**RECORD NO. 17-13025**

In The

# United States Court Of Appeals
# For The Eleventh Circuit

**AMANDA KONDRAT'YEV; ANDREIY KONDRAT'YEV; ANDRE RYLAND; DAVID SUHOR,**

***Plaintiffs-Appellees,***

**v.**

**CITY OF PENSACOLA, FLORIDA; ASHTON HAYWARD, Mayor; BRIAN COOPER,**

***Defendants-Appellants.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA**

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## APPELLEES' OPPOSITION TO APPELLANTS' PETITION FOR REHEARING EN BANC

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**Monica L. Miller**
**AMERICAN HUMANIST ASSOCIATION**
**1821 Jefferson Place, NW**
**Washington, DC 20036**
**(202) 238-9088**
**mmiller@americanhumanist.org**

***Counsel for Appellees***

**Madeline Ziegler**
**Rebecca S. Markert**
**FREEDOM FROM RELIGION FOUNDATION**
**P. O. Box 750**
**Madison, WI 53701**
**(608) 256-8900**
**mziegler@ffrf.org**
**rmarkert@ffrf.org**

***Counsel for Appellees***

## CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26,1, and Eleventh Circuit Rule 26.1, Appellees certify that the following entities and persons have an interest in the outcome of this appeal:

Abudu, Nancy G. (Counsel for amici curiae)

Agudath Israel of America (amicus curiae)

Allen, Norton & Blue, PA (law firm for Appellants)

American Civil Liberties Union (amicus curiae)

American Civil Liberties Union of Florida (amicus curiae)

American Humanist Association (law firm for Appellees)

Americans United for Separation of Church and State (amicus curiae)

Anti-Defamation League (amicus curiae)

Baptist Joint Committee for Religious Liberty (amicus curiae)

Barkey, David L. (Counsel for amici curiae)

Becket Fund for Religious Liberty (law firm for Appellants)

Beggs & Lane, RLLP (law firm for Appellants)

Bondi, Pamela Jo (Counsel for amicus curiae State of Florida)

Brasher, Andrew L. (Counsel for amicus curiae State of Alabama)

Buschbacher, Michael B. (Counsel for amicus curiae)

Carr, Christopher M. (Counsel for amicus curiae State of Georgia)

Center for Inquiry (amicus curiae)

Central Conference of American Rabbis (amicus curiae)

City of Pensacola, Florida (Appellant)

Clark, Matthew J. (Counsel for amicus curiae)

Coalition for Jewish Values (amicus curiae)

Coleman, Miles E. (Counsel for amicus curiae)

Cooper, Brian (Appellant)

Cozen O'Connor (law firm for amici curiae)

Daniel, James Nixon (Counsel for Appellants)

Darwall, Julian (Counsel for amici curiae)

Davis, Joseph (Counsel for Appellants)

DeWine, Michael (Counsel for amicus curiae State of Ohio)

Didier, Terrie Lee (Counsel for Appellants)

Foundation for Moral Law, Inc. (amicus curiae)

Freedom From Religion Foundation (law firm for Appellees)

Freeman, Stephen M. (Counsel for amici curiae)

Gay, Jack Wesley (Counsel for Appellants)

Goodrich, Luke William (Counsel for Appellants)

Hadassah, Women's Zionist Organization of Am., Inc. (amicus curiae)

Hawley, Joshua D. (Counsel for amicus curiae State of Missouri)

Haynes and Boone, LLP (law firm for amicus curiae)

Hayward, Ashton (Appellant)

Hill, Jr., Curtis T. (Counsel for amicus curiae State of Indiana)

Hunter, Mike (Counsel for amicus curiae State of Oklahoma)

International Municipal Lawyers Association (amicus curiae)

Jenny, Brenna E. (Counsel for amicus curiae)

Jewish Social Policy Action Network (amicus curiae)

Jews for Religious Liberty (amicus curiae)

Jones Day (law firm for amici curiae)

Junior Chamber International Florida (amicus curiae)

Kahn, Charles J. (Magistrate Judge)

Katskee, Richard B. (Counsel for amici curiae)

Kaur, Amrith (Counsel for amici curiae)

