolutely, and it is a factor. And in
01:53:21 9 the -- again, in the *Van Orden* case Justice Breyer said it was
01:53:24 10 the determinative factor for him, but a factor.

01:53:28 11 But you asked what is the distinction between *Rabun*
01:53:33 12 and this case. Time is certainly a factor. The immediacy of
01:53:39 13 the action in *Rabun*, the 40, 50, 60 years, depending on how you
01:53:44 14 measure the time, which cross you want to look at as far as
01:53:46 15 Bayview is concerned, but time is certainly a factor, which
01:53:50 16 indicates that there's no Establishment Clause violation here.

01:53:54 17 And Your Honor brought up the standing issue, and we
01:54:03 18 raised the standing issue with respect to the two Plaintiffs
01:54:06 19 that have moved to Canada.

01:54:09 20 But maybe as importantly in looking at this case, what
01:54:12 21 these Plaintiffs tell us about themselves in their own
01:54:16 22 affidavits belies the issue of whether there has really been
01:54:27 23 some divisive, as the Court has used, effort to establish
01:54:31 24 religion, because both of these Plaintiffs have said they
01:54:35 25 continued to go to the park, they continued to use the park.

01:54:38 1 In fact, Mr. Suhor, one of the Plaintiffs, actually
01:54:42 2 reserved the cross in 2016 on Easter Sunday, and McIlwain
01:54:49 3 Presbyterian, which had used it before, made no objection.
01:54:55 4 Mr. Suhor used it.

01:54:55 5 Now, the question is: Can one really say that that
01:54:59 6 cross is the kind of thing that Justice Breyer described in *Van*
01:55:04 7 *Orden* that causes one to look at it and say that this is an
01:55:13 8 establishment of religion, the kind of thing that the
01:55:18 9 Establishment Clause is designed to forbid? Can anyone look at
01:55:23 10 this and likely understand the monument to be a government
01:55:29 11 effort to favor a particular religious sect or anything like
01:55:33 12 that? There's none of that.

01:55:34 13 **THE COURT:** Your time is up, Paula says.

01:55:38 14 **MR. DANIEL:** Thank you, Your Honor.

01:55:42 15 **THE COURT:** All right, 15 minutes, Ms. Miller.

01:55:44 16 **MS. MILLER:** A few things. One is the Defendants can
01:55:47 17 only point to one distinction from this case in *Rabun*, and that
01:55:51 18 is the time factor. But in the *Rabun County* case which you
01:55:54 19 pointed out, it wasn't an immediate cross at all but one that
01:55:57 20 had succeeded or had followed several other series of crosses,
01:56:00 21 just like here.

01:56:01 22 The Eleventh Circuit went out of its way to say that
01:56:04 23 historical acceptance of a religious display, especially one as
01:56:08 24 sectarian as a Christian cross, cannot eliminate the aura of
01:56:15 25 religion that it conveys. And that's exactly true in this

01:56:18 1 case.

01:56:18 2 The fact that Justice Breyer in *Van Orden* focused on
01:56:21 3 the 40-year history of unobjection, tied directly to his other
01:56:27 4 point that he made that was also determinative, that those 40
01:56:31 5 years went by where there was no religious use of those Ten
01:56:35 6 Commandments. It was portrayed in this very secular setting, a
01:56:39 7 museum-like setting where there was nothing like an Easter
01:56:43 8 Sunrise Service that would occur there.

01:56:45 9 And so to Justice Breyer it was the fact that there
01:56:47 10 wasn't any religious use or objection for those 40 years that
01:56:51 11 made it clear that a reasonable observer didn't see it as a
01:56:52 12 religious --

01:56:52 13 **THE COURT:** Well, the court accepted the fact that it
01:56:54 14 was religious. I mean, that was a fundamental part of the
01:56:57 15 decision, right?

01:56:58 16 **MS. MILLER:** It was religious, but it also conveyed a
01:57:00 17 secular message. So what I read the court as saying is, is the
01:57:04 18 message that we're seeing from this more secular or more
01:57:07 19 religious, at least the plurality, and Justice Breyer
01:57:10 20 specifically, and he's saying this is more secular than
01:57:13 21 religious because it has this historical ties to our nation's
01:57:17 22 foundation of lawmaking, it's portrayed in a secular setting,
01:57:21 23 there's no evidence of any religious usage, no evidence of any
01:57:25 24 people coming forward and objecting, you know, seeing this as
01:57:27 25 religious, it's not the type of place where people come to

01:57:30 1 meditate or pray.

