



counsel, such other evidence as may be presented at the hearing on this motion, and such other matters of which the Court may take judicial notice.

The grounds for this motion are: (1) that no facts material to Plaintiffs' claims remain in dispute; and (2) that based on the undisputed facts and for the reasons explained in the accompanying Memorandum of Law, Plaintiffs are entitled to judgment as a matter of law.

Accordingly, Plaintiffs respectfully request that this Court grant them summary judgment on their Establishment Clause claims, and that the Court issue an order awarding them the following relief:

1. A declaratory judgment that Defendant's ownership, maintenance and display of the Bladensburg Cross on public property violates the Establishment Clause of the First Amendment and is a violation of the Plaintiffs' constitutional rights under 42 U.S.C. § 1983;

2. Order Defendant to remove the Bladensburg Cross from the Property forthwith; or in the alternative, demolish the Bladensburg Cross or remove the arms of the Bladensburg Cross to form a non-religious slab or obelisk forthwith;

3. Permanently enjoin Defendant (and any successors or assigns) from displaying the Bladensburg Cross on public property and from taking other steps to maintain the Bladensburg Cross at the current location in violation of the Establishment Clause;

4. Award Plaintiff attorneys fees pursuant to 42 U.S.C. § 1988;

5. Award Plaintiffs nominal damages in the amount of \$1 each; and

6. Grant Plaintiffs such further relief as the Court deems proper.

Respectfully submitted,

May 5, 2015

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**ATTORNEYS FOR PLAINTIFFS**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
GREENBELT DIVISION**

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American Humanist Association, et al.,	)	Case No. 8:14-cv-00550-DKC
	)	
<i>Plaintiffs,</i>	)	
	)	
v.	)	
	)	
Maryland-National Capital Park and Planning	)	
Commission	)	
	)	
<i>Defendant,</i>	)	
	)	
The American Legion, et al.,	)	
	)	
<i>Defendant-Intervenors</i>	)	

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR  
SUMMARY JUDGMENT**

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### **BATES CODES**

1. **TAL:** American Legion Bates (disregard “confidential” marking)
2. **AHAPOD:** Defendant Bates in response to Plaintiffs’ Requests for Production of Documents (“POD”).
3. **AHAINT:** Defendant Bates marking in response to Plaintiffs’ Interrogatories.
4. **AHA RPD:** Plaintiffs Bates in response to Intervenors’ Requests for Production of Documents
5. **AHA RPD D:** Plaintiffs Bates in response to Defendant’s Requests for Production

### **INDEX OF EXHIBITS AND EVIDENCE**

1. Verified Complaint (“VC”) [ECF Dkt. 1] *not separately filed herewith*
2. Defendant’s Answer (“Ans.”) [ECF Dkt. 12] *not separately filed herewith*
3. American Legion Answer (“AL Ans.”) [ECF Dkt. 17] *not separately filed herewith*
4. Defendant’s Second Amended Interrogatory Responses (“D. Int. No.”)
5. Defendant’s Amended Responses to Requests for Admissions (“D. RFA No.”)
6. American Legion’s Interrogatory Responses (“AL Int. No”) [excerpted]
7. American Legion Responses to Requests for Admissions (“AL RFA No”) [excerpted]
8. G. Kurt Piehler Initial Expert Witness Report (“Piehler Rep.”)
9. G. Kurt Piehler Initial Expert Witness Rebuttal Report (“Piehler Rebuttal”)
10. *Deposition Transcript Excerpts:*
  - Plaintiffs
    - **Fred Edwords** (“Edwards Dep.”)
    - **Bishop McNeill** (“McNeill Dep.”)
    - **Steven Lowe** (“Lowe Dep.”)
  - Defendants (Commission)