Klingler, Richard D. (Counsel for amicus curiae)

Kondrat'yev, Amanda (Appellee)

Kondrat'yev, Andreiy (Appellee)

Landrey, Jeff (Counsel for amicus curiae State of Louisiana)

Laxalt, Adam Paul (Counsel for amicus curiae State of Nevada)

Little, Nicholas J. (Counsel for amici curiae)

Mach, Daniel (Counsel for amici curiae)

Markert, Rebecca (Counsel for Appellees)

Marshall, Steve (Counsel for amicus curiae State of Alabama)

McConnell, Michael W. (Counsel for Appellants)

Miller, Monica Lynn (Counsel for Appellees)

Muslim Advocates (amicus curiae)

National Council of Jewish Women (amicus curiae)

Nellis, Andrew L. (Counsel for amici curiae)

Niose, David A. (Counsel for Appellees)

Paulsen, Ryan (Counsel for amicus curiae)

Pasek, Jeffrey I. (Counsel for amici curiae)

Peterson, Doug (Counsel for amicus curiae State of Nebraska)

Reyes, Sean (Counsel for amicus curiae State of Utah)

Roth, Yaakov M. (Counsel for amici curiae)

Ryland, Andre (Appellee)

Schmidt, Derek (Counsel for amicus curiae State of Kansas)

Shebaya, Sirine (Counsel for amici curiae)

Sidley Austin LLP (law firm for amicus curiae)

Sikh Coalition (amicus curiae)

Smith, Jonathan (Counsel for amici curiae)

State of Alabama (amicus curiae)

State of Florida (amicus curiae)

State of Georgia (amicus curiae)

State of Indiana (amicus curiae)

State of Kansas (amicus curiae)

State of Louisiana (amicus curiae)

State of Missouri (amicus curiae)

State of Nebraska (amicus curiae)

State of Nevada (amicus curiae)

State of North Dakota (amicus curiae)

State of Ohio (amicus curiae)

State of Oklahoma (amicus curiae)

State of South Carolina (amicus curiae)

State of Utah (amicus curiae)

Stenehjem, Wayne (Counsel for amicus curiae State of North Dakota)

Suhor, David (Appellee)

Suri, Vivek (Counsel for amici curiae)

The Rabbinical Council of America (amicus curiae)

Todd, Gordon D. (Counsel for amicus curiae)

Union for Reform Judaism (amicus curiae)

Union of Orthodox Jewish Congregations of America (amicus curiae)

Vinson, C. Roger (District Court Judge)

Webb, Derek A. (Counsel for amicus curiae)

Wilson, Alan (Counsel for amicus curiae State of South Carolina)

Windham, Lori (Counsel for Appellants)

Women of Reform Judaism (amicus curiae)

Ziegler, Madeline (Counsel for Appellees)

Appellees, Amanda Kondrat'yev, Andreiy Kondrat'yev, Andre Ryland, and David Suhor, are individuals, and private parties. There are no publicly-traded corporations or parties to the appeal that have a financial interest in the outcome.

Respectfully submitted,

October 22, 2018

/s/ Monica L. Miller

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

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## STATEMENT OF THE ISSUE

The Supreme Court has held that a government's religious display violates the Establishment Clause if it lacks a primary secular purpose. The City of Pensacola (the "City") owns, maintains, and prominently displays a 34-foot-tall cross in a popular city park for Easter Sunrise Services. The District Court ruled that the "Cross clearly has a primarily—*if not exclusively*—religious purpose," violating the Establishment Clause. The panel affirmed. The issue is simply: Does a city's massive Christian cross permanently displayed in a city park for exclusively religious ends violate the Establishment Clause?

