

July 29, 2015

Via Email

City of Pensacola, Florida

Ashton J. Hayward, Mayor; mayorhayward@cityofpensacola.com

Lysia H. Bowling, City Attorney; legal@cityofpensacola.com

Brian Cooper, Director; bcooper@cityofpensacola.com

cc: East Hill Neighborhood Association; info@myeasthill.org

Re: Unconstitutional Cross on Government Property

Dear Mayor Hayward, Ms. Bowling and Mr. Cooper,

A City of Pensacola resident has contacted our office on behalf of several concerned residents to request assistance with regard to what is correctly perceived as a constitutional violation. Specifically, the City of Pensacola is violating the Establishment Clause of the First Amendment by prominently displaying a towering, stand-alone Latin cross—a Christian symbol—on government property in Bayview Park. An image of this cross is provided below.



Because this cross violates the Establishment Clause, we hereby demand that the City promptly remove it to private property, and if the City does not, our organization will pursue the matter through litigation in federal court.

The American Humanist Association (AHA) is a national nonprofit organization with over 460,000 supporters and members across the country, including many in Florida. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring a separation of church and state. Our legal center includes a network of cooperating attorneys from around the country, including Florida, and we have litigated constitutional cases in state and federal courts from coast to coast.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It specifically commands that a city "pursue a course of neutrality toward religion" despite a community's "historical acceptance" of a particular religious monument on public property. *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983) (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963)) (cross placed in a state park violated the Establishment Clause). Not only must the government not advance, promote, affiliate with, or favor any particular religion, it "may not favor religious belief over disbelief." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 593, 610 (1989) (citation omitted). The City's Christian cross prominently displayed on government property violates the Establishment Clause as it strongly affiliates the government with religion and Christianity specifically, while sending a stigmatic message to non-Christians that they are outsiders, unwelcome in their own community. *See id.* at 606-07 ("the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin Cross"); *id.* at 661 (Kennedy, J., concurring and dissenting in part) (same).

Federal courts have been virtually unanimous in holding that a government display of the cross is unconstitutional, including the Eleventh Circuit and Florida District Courts. *See, e.g., ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (war memorial cross unconstitutional); *Am. Atheists, Inc. v. City of Starke*, No. 3:05-cv-977-J-16MMH, 2007 U.S. Dist. LEXIS 19512, at *14 (M.D. Fla. March 19, 2007) (cross on city water tower unconstitutional); *Mendelson v. St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989) (cross on government building unconstitutional); *Trunk v. City of San Diego*, 629 F.3d 1099, 1066 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2535 (2012); *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1162 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 12 (2011) (individualized memorial crosses for state troopers on public roadside unconstitutional); *Carpenter v. City & County of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) (war memorial cross in public park unconstitutional); *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995) (cross on city seal unconstitutional); *Ellis v. La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993) (three separate

government cross displays unconstitutional); *Gonzales v. North Township of Lake County*, 4 F.3d 1412, 1418 (7th Cir. 1993) (war memorial crucifix in public park unconstitutional); *Harris v. City of Zion*, 927 F.2d 1401, 1414 (7th Cir. 1991) (cross on city seal unconstitutional); *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (lighted cross on government building unconstitutional); *Friedman v. Board of County Commissioners*, 781 F.2d 777, 782 (10th Cir. 1985) (en banc) (cross on city seal unconstitutional); *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 930 (3d Cir. 1980) (platform containing a 36-foot-tall cross unconstitutional); *Am. Humanist Ass'n v. City of Lake Elsinore*, No. 5:13-cv-00989-SVX-OPx, 2014 U.S. Dist. LEXIS 25180, at *23-24 (C.D. Cal. February 25, 2014) (city monument displaying cross headstone markers held unconstitutional); *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018, 1029 (S.D. Ind. 2013) (“Accordingly, the City is hereby PERMANENTLY ENJOINED from permitting the erection of the display as described and referred to herein as ‘Cross the River’ within the Riverfront area.”); *ACLU v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998) (cross on city seal unconstitutional); *Granzeier v. Middleton*, 955 F. Supp. 741, 746 (E.D. Ky. 1997), *aff’d*, 173 F.3d 568 (6th Cir. 1999) (sign containing a 4-inch-high crucifix unconstitutional); *Jewish War Veterans v. U.S.*, 695 F. Supp. 3 (D.D.C. 1988) (war memorial cross on military base unconstitutional); *ACLU v. Mississippi State General Services Admin.*, 652 F. Supp. 380, 382 (S.D. Miss. 1987) (illuminated cross on state owned-building unconstitutional); *Libin v. Greenwich*, 625 F. Supp. 393, 399 (D. Conn. 1985) (3-by-5 foot cross on firehouse unconstitutional); *Greater Houston Chapter of ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984), *reh’g denied*, 763 F.2d 180 (5th Cir. 1985) (war memorial containing crosses and Star of David in public park unconstitutional); *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) (cross on city hall unconstitutional). *See also Allegheny*, 492 U.S. at 606-07 (explaining that there is “no doubt, ‘ . . . that the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross . . . 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.”).