- **Lawrence E. Quarrick** (“Quarrick Dep.”), M-NCPPC employee for 29 years; currently Chief of the Park, Planning and Development Division, and responsible for the Capital Improvement Program
  - **Frederick C. Stachura** (“Stachura Dep.”), M-NCPPC employee since 2008; Historic Preservation section; Historic Preservation Specialist
  - **Lieutenant Brian Waters** (“Waters Dep.”), M-NCPPC employee; Executive Lieutenant; Commission’s Police Department
  - **Kira Calm Lewis** (“Lewis Dep.”), M-NCPPC’s media relations manager
  - American Legion (Intervenors)
    - **Philip Barton Onderdonk, Jr.**, (“Onderdonk Dep.”), American Legion National Judge Advocate
    - **Russell W. Myers, Jr.** (“Myers Dep.”), American Legion Maryland Department Adjutant
    - **Phillip R. Holdcraft** (“Holdcraft Dep.”), American Legion Post 131 Adjutant
  - Others
    - **Kurt Piehler** (“Piehler Dep.”), Plaintiffs’ Expert Witness
    - **Renee Green** (“Green Dep.”), producer of “Save the Peace Cross” documentary
    - **Richard Douglas** (“Douglas Dep.”), attorney for amicus curiae “Eleven Marylanders”
    - **Warren Bradley** (“Bradley Dep.”), Post 131 Chaplain
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  - *The Washington Post*, May 31, 1929 (produced by Defendant)
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  - *The Washington Post*, May 21, 1933 (produced by Defendant)
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  - American Legion publications from the Library of Congress
- 57. **Exhibit 45:** The American Legion Online Update: “Atheist, Legion post battle over Pledge of Allegiance” (December 5, 2013); *Raw Story* October 30, 2013: “American Legion pulls park funding after atheist official won’t pledge ‘under God’”
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- 63. **Exhibit 51:** Defendant emails (August 2014) regarding contractor for Cross
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- 65. **Exhibit 53:** April 18, 2010 M-NCPPC report: “‘Peace Cross’ An Evaluation of Condition and Recommendations for Restoration” by Daniel Filippelli (“Filippelli Report”)
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68. **Exhibit 56:** Bladensburg Cross Project Report
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71. **Exhibit 59:** April 2014 Historic Preservation Commission meeting minutes
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72. **Exhibit 60:** Defendant emails (2014-2015) regarding condition of Cross
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79. **Exhibit 67:** Brief of the American Legion as Amicus Curiae in Support of Defendant-Appellees, *Green v. Haskell County Board of Commissioners*, 568 F.3d 784 (10th Cir. 2009)

80. **Exhibit 68:** The American Legion 2014 Officer's Guide And Manual Of Ceremonies (excerpted), *retrieved from the American Legion website on April 14, 2015*, at <http://www.legion.org/publications/160963/post-officer-guide-and-manual-ceremonies>
81. **Exhibit 69:** The American Legion National Constitution and By-Laws (excerpted) *retrieved from the American Legion website on April 14, 2015*, at <http://www.legion.org/publications/160958/national-constitution-and-laws>
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  - <https://www.libertyinstitute.org/jobs-at-liberty-institute> (last viewed April 22, 2015)
  - <https://www.libertyinstitute.org/about/faq> (last viewed April 22, 2015)
85. **Exhibit 73:** Post 131 supplemental discovery in responsive to the Plaintiffs' RFP #13, i.e., "All documents containing the text or transcript of any prayer, invocation or benediction delivered at any event or ceremony on The Property." (Produced by Intervenors on April 24, 2015)

## I. INTRODUCTION

“WE, THE CITIZENS OF MARYLAND, TRUSTING IN GOD, THE SUPREME RULER OF THE UNIVERSE, PLEDGE FAITH IN OUR BROTHERS . . . THEIR SPIRIT LIVES TO GUIDE US THROUGH LIFE IN THE WAY OF GODLINESS, JUSTICE AND LIBERTY. WITH OUR MOTTO, ‘ONE GOD, ONE COUNTRY AND ONE FLAG,’ WE CONTRIBUTE TO THIS MEMORIAL CROSS . . .” - *Contribution Pledge for creation of Bladensburg Cross*

“You men of Prince Georges county fought for the sacred right of all to live in peace and security and by the token of this cross, symbolic of Calvary, let us keep fresh the memory of our boys who died for a righteous cause.” - *Dedication address by Representative Stephen W. Gambrill, July 12, 1925*

“[W]henver government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.” *Engel v. Vitale*, 370 U.S. 421, 431-32 (1962).