## STATEMENT OF THE CASE

In 1969, the City approved the permanent erection of a freestanding 34-foot-tall Latin cross in Bayview Park (the "Cross" or "Bayview Cross") for an exclusively religious purpose: Easter Sunrise Services.[1] The Cross has consistently been used as a holy object for these annual Christian worship services.[2] Since 2009, the City has spent at least $2,000 on the Cross's maintenance.[3]

The Cross is one of only two monuments—and the only religious display—in the entire 28-acre park.[4] The Christian monolith towers over the main parking lot, adjacent to the amphitheater, boat ramps, jogging/bike path (along the shoreline), and tennis courts, and is visible from the City's Community Center and Senior Citizens Center.[5]

The City's first Easter service was held in 1941.[6] In 1949, an amphitheater was installed for the services.[7] In 1951, the City furnished a plaque for the amphitheater, which refers to "Easter Sunrise."[8]

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[1] (R.53)(R.206)(R.371-74)(DE-22, 8-11)(DE-41, 1-2).
[2](R.18)(R.50)(R.53-54)(R.57-249)(R.254-288)(R.398)(DE-22,10-11)(DE-30-1, 50-51, 56, 73, 111).
[3] (R.315-344)(R.371)(R.397-98)(DE-22, 9).
[4] (Op.3)(R.8-11)(R.374-375)(DE-22, 9).
[5] (DE-30, 5-6)(DE-1-5)(R.13).
[6](R.57-69)(DE-30-1,50-51)(DE-22, 11).
[7] (R.18)(R.50)(DE-30-1,51)(R.374-375)(DE-22, 9).
[8] (R.18)(R.52)(R.145-147)(DE-30-1,50).

In February 1969, the City approved the erection of a massive permanent cross for these "Easter Sunrise Services," contending it was a "very worthwhile project."[9] The Cross was dedicated at the 29th Easter Service.[10]

There is no purpose for this Cross other than for Christian worship services.[11] The District Court soundly rejected the City's attempts to portray it as a war memorial. (DE-41, 16 n.4). *See also County of Allegheny v. ACLU*, 492 U.S. 573, 599 (1989) ("the fact that the crèche was the setting" for a program dedicated to "world peace" and "war" did not diminish "its religious meaning"). The alleged "170 expressive displays" (Pet.2) scattered throughout the *entire* City are also irrelevant. *Id.* at 581 ("The crèche…was distinct and not connected with any exhibit in the gallery"); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 869 n.16 (2005) (Although courthouse "contained other displays besides the Ten Commandments," it was not "integrated to form a secular display.").

Nor has Bayview Cross stood for "75" years "without controversy." (Pet.1-2, 14).[12] A temporary wooden cross was erected anew each year for some, but not all, services prior to 1969.[13] And in the 1990s, William Caplinger, a local resident,

[9] (R.53)(R.374).
[10](DE-22, 4-5)(R.206)(DE-41, 1).
[11] (R.372-73, Int.16)(R.366-70)(Tr.53:6-9)(DE-41, 11,16)(DE-22, 2-4).
[12] (R.25-37)(R.39-40)(R.247-252)(DE-22,12)(DE-39-2).
[13] (R.415)(R.78)(R.83)(R.93)(R.146)(R.167)(R.174)(R.188-191)(R.197)(DE-22,3).

voiced his "objection to the cross" to the "Director of Leisure Services," who "acknowledged the legal issues with the display."[14]

## ARGUMENT

En banc review "is an extraordinary procedure" intended only to correct a "precedent-setting error of exceptional importance" or, for rehearing en banc, a "*direct conflict* with precedent of the Supreme Court or of this circuit." 11th Cir. R. 35-3 (emphasis added). The City identifies no case, *from any court*, with which the panel's decision conflicts.

### I. The panel's standing decision does not conflict with any Supreme Court or Circuit decision.

Direct unwelcome contact with government religious symbolism in one's community "surely suffices to give the parties standing." *Abington School District v. Schempp*, 374 U.S. 203, 224 n.9 (1963). Both the District Court and the panel properly found that Andre Ryland, who lives near the Cross and unavoidably encounters it during his normal activities, has standing.[15]

The City argues this conflicts with *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.22 (1982) (Pet.5-6), yet this Court's post-*Valley Forge* cases properly maintain that "direct contact with the offensive" display in one's *own community* is sufficient.

[14] (DE-39-2, 36-37)(Op.34 n.6).
[15] (Op.6-8)(DE-41,2)(R.418-423).