To comply with the Establishment Clause, a government practice must pass the *Lemon* test,¹ pursuant to which it must: (1) have a secular purpose; (2) not have the effect of advancing or endorsing religion; and (3) not foster excessive entanglement with religion. *Id.* at 592. Government action “violates the Establishment Clause if it fails to satisfy any of these prongs.” *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). *See also Am. Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512, *14 (M.D. Fla. 2007) (in “religious-symbol cases, the Supreme Court has applied the analysis outlined in *Lemon*”).

¹ The test is derived from *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

² *See also Robinson*, 68 F.3d at 1232 (“The religious significance and meaning of the Latin or Christian cross are unmistakable.”); *Gonzales*, 4 F.3d at 1418 (“we are masters of the obvious, and we know that the crucifix is a Christian symbol . . . In fact, the crucifix is arguably the quintessential Christian

The courts have held government cross displays unconstitutional even when: (1) the crosses were memorial roadside grave markers for individual fallen troopers, *Duncan*, 616 F.3d at 1162; (2) where the cross was longstanding, e.g., *Trunk*, 629 F.3d at 1110, *Gonzales v. North Twp. of Lake Cnty.*, 4 F.3d 1412 (7th Cir. 1993); (3) where the cross was used to promote tourism, e.g., *Rabun*, 698 F.2d 1098 (11th Cir. 1983); see also *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980); (4) when the crosses accurately replicate a World War II tombstone, *Am. Humanist Ass'n v. City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. Feb. 25, 2014); (5) serve as a historical landmark, *City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996); *Ellis*, 990 F.2d at 1525; *Mendelson v. St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989); (6) have independent historical significance, *Carpenter*, 93 F.3d at 630; *Harris*, 927 F.2d at 1414 (7th Cir. 1991); and (7) include other secular and patriotic symbols, *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, or Stars of David, *ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984).

Binding caselaw leaves no room for doubt that the City's cross must be removed. The Eleventh Circuit in *Rabun* specifically held that a cross displayed in a public park violated the Establishment Clause and ordered its removal. 698 F.2d at 1111. The cross had been in that location for two decades. *Id.* at 1101-02. The cross was popular in the community and the site of the Annual Easter Sunrise Service. *Id.* A group of concerned individuals sued to enjoin the placement of the cross on public land and won in both the district court and then the Eleventh Circuit on appeal because the "maintenance of the cross in a state park violates the Establishment Clause of the First Amendment." *Id.* at 1111.

Two U.S. District Courts in Florida have also held cross displays on government property unconstitutional, ordering their removal. *Starke*, 2007 U.S. Dist. LEXIS 19512, at *16-21; *Mendelson*, 719 F. Supp. at 1069-70. In *Starke*, a City owned and operated a public water tower that had a lit cross affixed to it. 2007 U.S. Dist. LEXIS 19512, at *5. The court held the cross violated the Establishment Clause. *Id.* at *21. In *Mendelson*, a Latin cross was donated to a city as a gift and was placed on top of its water tower. 719 F. Supp. at 1066-67. The city argued that the cross was a "landmark for citizens and others," and was an object that made some citizens feel at "home." *Id.* However, the courts in both of these cases explicitly cited and followed the precedent set in *Rabun*, as all District Courts are obligated to do in Florida, and found that the placement of a cross on government-owned property violated the Establishment Clause. *Id.* at 1069-70; *Starke*, 2007 U.S. Dist. LEXIS 19512, at *21.