The Bladensburg Cross is a large, 40-foot tall Latin cross that is prominently displayed on a traffic island in the middle of a busy thoroughfare in Bladensburg, Maryland, and is owned and maintained by the government, the Maryland-National Capital Park and Planning Commission (“Defendant” or “M-NCPPC”). The Bladensburg Cross is unequivocally a public display, and the religious symbolism of what is commonly known as a Latin cross cannot seriously be questioned.

A publicly displayed religious symbol violates the Establishment Clause of the First Amendment unless the government can prove that it meets each of the following prongs of the *Lemon* test:<sup>1</sup> it must (1) “have a secular purpose;” (2) not have the “effect” of advancing or endorsing religion; and (3) “not foster an excessive entanglement with religion.” Defendant’s Christian cross violates the Establishment Clause because it fails each prong of this test, *infra*.

When the government displays an iconic religious symbol – *the* symbol of Christianity – on its property, it sends a clear message that it supports Christianity to the exclusion of all other religions and non-religion. This message of religious favoritism is even more problematic when we consider the context in which the message is being delivered: *a government memorial purporting to honor war dead*. Any government monument honoring war dead should honor all of those who fought, but this

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



monument does the exact opposite: it exalts Christian soldiers and excludes everyone else. To uphold the government's sponsorship of this massive Christian symbol is to ignore its plain religious significance and the concomitant stigmatizing message it sends to non-Christians and their families.

Supporters of this Cross are predominantly, if not exclusively, Christian; this is not surprising. In fact, the American Legion, whose motto is "for God and Country," is represented by the Liberty Institute, a Christian legal organization. It is also not surprising that these Christian supporters take the position (litigation position that is) that the very cross they revere as the symbol of their faith – representative of Jesus Christ and his Ultimate Sacrifice – *is not a religious symbol*. Instead, they claim it is a war memorial that merely takes the shape of the cross.

The question is not whether the Bladensburg Cross is a war memorial *or* a Christian cross. It plainly is both. The proper question is whether this Christian cross war memorial can reasonably be perceived as a religious symbol. And the answer is as simple as the question. Because of the cross's inherently religious nature, *every* federal court decision involving a Christian cross as a government war memorial has held the cross to be unconstitutional. Such crosses have been found unconstitutional even where they have undeniable historic or artistic value, have served as a tourist attraction, are accompanied by other religious symbols such as Stars of David, are featured alongside other secular elements, feature a plaque declaring the cross to be a war memorial or feature a plaque including biographical information about the deceased. Virtually every court to consider a government's display of the Latin cross *in any context* has concluded that such display is unconstitutional.

For the reasons stated herein, Plaintiffs are entitled to summary judgment in their favor because the material facts are undisputed and they are entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

## **II. PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS**

**The Parties.** Plaintiffs include of past and present residents of Maryland and the District of Columbia who have had unwelcome contact with the Bladensburg Cross. (VC ¶¶1-10) (Exh. 2) (Lowe

Dep. 13; 23-28; 33-35; 58-60; 72) (Edwards Dep. 10; 18; 23-24; 26-28; 30-31) (McNeill Dep. 9; 21; 35). Plaintiffs are non-Christians who feel that the Cross associates a Christian symbol with the government and gives the impression that the state supports and approves of Christianity to the exclusion of other religions and non-religion. Plaintiffs feel personally excluded by this governmental message. (*Id.*). American Humanist Association (“AHA”) brings this action on behalf of its members. (*Id.*).