*Saladin v. City of Milledgeville*, 812 F.2d 687, 691-93 (11th Cir. 1987); *ACLU v. Rabun County Chamber of Commerce, Inc*., 698 F.2d 1098, 1103-04 (11th Cir. 1983) (per curiam); *cf. ACLU of Fla. v. Dixie County*, 690 F.3d 1244, 1246, 1249-50 (11th Cir. 2012) (where plaintiff had no "ties to property" in county with display and merely alleged an interest in "possibly buying land" there, but other factors beyond the monument deterred him from purchasing land, Court remanded for factfinding to determine whether removing display would redress his injury).

The Circuits have uniformly rejected the City's argument that plaintiffs must change "their conduct to avoid the display." (Pet.8). *See Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist*., 832 F.3d 469, 476-78, 479 n.8 (3d Cir. 2016). In *Pelphrey v. Cobb County*, the plaintiff *intentionally* subjected himself to the offensive prayers on the internet. 547 F.3d 1263, 1279-80 (11th Cir. 2008). The City relies on *Freedom From Religion Found., Inc. v. Zielke*, 845 F.2d 1463 (7th Cir. 1988) (Pet.10), but "the Seventh Circuit has [since] disowned the 'altered behavior' test." *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1029 n.7 (8th Cir. 2004) (citing *Books v. City of Elkhart*, 235 F.3d 292, 299-300 (7th Cir. 2000); *Doe v. Montgomery*, 41 F.3d 1156, 1160-61 (7th Cir. 1994)).

The Circuits have also refused "to cross-pollinate Equal Protection Clause standing jurisprudence with Establishment Clause cases" because "the injuries protected against under the Clauses are different." *Moore v. Bryant*, 853 F.3d 245, 249-50 (5th Cir. 2017) (finding *Allen v. Wright*, 468 U.S. 737 (1984) inapposite).

## II. The panel's decision on the merits does not conflict with decisions of the Supreme Court, this Court, or other Circuits.

### A. En banc review would waste precious judicial resources because the City's Cross violates the Establishment Clause pursuant to settled Supreme Court jurisprudence.

The City's 34-foot-tall Christian cross "violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose." *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987).

The District Court found that "based on the undisputed facts (i.e., the nature of the Latin cross, its dedication at the Easter Sunrise Service, and the mayor's statements), the Bayview Cross clearly has a primarily—*if not exclusively*—religious purpose," and "thus, runs afoul of the First Amendment as currently interpreted by the Supreme Court." (DE-41, 19, 21). The panel affirmed. (Op.9-10). An en banc Court could reach no other conclusion.

It is "settled [Supreme Court] jurisprudence that 'the Establishment Clause prohibits government from abandoning secular purposes.'" *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 8-9 (1989) (citing numerous cases predating *Lemon v. Kurtzman*,

403 U.S. 602 (1971). Both *before*, and "since *Lemon*," looking "to whether government action has 'a secular legislative purpose' has been a common," and even dispositive criteria. *McCreary*, 545 U.S. at 859-60 (quoting *Lemon*) (lack of secular purpose dispositive); *e.g.*, *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (same); *Edwards*, 482 U.S. at 586-593; *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Schempp*, 374 U.S. 203; *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Everson v. Board of Education*, 330 U.S. 1 (1947). In this case, "the answer to that question is dispositive," for this Cross has "*no* secular purpose." *Wallace v. Jaffree*, 472 U.S. 38, 56, 59 (1985).

**1. *McCreary* is binding and controlling.**

The "secular purpose" must be the "pre-eminent" and "primary" force, and "not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864 (citations omitted). When the government places "'an instrument of religion'" on its property, its purpose can "presumptively be understood as meant to advance religion." *Id.* at 867 (citation omitted). *E.g.*, *Stone*, 449 U.S. at 41 (purpose was "plainly religious"). In *McCreary*, the Court held a Ten Commandments display unconstitutional, emphasizing: "When the government initiates an effort to place this [religious] statement alone in public view, a religious object is unmistakable." 545 U.S. at 869.

The "religious object" is even more "unmistakable" here, for the standalone Cross is not only "plainly religious" (*Stone*), its sole purpose is for "Easter Sunrise Services" (R.387), which is a blatantly "religious purpose." *Rabun*, 698 F.2d at 1110-11. "Given the ample support for the District Court's finding of a predominantly religious purpose," this en banc Court would be constrained to "affirm" under *McCreary*, 545 U.S. at 881.