Turning to the facts here, the City's stand-alone Latin cross unquestionably violates the Establishment Clause pursuant to *each* prong of the *Lemon* test. "There is no question that the Latin cross is a symbol of Christianity, and that its placement on public land . . . violates the Establishment Clause." *Eugene*, 93 F.3d at 620. See also *Mendelson*, 719 F. Supp. at 1069 ("[A] cross has always been a symbol of Christianity, and *it has never had any secular purpose.*") (emphasis added).

Where, as here, the government promotes an “intrinsically religious” display, such as a cross, it “cannot meet the secular purpose prong” of the *Lemon* test. *Jager v. Douglas County School Dist.*, 862 F. 2d 824, 829-30 (11th Cir. 1989). *See also Stone v. Graham*, 449 U.S. 39, 41 (1980) (holding that “[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”); *Jaffree v. Wallace*, 705 F.2d 1526, 1534-35 (11th Cir. 1983), *aff’d* 472 U.S. 38 (1985); *N.C. Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991). When the government utilizes “religious symbols . . . its ability to articulate a secular purpose becomes the crucial focus under the Establishment Clause.” *Rabun*, 698 F.2d at 1110 (Latin cross in public park held unconstitutional under *Lemon*) (internal footnote omitted). “Several courts—including the Supreme Court—have noted that the presence of patently religious symbols, such as the Latin cross, suggest that the purpose of erecting a monument is religious motivated.” *Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, *36.

Federal courts, including the Eleventh Circuit, have uniformly recognized that the “cross is a universally recognized symbol of Christianity.” *Rabun*, 698 F.2d at 1103; *Trunk*, 629 F.3d at 1110-11 (citing *Buono v. Norton*, 371 F.3d 543, 544-45 (9th Cir. 2004); *Eugene*, 93 F.3d at 620; *Carpenter*, 93 F.3d at 630; *Ellis*, 990 F.2d at 1525-27).²

As such, the courts have made it clear that the government has no secular purpose in displaying the cross on its property. *See Rabun*, 698 F.2d at 1110-11 (“even if the . . . purpose for constructing the cross was to promote tourism, this . . . would not have provided a sufficient basis for avoiding conflict with the Establishment clause” as secular means were available); *Gonzales*, 4 F.3d at 1421 (the court could find “no secular purpose served by a crucifix”); *Harris*, 927 F.2d at 1414 (small cross on city logo); *City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *23-24; *City of Starke*, 2007 U.S. Dist. LEXIS 19512, at *14; *Eckels*, 589 F. Supp. 222 (war memorial cross); *Gilfillan*, 637 F.2d at 930 (platform containing a 36-foot-tall cross); *Mendelson*, 719 F. Supp. at 1069 (the cross is “unmistakably a universal symbol of Christianity, and it [therefore] has no secular purpose.”); *Mississippi State*, 652 F. Supp. at 382 (“it is clear that the overriding and motivating purpose of the display is to convey a message of endorsement of the Christian religion.”); *Libin*, 625 F. Supp. at 399 (explaining that “[b]ecause the cross has no meaning in the context of the celebration of Christmas except as religious symbol, there can be no secular purpose for including it in a Christmas display.”); *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1979) (cross on city hall had religious purpose).

² *See also Robinson*, 68 F.3d at 1232 (“The religious significance and meaning of the Latin or Christian cross are unmistakable.”); *Gonzales*, 4 F.3d at 1418 (“we are masters of the obvious, and we know that the crucifix is a Christian symbol . . . In fact, the crucifix is arguably the quintessential Christian symbol.”); *City of St. Charles*, 794 F.2d at 271 (“It is, indeed, the principal symbol of Christianity . . . When prominently displayed on a [government property] . . . the cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be.”); *Friedman*, 781 F.2d at 782 (government’s prominent use of seal bearing Latin cross “conveys a strong impression to the average observer that Christianity is being endorsed”).