Defendant is the sole owner of the Cross and the traffic island on which it stands (the “Property”). (VC ¶10; ¶24; ¶36; ¶38; ¶44) (Ans. ¶36; ¶38; ¶44) (AL Ans. ¶38; ¶44) (AL RFA No. 3) (Exhs. 1, 4, 8, 10, 12, 15) (Stachura Dep. 13; 22-23). Defendant maintains the grass and shrubbery on the Property as well as the lighting system. (*Id.*). The Cross was originally erected on land owned by the Town of Bladensburg (“Town”). (*Id.*) The State Roads Commission deeded the Cross and Property to Defendant in 1960. (*Id.*). Defendant does not own any structures featuring the Jewish Star of David or the Muslim Crescent Moon and Star. (Stachura Dep. 34).

Intervenors are The American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131 (“Post 131”). (ECF Dkt. 15 p.1) (Onderdonk Dep. 13). Intervenors are religious. The 2014 American Legion “Officer’s Guide And Manual Of Ceremonies” states: “The American Legion recognizes the influence of Almighty God in all worthwhile endeavors and declares the allegiance of Legionnaires to both God and nation.” (Exh. 68, p.91). The Legion’s preamble begins with “For God and Country,” which is as also motto. (Exhs. 15, 39, 41, 68-69) (Onderdonk Dep. 18, Exh. 2; 31) (Myers Dep. 31; 33 38-39; Exhs. 3, 5).<sup>2</sup> The American Legion and the Department have an official chaplain and prayers are delivered in their meetings. (Exh. 68) (Onderdonk Dep. 32) (Myers Dep. 26-27; 30; 43-44). The Department Adjutant testified that he was unaware of any Department chaplains who were not of the Christian faith. (*Id.*). Post 131 also has a chaplain who leads the prayers at meetings and events. (Exh. 73) (Holdcraft Dep. 18-19; 31-32) (Bradley Dep. 7; 11). Post

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<sup>2</sup> Snyder-Farmer-Butler Post No. 3 (“Post 3”), an entity partially responsible for raising funds for the Cross, used the phrase “For God and Country” too. (Exh. 42) (ECF Dkt. 15 p.1).

131's Chaplain, Warren Bradley, is a Christian. The previous chaplain, Frank Stultz, is a Catholic. (*Id.*)

Intervenors are represented by Liberty Institute, a Christian group based outside Dallas, Texas, whose mission is to "defend and restore religious liberty across America." (Exhs. 43, 48, 72).<sup>3</sup> Liberty Institute launched a campaign, "Don't Tear Me Down," to "help stop . . . anti-religious freedom groups from denying Americans their constitutional rights to religious expression in the public square." (*Id.*)

**The Cross.** The Bladensburg Cross is a massive sectarian monument that excludes non-Christians. (VC ¶15) (Ans. ¶15) (Exhs. 2, 8, 13, 36, 38-39, 53) (D. RFA No. 2) (AL RFA Nos. 1-2) (Stachura Dep. 11) (Waters Dep. 16) (Green Dep. 20) (Douglas Dep. 42; Exh. 3) (ECF Dkt. 11-12) (Piehler Rep. 3-4) (Piehler Rebuttal 3) (Piehler Dep. 21) (Torpy Decl. ¶¶6-7) (Weinstein Decl. ¶¶4-5). The Cross stands 40-feet high, with arms extending 5-feet from the center. (*Id.*). A Latin cross is an equal-armed cross with a longer foot. (*Id.*). The Bladensburg Cross takes the form of a Latin cross. (*Id.*). The cross is the traditional Christian symbol and has been used to symbolize Christianity since approximately 300 A.C.E. (*Id.*). Defendant and Intervenors admit that "the symbol of a cross has been associated with the Christian religion." (D. RFA No. 2) (AL RFA Nos. 1-2).