01:57:32 2 And so there was a bunch of factors that went into the
01:57:34 3 court's ultimate analysis, and that's why Justice Breyer said
01:57:36 4 that the outcome would probably be the same under *Lemon* because
01:57:39 5 we're seeing a predominantly secular purpose and secular
01:57:42 6 effect.

01:57:42 7 **THE COURT:** What's the meaning of *McCreary County*,
01:57:47 8 which was decided the same day as *Van Orden*, involving the Ten
01:57:50 9 Commandments in the courthouses, I think, in Kentucky? It was
01:57:54 10 decided on *Lemon*, right?

01:57:55 11 **MS. MILLER:** Exactly, it was decided on *Lemon*. And
01:58:00 12 *McCreary* is so much more clearer than *Van Orden* because the
01:58:04 13 court explicitly -- five justices explicitly apply *Lemon*. They
01:58:04 14 say the *Lemon* purpose prong is completely good law, that we
01:58:07 15 still should use it. And that was over the objection of the
01:58:10 16 counties that had argued that the court should abandon the
01:58:13 17 *Lemon* test, and abandon the purpose test specifically.

01:58:16 18 **THE COURT:** So you've got two Supreme Court decisions
01:58:18 19 decided the same day, both involving the Ten Commandments, and
01:58:23 20 they reached different results.

01:58:26 21 **MS. MILLER:** Yes. And one of the key distinguishing
01:58:27 22 factors between the two is that the displays in the *McCreary*
01:58:30 23 would be standalone displays, and the Supreme Court said in the
01:58:32 24 decision that when a government places a religious item on its
01:58:35 25 property as a standalone display, the religious purpose is

01:58:38 1 clear, or the religious effect is clear.

01:58:39 2 And that's exactly what we have here, a standalone,
01:58:42 3 enormous religious display for Christianity. It's not a
01:58:47 4 nondenominational symbol. It's a very sectarian display, and
01:58:53 5 it stands alone on government property, not among numerous
01:58:57 6 other objects. And so that was a main factor in *McCreary*.

01:59:00 7 The other factor that *McCreary* looked to was the
01:59:03 8 religious history leading up to the display. There had been
01:59:04 9 statements by the supporters of the Ten Commandments in
01:59:07 10 *McCreary* that were not found in *Van Orden* indicating that the
01:59:09 11 purpose of the display was to be religious. And that's exactly
01:59:12 12 what we have here as well.

01:59:13 13 So if the Court were to look to any Ten Commandments
01:59:15 14 case, *McCreary* would be far more telling or instructive to this
01:59:23 15 Court than the *Van Orden* case would be. And even if we looked
01:59:25 16 to *Van Orden* and this Court were to exercise its legal
01:59:28 17 judgment, I think it's good to sort of think of this as --

01:59:28 18 **THE COURT:** And specifically Justice Breyer agreed
01:59:31 19 with *McCreary*.

01:59:34 20 **MS. MILLER:** Absolutely, yes, he was on the majority
01:59:37 21 in *McCreary* finding that a standalone Christian or religious
01:59:41 22 display is unconstitutional, especially when it has a religious
01:59:43 23 history, and that *Lemon* is still good law and is binding,
01:59:45 24 especially as to the purpose test, which is what we recall the
01:59:49 25 *Rabun* case fell under.

01:59:51 1 If this Court were to consider this monument, say it
01:59:54 2 was a star and crescent, an Islamic star and crescent, and that
02:00:02 3 was some -- you know, it's been up for 40 years and maybe
02:00:03 4 there's no objection because everyone in the community is
02:00:06 5 Islamic. If a Christian came forward, you know, today, now
02:00:06 6 that there are organizations dedicated to separation of church
02:00:08 7 and state, and objected, I think you have to look at it in the
02:00:11 8 context of it's still a giant religious symbol, and to an
02:00:16 9 outsider -- in this case would be a Christian in that community
02:00:19 10 -- would see it as alienating to them. Because it's the
02:00:24 11 government's symbol, it's the government's property, and to an
02:00:27 12 outsider it can be alienating and it can be marginalizing, and
02:00:32 13 that's what we have in this case.