Here, as in the many cases cited above, there is no secular purpose “for the display of the cross.” *Mississippi State*, 652 F. Supp. at 383. Indeed, the “only purpose which can be ascribed to the display of the cross is to either advance or endorse the Christian religion.” *Id.* And, if the government “intended by their official activity to create a display of singularly religious significance, then their action was illegal.” *Id.*

The history of the cross underscores its religious purpose. The Eleventh Circuit was clear in *Rabun* that “the selection of an Easter deadline for completion of the cross, the decision to dedicate the cross at Easter Sunrise Services, and the several inspirational statements contained in the Chamber’s press releases all point to the existence of a religious purpose.” 698 F.2d at 1110-11. *See also Trunk*, 629 F.3d at 1121 (“[T]hat the effect of the symbols’ presence is religious is evidenced by what the site has been used for since the [cross was] constructed [including Easter sunrise services]. There is nothing remotely secular about church worship.” (quoting *Eckels*, 589 F. Supp. at 235)).

This cross is immediately juxtaposed to a platform that itself makes explicit reference to the major Christian holiday of Easter and the Easter Sunrise services for which this platform was intended. The platform and cross were both placed in that location during the same time period, and the news media and the City Council both referenced Easter Sunday services as the deadline and the event at which the dedication of a plaque located at these structures would occur. A local newspaper stated, “The new permanent platform at Bayview park will be completed for services, Joe Emmanuel, chairman of the Jaycee Easter Sunrise service committee, said Thursday.” A member of the City Council stated, “I move that it be complied with, and that a plaque be furnished by the City, with dedication services to be held on next Easter at sunrise.” This particular “history of this Cross only deepens its religious meaning” and purpose. *Trunk*, 629 F.3d at 1124. This history clearly casts “serious doubt on any argument that it was intended as a generic symbol, and not a sectarian one.” *Id.* at 1124.

Such “[p]ublic comments of [a display's] sponsors’ is important evidence to consider in assessing government purpose.” *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *24. *See McCreary*, 545 U.S. at 866 n.14; *Edwards*, 482 U.S. at 594-95; *Wallace*, 472 U.S. at 57-58; *Am. Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512, *14 (M.D. Fla. 2007). This includes the religious motivations of a display’s private sponsors. *See Rabun*, 698 F.2d at 1111 (finding unconstitutional purpose based in part on “the several inspirational statements contained in the Chamber’s press releases.”); *Gonzales v. North Twp. of Lake Cnty.*, 4 F.3d 1412, 1418 (7th Cir. 1993); *Books v. City of Elkhart*, 235 F.3d 292, 303 (7th Cir. 2000) (“The participation of these influential members of several religious congregations makes it clear that the purpose for displaying the monument was [religious]”); *Cooper v. USPS*, 577 F.3d 479, 493-95 (2d Cir. 2009) (no secular purpose for “displaying [a Christian Church’s] religious material”). The statements by the cross’s sponsors here reveal an unyielding religious purpose.

No avowed governmental purpose can overcome the obvious religious purpose that the City's cross serves. The Supreme Court and the Eleventh Circuit have held that the purpose prong is also violated where, as here, the government uses inherently religious means to achieve ostensibly secular ends. "[A]ttempting to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally impermissible purpose." *Holloman v. Harland*, 370 F.3d 1252, 1286 (11th Cir. 2004). The Eleventh Circuit in *Rabun* adopted this reasoning in holding that a memorial cross failed the purpose prong, explaining: "even if the . . . purpose for constructing the cross was to promote tourism, this alleged secular purpose would not have provided a sufficient basis for avoiding conflict with the Establishment Clause." 698 F.2d at 1111 (citations omitted).

Similarly, in *Mendelson*, a cross was given as a gift to a Florida city and was placed on the city's water tower. 719 F. Supp. at 1067. The city contended "that the cross has secular and historical value as a guidepost for fishermen and pilots and as a landmark." *Id.* at 1069-70. Yet the district court in Florida declared: "Even if the court found the City's purpose to be truly secular, a government may not 'employ religious means to reach a secular goal unless secular means are wholly unavailing.'" *Id.* (citation omitted).