A June 2014 American Legion article states that the Bladensburg "monument is undeniably in the shape of a Latin cross[.]" (Exh. 38). A May 2014 article written by an American Legion national employee stated: "What could be so offensive about a local monument to war dead? The fact that it is in the shape of a Latin cross, of course." (Exh. 39). In an email to its subscribers on June 3, 2014, Liberty Institute stated: "[The] American Humanist Association and the Freedom From Religion Foundation have sued to tear down veterans' memorials that contain **religious images**." (Exh. 48) (emphasis added). In another email, it wrote: "We are: Defending historic veterans memorials that contain religious imagery from cold-blooded attempts to tear them down." (*Id.*). The Proposed Amicus Brief admits: "The form chosen for the war memorial was a latin cross." (Douglas Dep. 42; Exh. 3).

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<sup>3</sup> Job "Qualifications/Requirements" for a Liberty Institute position include: "Committed, Authentic Christian - a professing Christian, who in word and deed has demonstrated a commitment to Jesus Christ, professionally and personally agrees with Liberty Institute's Statement of Faith." (*Id.*)

According to Professor Piehler, thousands of war memorials have been dedicated since the end of the American Revolution, and most do not use *any* religious iconography, let alone something as blatantly sectarian as the Latin cross. (Piehler Rep. 3-5; 13; 21-25) (Piehler Dep. 48-49; 70). The majority of WWI memorials consist of the secular “doughboy statue.” (*Id.*). While crosses are found in overseas cemeteries, those crosses mark *individual graves* and retain their religious meaning. (Piehler Rep. 20-21) (Piehler Rebuttal 16-17; 21) (Piehler Dep. 31; 34-35; 48; 67). Such is evident also by the fact that the Star of David would be used to mark the burial site of the Jewish war dead. (*Id.*). When a freestanding Latin cross has been used, it is generally located in a cemetery and the cross itself is seldom a dominant feature of the memorial. A freestanding, 40-foot Latin cross war memorial on public property is virtually unprecedented (Piehler Rep. 3; 5; 7-8; 21) (Piehler Rebuttal 24-25).

**The Property.** The Bladensburg Cross stands on a small traffic island about a third of an acre in size, which serves as a median between three principal commercial/commuter roadways.<sup>4</sup> There are no other monuments on the island. (VC ¶¶47-48) (Ans. ¶¶47-48) (AL Ans. ¶¶47-48). The Property is “one of the county’s busiest intersections.” (Exhs. 8, 31). Defendant admits that “[t]here are no specific pedestrian rights-of-way to The Property” and that “[n]o public access is possible.” (*Id.*) (D. Int. No. 14).

The Cross rests on a rectangular platform. (VC ¶¶15-16) (Ans. ¶¶15-16) (Exh. 65) (Piehler Rebuttal 11). Affixed to this platform is a small plaque (the “Plaque”) listing the names of 49 men from Prince George’s County who died in World War I. All but three of these men are buried in cemeteries within the U.S. (*Id.*). Of those, many are buried in Christian cemeteries or underneath headstones marked with a cross. (*Id.*). Prior to this litigation, the Plaque was not legible because of bushes obscuring the Plaque. (VC ¶21 & Exhs. A-B) (Exhs. 2, 40, 31) (Holdcraft Dep. 54).<sup>5</sup> There is no mention of the American Legion on the monument. (VC ¶22) (Ans. ¶22) (Exh. 2) (Piehler Rebuttal 2).

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<sup>4</sup> (VC ¶¶12-13; ¶¶18-19; Exhs. A & E) (Ans. ¶¶12-14; ¶18) (AL Ans. ¶¶12-14; ¶18) (Exhs. 8, 31, 53, 63, 71) (D. Int. No. 14) (D. RFA No. 25) (Waters Dep. 17-18; Exh. 5) (Lewis Dep. 15 and Exh. 2).

<sup>5</sup> After this lawsuit commenced, the bushes obscuring the Plaque were at least temporarily cleared. This was interpreted by one of Defendant’s agents as a direct “response to the American Humanist Association’s claim that the site is unintelligible and inaccessible to the general public and therefore secularly irrelevant.” (Exh. 31).