02:00:32 14 I wanted to go back to something Your Honor had
02:00:36 15 mentioned about whether there was any case that had analyzed a
02:00:39 16 cross under *Van Orden*. And the answer is yes. In fact, the
02:00:41 17 Ninth Circuit did in the *Trunk* case. The Ninth Circuit had
02:00:46 18 considered the constitutionality of a very longstanding war --

02:00:46 19 **THE COURT:** Which case was this?

02:00:47 20 **MS. MILLER:** It was the *Trunk* case, and that was the
02:00:51 21 Mount Soledad cross.

02:00:52 22 **THE COURT:** Okay, *Mount Soledad* case, okay, yeah.

02:00:54 23 **MS. MILLER:** I think it was Jewish war veterans were
02:00:58 24 the plaintiffs. It was a longstanding war memorial cross
02:01:03 25 surrounded by thousands of secular symbols all commemorating

02:01:11 1 World War I and I believe World War II, and there's no dispute
02:01:12 2 is was a war memorial. And I should also add that this case
02:01:13 3 also came after *Salazar*, so this is a post-*Salazar*, post-*Van*
02:01:16 4 *Orden* case.

02:01:16 5 And the defendants argued, just as in this case, that
02:01:19 6 *Van Orden* applied and not *Lemon*, and the plaintiffs argued that
02:01:23 7 *Lemon* applied and not *Van Orden*. And the Ninth Circuit said,
02:01:26 8 *Look, we think that Lemon probably applies here because it's*
02:01:29 9 *never been overruled, this is not a Ten Commandments case, we*
02:01:31 10 *had decided a previous Ten Commandments case where we did apply*
02:01:35 11 *Van Orden but this is not that. But let's just assume that Van*
02:01:40 12 *Orden applies and apply both Van Orden and Lemon.*

02:01:43 13 And it reached the exact same outcome that the cross
02:01:45 14 remained unconstitutional under both standards because of the
02:01:50 15 distinguishing factors between an enormous Christian cross and
02:01:50 16 a Ten Commandments in the multifaceted display.

02:01:55 17 So, yes, one court had. And that court was an
02:01:57 18 anomaly, too, because the Tenth Circuit had subsequently
02:02:01 19 evaluated a cross after *Van Orden* as well as after *Salazar* and
02:02:06 20 did not find *Van Orden* relevant at all, even though the crosses
02:02:09 21 -- there were, I want to say, 10 to 12 roadside memorial
02:02:13 22 crosses that had also been longstanding, I want to say, 20
02:02:15 23 years or so.

02:02:16 24 **THE COURT:** The Tenth Circuit, is that the one where
02:02:19 25 there was a dissent by our new justice?

02:02:23 1 **MS. MILLER:** That is true, yes.

02:02:24 2 **THE COURT:** What was the name of that case?

02:02:27 3 **MS. MILLER:** That is called *Davenport v. Utah Highway*
02:02:27 4 *Patrol*.

02:02:27 5 **THE COURT:** *Davenport*, okay.

02:02:33 6 **MS. MILLER:** It also has another name, *Duncan*, and I
02:02:34 7 can't really figure out why, but, yes, *Davenport* is how we
02:02:36 8 cited it.

02:02:37 9 **THE COURT:** I want to ask you about something that
02:02:39 10 Mr. Daniel brought up. Mr. Suhor apparently leased or reserved
02:02:44 11 the cross of Easter. Is that a fact?

02:02:44 12 **MS. MILLER:** Yes, he did. He wanted to use it for
02:02:50 13 satanic purposes.

02:02:50 14 **THE COURT:** Okay. So he's actually used the cross.
02:02:53 15 What does that do to his objecting to the cross? Does that
02:02:57 16 create an estoppel situation?

02:03:00 17 **MS. MILLER:** It doesn't, Your Honor. There's plenty
02:03:03 18 of cases, for instance, the legislative prayer cases that the
02:03:07 19 Defendants rely so heavily upon, where plaintiffs continue to
02:03:10 20 go to county meetings where they hear objectionable prayers,
02:03:12 21 they listen to the meetings at home and don't fast-forward, and
02:03:15 22 the courts have said explicitly -- actually, in the *Pelphrey*
02:03:17 23 case, the Eleventh Circuit *Pelphrey* case that the plaintiffs
02:03:18 24 had standing even though they could have avoided the prayers.