The government "cannot overcome the first *Lemon* prong merely by articulating" some secular purpose. *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1527 (11th Cir. 1993). A display "in which an impermissible purpose predominates is invalid even if the legislative body was motivated in part by legitimate secular objectives." *Id.* See *Hall*, 630 F.2d at 1020-21.

Nor is it relevant that the cross may have been donated to the City by a private entity or by the Chamber of Commerce. See *Ellis v. City of La Mesa*, 990 F.2d 1518, 1520-25 (9th Cir. 1993) (finding "unpersuasive the fact that the cross was built and dedicated as a memorial to a private individual before being conveyed, in trust, nevertheless, to the County."). For instance, in *Rabun*, the Chamber of Commerce approved a plan for the erection of a cross on government land. 698 F.2d at 1101. The Chamber sought approval from the Georgia Department of Natural Resources (Department). The Chamber would take full responsibility for the fund-raising of both the construction and maintenance costs. *Id.* The Department merely approved. *Id.* In fact, after receiving a complaint, the Department ordered "the Chamber to remove the cross from state property." *Id.* at 1101-02. The court found the purpose prong violated based largely on the Chamber's "decision to dedicate the cross at Easter Sunrise Services, and the several inspirational statements contained in the Chamber's press releases." *Id.* at 1111 (emphasis added). The Eleventh Circuit specifically held that the Chamber's motives could be imputed for the following reasons: "The cross is located on state property. The state, acting through its Department of Natural Resources, initially approved the Chamber's project and later failed to

require the Chamber to remove the cross. Under the now familiar principles of state action, the state's involvement with the cross is clearly sufficient [.]” *Id.* at 1109, n.19.³

In *Eugene*, the Ninth Circuit held that a concrete cross in a city park constituted an impermissible endorsement of Christianity, even though it also served as a war memorial. 93 F.3d 617. “The land was donated to the City . . . From the late 1930s to 1964, private individuals erected a succession of wooden crosses in the park, one replacing another as they deteriorated. In 1964, private individuals erected the cross at issue in th[e] litigation.” *Id.* at 618. There, as here, “[m]emorial ceremonies were [] conducted by the American Legion” for many years. *Id.* at 625 n.9 (O’Scannlain J., concurring). The Ninth Circuit held that it “*clearly* represents governmental endorsement of Christianity[.]” *Id.* at 619 (emphasis added).

In *Murphy v. Bilbray*, 782 F. Supp. 1420, 1432 (S.D. Cal. 1991), *aff’d*, 990 F.2d 1518 (9th Cir. 1993), the court noted that the Mt. Helix cross “stood, unchallenged, on public property for a period of sixty-one years before this lawsuit was filed and, moreover, that the record in this case reveals few public expressions of opposition to the cross' presence.” In the mid-1920's, “Cyrus Carpenter Yawkey and Mary Yawkey White placed a 36-foot Latin cross on the summit of Mount Helix on privately owned land.” *Ellis*, 990 F.2d at 1520-21. The cross was “erected as a memorial” to their mother. *Id.* In 1929, they conveyed 3.2 acres, including the cross and an amphitheater, to San Diego County. *Id.* Despite its original private ownership and the fact it went unchallenged for 61 years, both the district court and the Ninth Circuit held the cross unconstitutional. *Id.* at 1525.

For the foregoing reasons, it is clear that the City’s cross violates the Establishment Clause under the first prong of the *Lemon* test, without more.