**2. *Rabun* is controlling and enshrined by Supreme Court precedent.**

This Court in *Rabun* squarely held that the "maintenance of [a] cross in a state park violates the Establishment Clause" because the government "failed to establish a secular purpose." 698 F.2d at 1109, 1111. The "decision to dedicate the cross at Easter Sunrise Services" evidenced a distinctly "religious purpose." *Id.* Both the District Court and panel agreed "*Rabun* (with its *Lemon*-based purpose analysis) controls." (Op.10)(DE-41, 21). An en banc Court could not overrule *Rabun* unless it is "'plainly and palpably wrong.'" *McCarthan v. Dir. of Goodwill Indus.-Suncoast*, 851 F.3d 1076, 1096 (11th Cir. 2017). It is neither.

In *Allegheny*, both the majority and Justice Kennedy made clear that the Establishment Clause prohibits a city from placing its imprimatur on a large permanent cross. 492 U.S. at 599, 606-07, 615 n.61 & 661 (Kennedy, J, concurring and dissenting in part). The majority held that a temporary crèche in a courthouse violated the Establishment Clause. *Id.* at 602. The county argued that the

surrounding floral decoration secularized the display. *Id.* at 599. In rejecting this contention, the Court described what it deemed an *obvious* violation, analogous to *Rabun* and here: "It is as if the county had allowed the Holy Name Society to display *a cross* on the Grand Staircase *at Easter*, and the county had surrounded *the cross* with Easter lilies." *Id.* (emphasis added).

Importantly, although Justice Kennedy would have upheld the small seasonal crèche, he went out of his way to explain:

> I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a *large Latin cross* on the roof of city hall. This is…because 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 (emphasis added) (concurring and dissenting). And in support of this "extreme" example, he *specifically* cited *Rabun*, noting that it involved a "cross erected in public park." *Id.*

Even more significantly, the *Salazar v. Buono* plurality *explicitly* adopted Kennedy's large-cross-on-city-hall admonition, and thus, *Rabun* by implication. 559 U.S. 700, 715 (2010) (quoting, 492 U.S. at 661 (citing *Rabun*)). *Buono* reiterated that the "[p]lacement of [a] cross on Government-owned land" is unconstitutional where it carries "the imprimatur of the state." *Id.*

Justices Brennan, Stevens, Blackmun, and Marshall also cited *Rabun* with approval in *Lynch v. Donnelly*, stressing that the majority's "narrow" ruling did not

implicate the sound holding of the "Eleventh Circuit" regarding a "Latin cross on state park." 465 U.S. 668, 695 n.1 (1984) (Brennan, J., dissenting) (citing *Rabun*).

The "deliberation by the en banc Court on a question that has been correctly considered and resolved by a panel would consume precious judicial resources." *In re Morgan*, 717 F.3d 1186, 1194 (11th Cir. 2013) (Pryor, J., concurring in en banc denial). As Judge Newsom understood, "[a]s tempting as it may be to … 'write around' *Rabun*" and eschew *Lemon*, a contrary "Supreme Court decision must be clearly on point" and no such case exists. (Op.11 n.1). Consequently, the en banc Court would be equally powerless to eschew *Lemon* and overrule *Rabun*. *See Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) (lower courts must *not* "conclude our more recent [Establishment Clause] cases have, by implication, overruled an earlier precedent.").

**3. An en banc Court is bound by the secular purpose requirement.**

Even assuming, *arguendo*, the Court could evade the *Lemon* "test," it would still be bound by the "settled" secular purpose requirement, *Texas Monthly*, 489 U.S. at 8-9; a "'requirement'" that "'is precisely tailored to the Establishment Clause's purpose.'" *Edwards*, 482 U.S. at 586-87 (citation omitted). *Lemon* merely "encapsulate[s] the essential precepts of the Establishment Clause," *Allegheny*, 492 U.S. at 590-91, including the purpose requirement. *Wallace*, 472 U.S. at 55-56. Years before *Lemon*, the Court announced in *Schempp*: "[W]hat are the purpose and

the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment" violates "the Constitution." 374 U.S. at 222. *See also Epperson*, 393 U.S. at 107-08.