02:03:22 25 The Plaintiffs don't want to avoid the park, and they

02:03:25 1 actually want to use it, they want to use the space. He wished
02:03:27 2 to use the amphitheater and the area around it for satanic
02:03:33 3 purposes, and he actually had some issues with the County as
02:03:35 4 far as they said that -- or the City said that the church
02:03:37 5 actually had a first-come, first-serve use for the cross for
02:03:41 6 Easter services. So that's that issue.

02:03:43 7 But at the end of the day, we still have another
02:03:46 8 Plaintiff who has not used the cross for any purpose. So even
02:03:50 9 if the Court were to have some issue with that, which, again,
02:03:52 10 under the case law there shouldn't be any, there is at least
02:03:56 11 one Plaintiff that has not used the cross for such purposes
02:04:00 12 that has objected to the cross, that lives near the cross, and
02:04:04 13 has standing.

02:04:04 14 **THE COURT:** I want to ask you about another case. Are
02:04:05 15 you familiar with *Capital Square Review vs Pinette*?

02:04:11 16 **MS. MILLER:** I am.

02:04:12 17 **THE COURT:** And we had a cross there that was approved
02:04:15 18 by the Supreme Court in the Ohio State Capitol.

02:04:19 19 **MS. MILLER:** And that was the KKK case?

02:04:21 20 **THE COURT:** The Ku Klux Klan, yes.

02:04:21 21 **MS. MILLER:** Yes, the Ku Klux Klan, so that was --

02:04:24 22 **THE COURT:** They were allowed to put a cross during
02:04:26 23 the Christmas season at the state capitol.

02:04:26 24 **MS. MILLER:** Yes, I think it was for about 16 days.
02:04:28 25 And so that was pursuant to an open forum policy where the

02:04:31 1 evidence was shown that the government had already allowed
02:04:34 2 numerous displays, somewhere in the ballpark of 20. And so to
02:04:37 3 exclude the Ku Klux Klan would actually be to discriminate on
02:04:43 4 the basis of viewpoint under the free speech analysis, so it
02:04:46 5 was not an Establishment Clause analysis.

02:04:48 6 **THE COURT:** The lower court analyzed it -- the lower
02:04:51 7 courts, I guess I should say, including the Sixth Circuit,
02:04:53 8 analyzed it as an Establishment Clause and affirmed it.

02:04:57 9 **MS. MILLER:** I mean, yes, I will admit that I am not
02:05:01 10 familiar with the --

02:05:01 11 **THE COURT:** I'm not sure if the Sixth Circuit affirmed
02:05:04 12 on that basis, but the justification by the state was under the
02:05:08 13 Establishment Clause for denying. And it was analyzed under
02:05:11 14 the Establishment Clause, right, I mean, initially?

02:05:13 15 **MS. MILLER:** You know, I'm not familiar with the lower
02:05:16 16 court decisions. I'm just familiar with the Supreme Court one.
02:05:19 17 I would say that was probably -- if the defense was -- my guess
02:05:22 18 is that it was on the defense side. So if the city said or the
02:05:25 19 government said that if we accept this monument it will violate
02:05:28 20 the Establishment Clause, so it was probably under the defense
02:05:33 21 versus the plaintiff saying that, I guess, obviously with the
02:05:34 22 posture, so I guess I could see how that would fit in.

02:05:37 23 But if they upheld the cross as being not violative of
02:05:41 24 the Establishment Clause -- is that what you're saying that
02:05:44 25 happened?

02:05:44 1 **THE COURT:** Well, that's the effect of it, anyway,
02:05:46 2 right?

02:05:46 3 **MS. MILLER:** Yes, yes. And that's consistent with
02:05:48 4 what we're saying, I mean, and again, it's consistent with the
02:05:50 5 position that, if they were to make this a public forum and
02:05:53 6 allow private citizens to bring in a cross annually for the
02:05:58 7 holiday display, you know, for their service and then remove
02:06:00 8 it, you know, the next day or pursuant to some open forum
02:06:04 9 policy, that would be completely allowed.