But, regardless of the City’s purpose for displaying the cross in Bayview Park, its placement there clearly fails *Lemon*’s effect prong. The “effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion].” *Wallace v. Jaffree*, 472 U.S. 38, 56 n.42 (1985) (quotation marks omitted). The “prohibition against governmental endorsement of religion ‘preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.’” *Allegheny*, 492 U.S. at 593 (citation omitted). Whether “the key word is ‘endorsement’ ‘favoritism,’ or ‘promotion,’ the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief[.]” *Id.* at 593-94. Even the “**mere appearance** of a joint exercise of authority by Church and State provides a significant symbolic

³ *Cf. Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1160 n.12 (10th Cir. 2010) *cert. denied*, 132 S. Ct. 12 (2011) (it was irrelevant that “at least one, and perhaps several, of these [cross] memorials are located on private land”).

benefit to religion,” and, therefore, has the impermissible effect of advancing religion. *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27 (1982). The Supreme Court has stated that:

an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

School Dist. v. Ball, 473 U.S. 373, 390 (1985) (internal citation omitted). By way of example, in *Granzeier v. Middleton*, 955 F. Supp. 741, 746-47 (E.D. Ky. 1997), *aff'd*, 173 F.3d 568 (6th Cir. 1999), the court held that a government sign depicting a small (4-inch) “clip art” cross violated the Establishment Clause reasoning, “the sign could be, and was in fact, perceived by reasonably informed observers, to be a government endorsement of the Christian religion. The court accepts that this apparent endorsement was not intended, but this made no difference in the observer’s perception.”

The City’s decision to maintain a cross at Bayview Park inevitably has the effect of advancing Christianity because this symbol is inherently religious. *See Rabun*, 698 F.2d at 1109. Numerous courts have likewise held that the government’s display of a cross unconstitutionally endorses Christianity and thus fails the second prong of *Lemon*.⁴ *See also Mendelson*, 719 F. Supp. at 1069 (“no federal case has ever found the display of a Latin cross on public land by a state or state subdivision to be constitutional.”); *Jewish War Veterans*, 695 F. Supp. at 8 (“defendants are unable to cite a single federal case where a cross . . . has survived Establishment Clause scrutiny.”); *Mississippi State*, 652 F. Supp. at 384-385 (“in no other federal case either before or since *Lynch v. Donnelly* has the public display of a cross by a state or subdivision thereof been found to be constitutional.”). There “is *no question* that the Latin cross is a symbol of Christianity, and that its placement on public [property] . . . violates the Establishment Clause.” *City of Eugene*, 93 F.3d at 620 (emphasis added). *See also City of St. Charles*, 794 F.2d at 271 (“[w]hen prominently displayed on [government property] . . . the cross dramatically conveys a message of governmental support for Christianity.”).

The Eleventh Circuit made this point clear when it affirmed a ruling by the Northern District Court of Georgia, which found that a cross placed in the Black Rock Mountain State Park was “an obviously Christian emblem . . . [that] can have no other . . . effect but to further

⁴ *See, e.g., Trunk*, 629 F.3d at 1110-11; *Duncan*, 616 F.3d 1145 (individualized memorial crosses for state troopers on public roadside); *Eugene*, 93 F.3d 617 (war memorial cross erected by private group in public park); *Gonzales*, 4 F.3d 1412 (war memorial crucifix in public park); *City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180; *Jewish War Veterans*, 695 F. Supp. 3 (memorial cross on military base); *Eckels*, 589 F. Supp. 222 (three crosses and Star of David war memorial in public park). *See also Allegheny*, 492 U.S. at 599 (using the display of a cross in a government building as the prototypical example of a display that would convey government “endorsement of Christianity”); *Carpenter*, 93 F.3d at 630; *Ellis*, 990 F.2d at 1525- 27.

the cause of the religion it symbolizes. It thus fails to pass constitutional muster under the second part of the test . . .” *ACLU v. Rabun County Chamber of Commerce, Inc.*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff’d*, 698 F.2d 1098 (11th Cir. 1983).