The Supreme Court's most recent religious display case reaffirmed the "intuitive importance of official purpose to the realization of Establishment Clause values," and rejected the "seismic" argument that *Lemon*'s purpose requirement should be disregarded or minimized. *McCreary*, 545 U.S. at 861-62.

### B. There is no conflict with any Supreme Court decision.

#### 1. *Van Orden*

The City's argument that *Van Orden v. Perry*, 545 U.S. 677 (2005) "rejected" *Lemon* (Pet.ii,10-16) is meritless for five reasons. First, the majority in *McCreary* invalidated a Ten Commandments display under *Lemon* on the very same day. Second, the plurality *applied Lemon*'s purpose prong, finding "no evidence of such" a "primarily religious purpose." *Id*. at 691 n.11. Third, the plurality merely said *Lemon* was "not useful" for "the sort" of display Texas erected. *Id*. at 686. And that six-foot-tall display—integrated into a unified-museum-like setting among "17 monuments and 21 historical markers" (of similar size)—was the Ten Commandments, which has an "undeniable historical meaning" tied to the foundations of lawmaking. *Id*. at 681, 688-90.

Fourth, Justice Breyer's *controlling* concurrence stated *Lemon* would continue to be "useful." *Id.* 700. He joined the *McCreary* majority and went out of his way (at 704), to express disagreement with Justice Scalia's *McCreary* dissent arguing *Lemon* should be "abandoned (at 902-03). Notably, even Justice Scalia agreed that "[t]he Establishment Clause would prohibit, for example, governmental endorsement of a particular version of the Decalogue as authoritative." 545 U.S. at 894 n.4 (dissenting).

Fifth, like the plurality, Justice Breyer adhered to *Lemon*'s purpose test. 545 U.S. at 701-702. In fact, he applied the *entire* test, concluding that the display served a "primarily nonreligious purpose," and neither advanced religion nor created "an 'excessive government entanglement.'" *Id.* at 700, 703-04. He simply declared that in difficult "borderline cases" involving a dual-meaning symbol in a museum-like setting, where the "nonreligious aspects of the tablets' message [] predominate[d]," there is "no test-related substitute for the exercise of legal judgment." *Id.* at 699-702. Justice Breyer deemed it critical that the display was not *used* for any "religious activity." *Id.* at 702.

**2. *Buono***

Next, the City argues that the *Buono* plurality "criticized 'the so-called *Lemon* test," suggesting that it is no longer 'the appropriate framework' to apply." (Pet.12). But the "*Lemon* test" is not even mentioned there. 559 U.S. at 720-21. Rather, the

plurality, in *dicta*, merely questioned whether the "'*reasonable observer*' standard continued to be the appropriate framework" in light of the *land transfer* because courts "do not inquire into 'reasonable observer' perceptions with *respect to objects on private land*." *Id.* (emphasis added).

Furthermore, the plurality expressly adopted Justice Kennedy's *Allegheny* decree that, independent of *Lemon*, "'the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall…'" 559 U.S. at 715 (quoting 492 U.S. at 661). *Buono* contrasted this "extreme" example with the small cross in the desert, noting it was "not an attempt to set the *imprimatur* of the state on a particular creed." *Id.* 707, 715.

Justice Alito agreed that the absence of *government imprimatur* was crucial. *Id.* at 724-25 (concurring). He explained that private citizens placed "their monument on that spot, *apparently without obtaining approval* from any federal officials, and this use of federal land seems to have gone largely unnoticed for many years." *Id.* (emphasis added). It would be different if the cross were constructed "on the National Mall." *Id.* at 728.

Bayview Cross *was* emplaced for a Christian purpose with the enthusiastic support of the City. And whereas the *Buono* cross "was seen by more rattlesnakes than humans," *id.* at 725, "[t]ens of thousands of Pensacolians have used the site." (Appellants' Br.23).