02:06:05 10 **THE COURT:** So we have the Supreme Court affirming the
02:06:07 11 placement of a cross by the Ku Klux Klan on the state capitol
02:06:12 12 but denying the use of a cross as a war memorial or a monument
02:06:17 13 to veterans or anything else. Is that where we are?

02:06:19 14 **MS. MILLER:** Your Honor, I don't find it inconsistent
02:06:21 15 only because it was an open forum. So the presumption is that
02:06:21 16 citizens are aware that an atheist can come in and bring in
02:06:26 17 their symbol. You know, if Plaintiff Suhor wishes to bring in
02:06:28 18 a satanic symbol, he could. That was the underlying principle
02:06:33 19 of the *Pinette* case.

02:06:35 20 This is a permanent religious monument on government
02:06:40 21 property. There's no question that this is not a private
02:06:41 22 symbol, you know, this is not the Ku Klux Klan's cross. This
02:06:43 23 the City of Pensacola's cross, and that's where the
02:06:49 24 Establishment Clause kicks in and not the free speech clause.

02:06:51 25 The other point that I wanted to make was that the

02:06:53 1 *Lynch* case was cited by the Defendants as being one of the
02:06:57 2 cases that did not employ *Lemon*, but that's actually incorrect.
02:06:57 3 The *Lynch* case did look to *Lemon* and then just said that the
02:07:00 4 display in that case satisfied *Lemon* because it was one
02:07:04 5 religious part of an otherwise secular display. That was
02:07:07 6 actually also on private property, it wasn't actually city
02:07:10 7 property.

02:07:11 8 So the facts in that case are distinguishable, but
02:07:13 9 ultimately the court did apply and look to *Lemon* as it did in
02:07:16 10 the other case that it looked to a nativity scene, which was
02:07:20 11 the *Allegheny County* case.

02:07:24 12 **THE COURT:** Well, *Allegheny County* just sort of
02:07:27 13 amplified the second *Lemon* factor, right?

02:07:31 14 **MS. MILLER:** Yes.

02:07:32 15 **THE COURT:** I mean, it didn't change *Lemon* at all?

02:07:35 16 **MS. MILLER:** No, not at all, Your Honor, no. It did
02:07:37 17 amplify the second prong of *Lemon*, and it also emphasized that
02:07:41 18 even a donated display or one that's temporary is
02:07:44 19 unconstitutional when it has the government's stamp of approval
02:07:47 20 on it.

02:07:49 21 Your Honor, I don't have any other points to make.

02:07:51 22 **THE COURT:** Thank you.

02:07:52 23 Mr. Daniel, 15 minutes.

02:08:00 24 **MR. DANIEL:** Thank you, Your Honor. Just a few
02:08:03 25 comments. Number one, as far as the use of this cross is

02:08:06 1 concerned, the City has no position whatsoever. If Mr. Suhor
02:08:12 2 wants to use it, whoever wants to use it can use it for
02:08:16 3 whatever purpose. In fact, it would probably be
02:08:18 4 unconstitutional if the City forbade a church from coming in
02:08:22 5 there and having Easter Sunrise Services or whatever. So the
02:08:26 6 use of it --

02:08:26 7 **THE COURT:** I was trying to figure out how you reserve
02:08:29 8 a cross, but actually what you reserve is the little
02:08:31 9 amphitheater that's right there with it, I guess.

02:08:33 10 **MR. DANIEL:** Exactly, you reserve the space. And in
02:08:35 11 the affidavits that we submitted, the practice of the City was
02:08:38 12 that, if you had a recurring event -- and there are Bayou runs
02:08:43 13 and various events -- if you had a recurring event where you
02:08:48 14 used the Bayview Park on a particular day for a particular
02:08:52 15 event, you had first dibs, so to speak, on it again.

02:08:57 16 In 2016 McIlwain Presbyterian intended to use the
02:09:04 17 cross for its Easter service. Mr. Suhor was told that -- and
02:09:06 18 this is in the affidavit of Mr. Cooper that we submitted to the
02:09:09 19 Court. Mr. Suhor wanted it. McIlwain said, *Well, that's fine,*
02:09:14 20 *we'll go down to the dock,* and I think they went down to the
02:09:18 21 dock, and he reserved it. Whether he used it or not, we don't
02:09:21 22 know. We don't keep up with who uses it and what they do. We
02:09:26 23 simply allow anyone who wants to use it to use it.