There is no question that “a reasonable observer would perceive [the cross] as projecting a message of religious endorsement.” *Trunk*, 629 F.3d at 1118. The “size and prominence of the Cross,” which towers over Bayview Park, “evokes a message of aggrandizement” and “presents a strongly sectarian picture.” *Id.* at 1116 n.18, 1123; *Duncan*, 616 F.3d at 1162 (“[t]he massive size of the crosses . . . unmistakably conveys a message of endorsement”); *City of St. Charles*, 794 F.2d at 267 (the cross was “an overpowering feature”); *Robinson*, 68 F.3d at 1232 n.11; *Joki v. Bd. of Educ.*, 745 F. Supp. 823, 829-31 (N.D.N.Y. 1990) (“the cross occupies a highly prominent place in the painting and draws the attention of the eye.”). In other cases, although crosses on public property were still found to violate the Establishment Clause, courts did consider war memorial plaques or other indicators that may reduce the magnitude of the religious message communicated by the cross. *See e.g., Trunk*, 629 F.3d at 1123. Here, the cross in Bayview Park stands alone and has no such plaque or indicator, reinforcing its clear and exclusive message of endorsement of Christianity.

The cross further conveys a message of endorsement because of its proximity to a platform that is used for and has a plaque referencing Easter Sunday Sunrise services. *E.g., Allegheny*, 492 U.S. at 581; *Trunk*, 629 F.3d at 1123-24; *Mississippi State*, 652 F. Supp. at 384. When the platform was placed at the foot of this cross, there were explicit references to Easter Sunday services, cited above, and the platform was completed in time to hold Easter services at that site. These statements contribute to the to the already overwhelming Christian message of the cross. *E.g., Felix v. City of Bloomfield*, 36 F. Supp. 3d 1233, 1252 (D.N.M. 2014) (“statements at the dedication ceremony heavily contributed to the impression that the City endorsed his religious message.”); *Summers v. Adams*, 2008 U.S. Dist. LEXIS 103729, at *42 (D.S.C. Dec. 23, 2008).

Furthermore, there is a clear understanding amongst the public that this is a Christian symbol, and this has the effect of endorsing or advancing Christianity. Such “the actions and statements of . . . the community at large . . . also contribute to the perception that the memorial [is] viewed as endorsing religion. In analyzing the effect of the memorial, these statements are probative.” *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *35-36. *See Trunk*, 629 F.3d at 1119-20 & n.19; *Green*, 568 F.3d at 800 (the reasonable observer would be aware of the “community's response to the Monument”); *Lund*, 2015 U.S. Dist. LEXIS 57840, at *45; *City of Starke*, 2007 U.S. Dist. LEXIS 19512, at * 13-14. A mere sample of comments from those who perceive the City’s cross as a religious symbol and/or support the maintenance of the cross include:

“The Cross” in Bayview Park was erected in the 1940s or 50s (date unknown) by the Junior Chamber of Commerce (Jaycees). It was the centerpiece for the once-popular Easter Sunday services, held there for decades and recently resumed by McIlwain Presbyterian Church.’- that is history in my book! what is your definition of history? ~Meghan Routt

“It has historical value to my family. We go down there with the kids every Easter and plant flowers to remember the one who died for our sins. ‘His’story.” ~Meghan Routt

BTW. It's ‘Freedom OF Religion’. NOT, ‘Freedom FROM Religion’. Plain and very simple. It's not just an American thing either. Many countries, even countries with State Religions have a ‘Freedom OF Religion’ stance. ... ~McCall Richardson

For the message of the cross is foolishness to those who are perishing, but to us who are being saved it is the power of God. 1 Corinthians 1:18. That is in the BIBLE, which is probably also offensive to you. What will you say to GOD about this matter when you see His face....and you most certainly will one of these days. I am praying for your eyes to be opened to the Truth and your spirit to be saved before it is too late! ~Nancy Huggins Peters

If it's offensive, don't take it down. Erect other religious icons. ~Crystal Lynn Huber

As a Christian, I enjoy seeing the Cross and in the past have often used it as a place of meditation and reflection. ... ~Andrew Myers

Unlike everyone else on here, I definitely think that the cross at Bayview should be removed . . . [A]s being not a part of the system of religion, I've felt very uncomfortable for a long time around that religious symbol in Bayview, and I'd hate to think how people of other religious affiliations feel about the matter. ~Cooper Dalrymple

The right to religious freedom is granted by the Constitution of the United States. That allows us to practice, or not, our faith without persecution.... ~Dave Kelley

Through its apparent endorsement of Christianity, the City is sending a “stigmatic message to nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members’” of the community. *Trunk*, 629 F.3d at 1109, 1125 (citations omitted). This “message violates the Establishment Clause.” *Id.* at 1125. *See id.* at 1124-25 (the use of the “Christian symbol to

honor all veterans sends a strong message of endorsement and exclusion. It suggests that the government is so connected to a particular religion that it treats that religion's symbolism as its own, as universal. To many non-Christian veterans, this claim of universality is alienating.”).