### *3. Galloway*

Lastly, the City argues that *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) "squarely rejected *Lemon*" (Pet.ii,12), yet *Lemon* is not mentioned in the opinion. It did, however, adopt Justice Kennedy's *Allegheny* concurrence, *id.* at 1819, 1825, which condemned a city-sponsored cross and expressed contentment to "remain within the *Lemon* framework." 492 U.S. at 661, 655. Justice Kennedy subsequently joined the majority in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308-30 (2000), which invalidated school prayer under *Lemon*'s purpose and effect prongs. And his *Galloway* opinion made clear that *Santa Fe* was not impacted by the decision. 134 S. Ct. at 1827.

*Galloway* simply applied and extended *Marsh v. Chambers*, 463 U.S. 783 (1983). As Justice Alito summarized: "All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures." 134 S. Ct. at 1834 (concurring).

The City seizes on Justice Kennedy's statement about "[a]ny test the Court adopts" (Pet.12), but this passage just reaffirmed that *Marsh* stands "for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice" was "accepted by the Framers." *Id.* at 1819. The Court warned that *Galloway* "must *not* be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id.* (emphasis added).

And although *Marsh* did not apply *Lemon*, the Supreme Court and this Court applied *Lemon* in many subsequent decisions, making clear that *Marsh* is inapposite in display cases. *E.g.*, *McCreary*, 545 U.S. at 860 n.10; *Allegheny*, 492 U.S. at 604 n.53; *Lynch*, 465 U.S. at 683; *Edwards*, 482 U.S. at 583 n.4 (*Marsh* "not useful" in other contexts); *Glassroth v. Moore*, 335 F.3d 1282, 1296-98 (11th Cir. 2003); *Selman v. Cobb Co. Sch. Dist.*, 449 F.3d 1320 (11th Cir. 2006); *Pelphrey*, 547 F.3d at 1276 (*Marsh* inapplicable to "religious monuments."). Just as *Marsh* did not overrule *Lemon* in upholding state legislative prayer, neither did *Galloway*, *Pelphrey*, or *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577 (11th Cir. 2013) in applying *Marsh* to municipalities. *E.g.*, *Smith v. Governor for Ala.*, 562 F. App'x 806, 816 (11th Cir. 2014) (applying *Lemon*).

*Galloway* did not apply any "test." It simply determined whether Greece's practice fit "within the [*Marsh*] tradition." *Id*. at 1819, 1825. The "inquiry remains a fact-sensitive one" that considers "both the setting in which the prayer arises and the audience to whom it is directed." *Id*. at 1823-25. *See Lund v. Rowan County*, 863 F.3d 268, 277 (4th Cir. 2017) (en banc) (government-led *legislative prayers* are "a conceptual world apart" from *Galloway* and thus unconstitutional), *cert. denied*, 138 S. Ct. 2564 (2018).

En banc review would be futile because the City's Cross is certainly not "constitutional" under *Galloway*. (Pet.13). First, the Cross is not an "internal act" to

"accommodate the spiritual needs of lawmakers," but instead, promotes "religious observance among the public," contravening *Marsh*. 134 S. Ct. at 1825-26. Second, there "is a complete lack of evidence that our founding fathers were aware of the practice of placing crosses" in public parks. *Greater Houston Chapter ACLU v. Eckels*, 589 F. Supp. 222, 237 (S.D. Tex. 1984), *reh'g denied*, 763 F.2d 180 (5th Cir. 1985); *accord Glassroth*, 335 F.3d at 1298. Third, "the Framers considered legislative prayer a *benign* acknowledgment" of religion because "no faith" was "excluded" or "favored." 134 S. Ct. at 1819. *Galloway* reaffirmed the importance of "a policy of nondiscrimination," upholding Greece's practice because even an "atheist" could "give the invocation." *Id.* at 1816, 1824 (emphasis added). The cross, by contrast, "is an especially potent sectarian symbol," *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995), that "proselytize[s] on behalf of a particular religion." *Allegheny*, 492 U.S. at 661 (Kennedy, J.).