02:09:29 24 **THE COURT:** And there's no fee for that?

02:09:32 25 **MR. DANIEL:** No fee, no fee. Now, you can be charged

02:09:34 1 a fee if you're going to have a crowd, and there's some limit
02:09:37 2 and I don't recall what the limit is. But say it's a hundred
02:09:40 3 people or more and that requires security or something like
02:09:43 4 that, there could be a fee associated with that.

02:09:45 5 But the truth of the matter is that anybody could go
02:09:49 6 down there anytime and do whatever they want to at the cross or
02:09:52 7 on the dock or on the swing set or wherever they want to do it
02:09:57 8 at the park. There is no limitation on it.

02:10:01 9 If you want to reserve it, you can reserve it, if you
02:10:05 10 anticipate, again, a particular event and that sort of thing.
02:10:08 11 But there's no discrimination at all in who gets to reserve the
02:10:12 12 cross.

02:10:12 13 Let me talk about the *McCreary* case for just a minute
02:10:18 14 because I think that it is very distinguishable from *Van Orden*.
02:10:21 15 And in that case, there were two Kentucky counties who wanted
02:10:27 16 to post large readily visible copies of the Ten Commandments in
02:10:33 17 their courthouses, and they adopted identical resolutions that
02:10:40 18 basically said that the commandments -- the Ten Commandments
02:10:45 19 were Kentucky's, quote, "precedent legal code." That was what
02:10:49 20 the resolution said.

02:10:51 21 The resolution went on to say that the state
02:10:53 22 legislature -- that not only the resolutions but the state
02:10:59 23 legislature acknowledged Christ as the, quote, "Prince of
02:11:04 24 Ethics."

02:11:04 25 Now, when you look at *Van Orden* and you say Justice

02:11:08 1 Breyer's analysis was *'What's the purpose and effect of this*
02:11:11 2 *cross,' Van Orden* says the Ten Commandments in that case had
02:11:15 3 been there for 40 years, and I read to you a minute ago what he
02:11:19 4 said the determinative factor was and why.

02:11:21 5 It's very easy to see that, if you have a county
02:11:26 6 adopting an ordinance talking about the commandments as
02:11:30 7 Kentucky's precedent legal code and Christ as the Prince of
02:11:34 8 Ethics, the purpose as advocated by the government entity
02:11:38 9 itself is not anything but a religious purpose. That's what
02:11:42 10 they're doing.

02:11:42 11 And so it's very easy to see how the justices could
02:11:47 12 decide *Van Orden* where there's no evidence of any coercion or
02:11:54 13 advocacy of any religion in *Van Orden* for 40 years versus
02:12:04 14 contemporary resolutions where the Kentucky counties are trying
02:12:09 15 to establish these kinds of things that are clearly --

02:12:12 16 **THE COURT:** Well, when they first did it they said it
02:12:14 17 was for religious purposes. But then after the District Court
02:12:18 18 questioned it, they went back and they changed it and added
02:12:22 19 nine framed documents of equal size including a copy of the
02:12:26 20 Star-Spangled Banner's lyrics, the Declaration of Independence,
02:12:33 21 and other things like that.

02:12:35 22 **MR. DANIEL:** And the court said, *You can't fool me on*
02:12:38 23 *stuff like that, We know what you're doing, You showed us what*
02:12:41 24 *you're doing, And to go back and try to work your way around*
02:12:45 25 *something like this is not appropriate.* That's what the court

02:12:47 1 said in its --

02:12:47 2 **THE COURT:** Well, this is, again, a finding of a
02:12:48 3 subterfuge.

02:12:50 4 **MR. DANIEL:** Yes, sir, exactly, that's exactly the
02:12:53 5 point, the court said, *We're not going to look at that kind of*
02:12:56 6 *thing, which is a subterfuge, as opposed to looking at the act*
02:13:01 7 *itself to see what its purpose is.*

02:13:03 8 And in *Van Orden* the court says, *Forty years tells us*
02:13:07 9 *this purpose is not to establish religion.* But in *McCreary* the
02:13:13 10 court said, *It's real obvious what your purpose is regardless*
02:13:15 11 *of what you say.*

02:13:16 12 **THE COURT:** But it then went on to apply the *Lemon*
02:13:18 13 three-part analysis and said it prohibited the use of those Ten
02:13:24 14 Commandments --

02:13:24 15 **MR. DANIEL:** It did.