The third *Lemon* prong, the question of excessive government entanglement with religion, is also violated here. Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion “rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.” *McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).⁵ A “government act is more likely to be found unconstitutional if it generates religion-based political division.” *Jewish War Veterans*, 695 F. Supp. at 14. This includes any “polarization of the community” generated by the religiously-tinged public debate about erecting a religious monument. *Id.* Indeed, several courts have specifically ruled that government cross displays foster unconstitutional entanglement with religion.⁶ In this situation, “where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration.” *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 797 (1973).

It bears emphasis that the most efficient way to resolve this constitutional violation is to remove this cross from Bayview Park. Although perhaps tempting as a means of skirting the spirit of the Establishment Clause, merely deeding this land to a private group will not resolve this dispute if such a deed is not executed in accordance with local, state and federal law and in accordance with the Constitution. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702 (7th Cir. 2005) (sale of land was only upheld because there were no unusual or unlawful circumstances surrounding the sale that would void it). Specifically, this means that any organization that obtains land from the government must pay the fair market value for the land, the organization must assume all traditional duties associated with ownership, the property cannot be one that is “inextricably linked with the seat of government,” and any “reasonable person walking past the Monument [must be able to] quickly recognize that the Monument . . . is not the property of the City.” *Id.* at 698, 700, 703, 704. See *Wirtz v. City of South Bend*, 813 F. Supp. 2d 1051, 1068 (N.D. Ind. 2011). Furthermore, the City could not sell its land to an organization that is tantamount to a straw purchaser, thus leaving the City with continuing power to exercise duties of ownership. *Id.* at 703. And, the City cannot place religious or cross-related requirements in any such deed that would benefit those who would keep the monument but would harm any purchaser in the market who would remove the monument upon purchasing the

⁵ See also *Tenaflly Eruv Ass'n v. Borough of Tenaflly*, 309 F.3d 144, 175 n.36 (3d Cir. 2002) (“‘Entanglement’ still matters, however, . . . in the rare case where government delegates civic power to a religious group.”) (citing *Grumet and Larkin*).

⁶ See *Rabun*, 698 F.2d at 1109-10 (affirming district court ruling that “the presence of the cross created a potential for political divisiveness”); *City of Starke*, 2007 U.S. Dist. LEXIS 19512, at *19; *Mendelson*, 719 F. Supp. at 1071; *Jewish War Veterans*, 695 F. Supp. at 14 (war memorial cross was unconstitutional because it generated “religion-based political division.”).

land. *See Paulson v. City of San Diego*, 249 F.3d 1124, 1127-1128 (9th Cir. 2002) (en banc), cert. denied, 538 U.S. 978 (2003).

To be more explicit, if the City decides to deed this land to the East Hill Neighborhood Association, both the City and the Association should ensure that they understand all local, state and federal laws associated with this type of land transfer and all of the other ramifications of this decision. The East Hill Neighborhood Association would have to pay the fair market value for the land. The City would have to relinquish all control of and rights to the land, and the East Hill Neighborhood Association would be obligated to take on all duties and liabilities of land ownership. The East Hill Neighborhood Association must then make it clear that this land is no longer a public park because public parks are reasonably understood to passersby to be inextricably linked with the government, and it would have to be explicitly clear to the public that the city is no longer involved or affiliated with this land, this cross or the Christian religion.

In view of the aforementioned authorities, it is clear that the City is in violation of the Establishment Clause. This letter serves as an official notice of the unconstitutional activity and demands that the City remove the cross from Bayview Park immediately. We kindly ask that you notify us in writing within seven (7) days of receipt of this letter setting forth the steps you will take to rectify this constitutional infringement. Thank you for turning your attention to this important matter.

Sincerely,
Monica Miller, Esq.