The City argues its Cross survives *Galloway* merely because the *Van Orden* plurality recognized "the role of religion in American life." 545 U.S. at 686. (Pet.13). But the plurality only discussed general religious references. *Id.* at 689 n.9. Even *Lemon*'s harshest critics understand that "[h]istorical practices" demonstrate "a distance between the acknowledgment of a single Creator" and "Jesus Christ," the latter being an "establishment of a religion." *McCreary*, 545 U.S. at 897-98, 894 (Scalia, J., dissenting). Notably, Judge Newsom's suggestion that this Cross poses

"'no greater potential for an establishment of religion'" (Op.20-22), quotes Kennedy's *Allegheny* concurrence, 492 U.S. at 670, which of course, stands for the exact *opposite* conclusion.

Consequently, there is no conflict with *Doe v. United States*, 2018 U.S. App. LEXIS 24387 (8th Cir. Aug. 28, 2018). (Pet.15-16). The Eighth Circuit simply deemed *Galloway* the most analogous decision because both the national motto and legislative prayer "'strive for the idea that people of *many faiths* may be united.'" *Id.* at *6-7 (emphasis added).

**C. Reversal would create a split.**

Every Circuit that has determined the constitutionality of a cross intended for plainly religious ends found it unconstitutional. *See Gonzales v. North Township Lake County*, 4 F.3d 1412, 1421 (7th Cir. 1993) (Easter); *Harris v. City of Zion*, 927 F.2d 1401, 1413 (7th Cir. 1991) (specific church); *ACLU v. City of St. Charles*, 794 F.2d 265, 273 (7th Cir. 1986) (Christmas); *Rabun*, 698 F.2d at 1101 (Easter); *Gilfillan v. Philadelphia*, 637 F.2d 924, 929 (3d Cir. 1980) (Pope's mass). There is *no* contrary authority.

Indeed, there are at least *thirty* federal cases—including by the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits—holding crosses unconstitutional in a

range of contexts,[16] and only *three* highly unique outliers, each involving an integrated display with a self-evident secular purpose: *American Atheists, Inc. v. Port Authority*, 760 F.3d 227, 232, 234-36, 238 (2d Cir. 2014) ("a particular artifact recovered from World Trade Center debris" donated along with "more than 10,000 artifacts" in 9/11 museum); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008); *Murray v. Austin*, 947 F.2d 147 (5th Cir. 1991). *See Trunk v. City of San Diego*, 629 F.3d 1099, 1111 (9th Cir. 2011) (*Weinbaum* and *Murray* involved small crosses *integrated* into seals with highly unique "localized secular meanings."). And of the thirteen cross cases decided after *Van Orden*, and six decided after *Galloway*, every single court adhered to *Lemon*.[17]

## III. There is no "precedent-setting error of exceptional importance."

While the City argues this case is "of exceptional importance" (Pet.i), this Circuit requires a "*precedent-setting error* of exceptional importance." 11th Cir. R. 35-3 (emphasis added). The City identified none. This "Court often decides issues of exceptional importance without granting en banc review," including "matters of church and state." *In re Morgan*, 717 F.3d at 1194 (Pryor, J., concurring) (citing *Pelphrey* and *Glassroth*).

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[16] Resp. Br. *American Legion v. AHA* (17-1717), https://perma.cc/9Y3E-GB9Q at 15-18 (listing 29 cases, excluding this panel's ruling and *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n*, 874 F.3d 195 (4th Cir. 2017)).
[17] *Id.* at 21.

Accordingly, there is no reason to hold this petition "in abeyance pending the Supreme Court's action." (Pet.19). If *certiorari* is denied, an en banc Court would have to affirm under *Lemon* and *McCreary*.

## CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted,

October 22, 2018

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

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

MADELINE ZIEGLER
Freedom From Religion Foundation
PO Box 750, Madison, WI 53701
Phone: 608-256-8900
Email: mziegler@ffrf.org
WI Bar Number: 1097214

***COUNSEL FOR APPELLEES***

## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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Dated: October 22, 2018

/s/ Monica L. Miller
MONICA L. MILLER

*Counsel for Plaintiffs-Appellees*

# CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of October, 2018, I caused the foregoing to be filed with the Clerk of the Court, via the CM/ECF System, which will send notice of such filing to all registered users.

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/s/ Karen R. Taylor
Karen R. Taylor
GIBSON MOORE APPELLATE SERVICES, LLC
206 East Cary Street
Richmond, VA 23219
(804) 249-7770