02:13:25 16 **THE COURT:** -- on the very same day that *Van Orden* was
02:13:29 17 decided.

02:13:30 18 **MR. DANIEL:** It did. And let me talk about *Lemon* just
02:13:33 19 a minute. Because, in all candor, when I first started looking
02:13:36 20 at this case and looked at the *Lemon* test, I thought, you know,
02:13:40 21 if *Lemon* is the law, this is a problem as far as the City is
02:13:44 22 concerned.

02:13:44 23 But then I started looking at *Lemon*, and I said, well,
02:13:54 24 let's look at those factors. And *Lemon* was a legislative
02:13:59 25 action case. And the first prong says the statute must have a

secular legislative purpose. We're looking at the purpose of the enactment of the legislature, what was the purpose of that.

From the City's point of view we look at the placement of the cross by the Jaycees, not the City, but by the Jaycees in the park, and we say what is the City's purpose in that.

Well, the City is accommodating religion, certainly. But can it be said that the City is advocating religion or attempting to establish a religion in some way?

And we know that the Jaycees, as we pointed out in our papers, and as Your Honor is well aware what the Jaycees is, what kind of organization it is. It's a civic organization. It's not to say that it has no faith element to it at all, but it's primarily a civic organization.

We know from the record in this case that that organization -- at that site there's a plaque that says that this amphitheater is dedicated to Frazier Phelps, and this cross stands right next to it. We know that that site was used for Veterans Day and Memorial Day celebrations honoring the dead. The quote that we gave you from *Salazar* related to what crosses mean, we know that that's what they did.

The *Lemon* test does not require that its total purpose be secular. It has to have "a" secular purpose. There is -- from the City's perspective there is some secular purpose of this. And I'm not going to stand here and say that there's no religious purpose, but there is a secular purpose.

02:15:39 1 And then its principal or primary effect must be one
02:15:44 2 that neither advances nor inhibits religion. No one can stand
02:15:50 3 before you and say the principal effect of this cross is to
02:15:54 4 advance or inhibit religion. That's not what's happening at
02:15:59 5 all. It hadn't happened for 70 years.

02:16:04 6 **THE COURT:** Well, you have religious services there.

02:16:04 7 **MR. DANIEL:** Yes, sir.

02:16:08 8 **THE COURT:** I mean, it's primarily associated with the
02:16:09 9 Easter Sunrise Service.

02:16:11 10 **MR. DANIEL:** It is. But it's the City's -- you've got
02:16:12 11 to look not -- if that's the test, then people can't come into
02:16:14 12 the park and do anything that might be religious because
02:16:18 13 they're using this public forum, this park as a place to have a
02:16:22 14 religious service, which clearly is not what the law is. It's
02:16:24 15 the City's perspective. It's not -- the principal effect of
02:16:30 16 what it has done is not to promote a religion.

02:16:34 17 **THE COURT:** But it isn't the City's perspective that
02:16:38 18 counts. It's sort of an objective onlooker.

02:16:41 19 **MR. DANIEL:** Well, that's where you go back to what
02:16:46 20 Justice Gorsuch said in the Tenth Circuit, the *Davenport* case,
02:16:50 21 he says, you know, those objective reasonable observers are, in
02:16:51 22 the vernacular, grossly overrated, is basically what he said.

02:16:56 23 **THE COURT:** Well, I don't disagree with that, but
02:16:58 24 that's different from the City's perspective.

02:17:02 25 **MR. DANIEL:** Well, it is, but I'm talking about what

02:17:04 1 *Lemon* says. *Lemon* says that the primary or principal effect
02:17:09 2 must be one that neither advances nor inhibits. And what we're
02:17:14 3 looking at is the effect of the City's action.

02:17:17 4 And I understand Your Honor's point. I understand
02:17:20 5 that the effect of the cross may be one that is perceived by
02:17:26 6 somebody. But perception -- and we know this from other cases,
02:17:31 7 the mere fact that someone perceives something does not make it
02:17:35 8 a constitutional violation. There has to be more objectivity
02:17:40 9 to it than that. And that's why Justice Breyer said in *Van*
02:17:44 10 *Orden* the objectivity to him, the determinative factor was it's
02:17:47 11 been there for 40 years and nobody has complained about it.

02:17:51 12 And now this contrived kind of lawsuit, frankly, is
02:17:56 13 what we're now faced with and by people, two of whom have now
02:18:03 14 moved to Canada, and it's not something that really is a
02:18:07 15 statement of the City is trying to advance or inhibit religion.
02:18:14 16 It's as the organizations that support them -- and we pointed
02:18:18 17 it out in our briefs -- their purpose is to eliminate religion
02:18:23 18 from society. That's not the purpose of the Establishment
02:18:25 19 Clause. The Establishment Clause is to accommodate religion.

02:18:30 20 And then, if you look at the excessive government
02:18:33 21 entanglement, which is where *Van Orden* -- where Justice Breyer
02:18:36 22 came down, the entanglement issue, there's clearly no
02:18:40 23 entanglement in this case. The City does not in any way
02:18:45 24 discriminate. Contrary to what the Plaintiffs said in their
02:18:50 25 filings with the Court, they don't sponsor anything.

02:18:53 1 There may be a quid pro quo that, if you have another
02:18:56 2 event that's going to raise some money for another function,
02:19:00 3 they may trade out with you, kind of thing, which they do with
02:19:04 4 all organizations, according to Mr. Cooper's affidavit.

02:19:07 5 So I'm not sure that if you look at *Lemon* and look at
02:19:14 6 it in the context of the Establishment Clause and the
02:19:17 7 purpose --

02:19:17 8 **THE COURT:** Well, if the cross were just, what, 100
02:19:22 9 feet farther north on the other side of the street it wouldn't
02:19:24 10 be a problem. It wouldn't be in the park, it wouldn't be part
02:19:29 11 of the City's.

02:19:30 12 **MR. DANIEL:** True.

02:19:31 13 **THE COURT:** But the City owns it, maintains it.

02:19:33 14 **MR. DANIEL:** Well, the City owns it and the --

02:19:35 15 **THE COURT:** Well, it has been maintained, the evidence
02:19:37 16 in the record shows that.

02:19:40 17 **MR. DANIEL:** \$2,000 out of about several million
02:19:44 18 dollars. I did the calculation, and I don't remember exactly,
02:19:45 19 but the calculation is like .001 percent of the City's budget.
02:19:49 20 It is so de minimus as to be nonexistent.

02:19:53 21 **THE COURT:** I think the evidence shows it was actually
02:19:54 22 refurbished a few years ago.

02:19:59 23 **MR. DANIEL:** That's included in that \$2,000 figure,
02:19:59 24 and the refurbishment was paint, I think. So yes, there is
02:20:08 25 evidence that there was a dollar factor in the maintenance of

02:20:10 1 it. There's also evidence I think in Mr. Cooper's affidavit
02:20:15 2 that volunteers have come in and helped do some of that
02:20:18 3 maintenance.

02:20:19 4 But Your Honor is correct, there is an element of
02:20:22 5 public dollar -- just like there is in paying for a chaplain
02:20:26 6 for the Senate and that kind of thing, there's public money
02:20:30 7 involved in some of these things that are accommodations of
02:20:34 8 religion as opposed to the exclusion of religion.

02:20:38 9 Thank you, Your Honor.

02:20:39 10 **THE COURT:** All right. Well, this is clearly a case
02:20:43 11 that will be decided by summary judgment. There are no issues
02:20:50 12 of disputed fact and it's purely a question of law. So I will
02:20:56 13 get a decision to you as quickly as possible.

02:21:00 14 Unless there's something else, that will complete the
02:21:03 15 hearing. Anything else?

02:21:05 16 **MR. DANIEL:** No, Your Honor.

02:21:05 17 **THE COURT:** If not, then we are adjourned. Thank you.

18 *(Proceedings concluded at 2:21 p.m.)*

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20 *I certify that the foregoing is a correct transcript from the*
21 *record of proceedings in the above-entitled matter. Any*
22 *redaction of personal data identifiers pursuant to the Judicial*
Conference Policy on Privacy are noted within the transcript.

23 *Donna L Boland*

24 Donna L. Boland, RPR, FCRR
25 Official Court Reporter

7-18-2017
Date

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