Moreover, the Post 131 30(b)(6) designee, Phillip R. Holdcraft testified that he could only recall the names of two of the soldiers on the Plaque - Snyder and Farmer. (Holdcraft Dep. 24). Despite visiting the Cross multiple times a year for the past 30 years, Richard Douglas, representing Amici, could not recall the names of *any* of the soldiers on the Plaque. (Douglas Dep. 24).

**Religious Purpose and Early History.** The Cross was erected on land owned by the Town. (VC ¶24) (Exhs. 1, 4, 10, 12, 15). In 1918, the Prince George's County Memorial Committee began to raise funds to construct a massive "sacrifice" Cross on the Property. (VC ¶25) (Ans. ¶25) (AL Ans. ¶25) (Exhs. 1, 10, 14). The founders deliberately chose a Christian symbol; those who sponsored the Cross, especially at the dedication ceremony, *infra*, stressed the overt Christian character of it. (Piehler Dep. 58) (Piehler Rep. 28) (Piehler Rebuttal 4). "In 1919, Mr. Riggles stated the intention of the Committee succinctly in a fund-raising letter: 'Dear Friend: To honor your comrades lost in the War, we are going to . . . build a massive sacrifice cross at the beginning of the Highway.'" (Exhs. 10, 14).

As part of the fundraising for the Cross, contributors signed a religious pledge, which states in part: "WE, THE CITIZENS OF MARYLAND, TRUSTING IN GOD, THE SUPREME RULER OF THE UNIVERSE, PLEDGE FAITH IN OUR BROTHERS . . . THEIR SPIRIT LIVES TO GUIDE US THROUGH LIFE IN THE WAY OF GODLINESS, JUSTICE AND LIBERTY. WITH OUR MOTTO, 'ONE GOD, ONE COUNTRY AND ONE FLAG,' WE CONTRIBUTE TO THIS MEMORIAL CROSS . . ." (VC ¶26) (Exh. 9) (Stachura Dep. 37; Exh. 5) (Piehler Rebuttal 7).

A groundbreaking ceremony for the Cross was held on September 28, 1919. (AL RFA No. 7) (Exhs. 10, 11, 17). During the groundbreaking ceremony, Hon. Josephus Daniels delivered a eulogy in which he spoke of the Cross: ". . . and a cross that will stand for time and eternity, like the principles they defended." (*Id.*). According to Defendant's records, the inability of the Committee to raise sufficient funds for the Cross was because of "the keen competition it encountered." (Exh. 13) (Green Dep. Exh. 4) (Piehler Rep. 21-22). Namely, the Town already had (and still has) a WWI monument

dedicated to the veterans of Prince George's County. (*Id.*). That monument is secular. (*Id.*).<sup>6</sup>

The Bladensburg Cross was formally dedicated on July 12, 1925. (VC ¶27) (Ans. ¶27) (AL Ans. ¶27) (D. Int. No. 1) (AL Int. No. 1) (Exhs. 10-11). Representative Stephen W. Gambrill of the Fifth Maryland District delivered the dedication address, stating: "You men of Prince Georges county fought for the sacred right of all to live in peace and security and by the token of this cross, symbolic of Calvary, let us keep fresh the memory of our boys who died for a righteous cause." (VC ¶28) (D RFA No. 29) (AL RFA No. 17) (Exhs. 5, 10, 11) (Piehler Rep. 26). The dedication ceremony included two prayers delivered by Christian clergy (a Roman Catholic and a Baptist minister). (VC ¶¶30-32) (Exhs. 5-6). No rabbi or Jewish leader took part in the dedication ceremony. (Piehler Rep. 27). Newspaper reports discussed the Bladensburg Cross alongside other Christian happenings in the region, indicating that the Cross was understood then as a Christian symbol in a predominantly Christian community. (Exh. 7).

"Calvary" and "Sacrifice" Cross. Prior to being locally known as the "Peace Cross," the Bladensburg Cross was known and referred to as the "Calvary cross" or the "Sacrifice cross." (VC ¶28) (D. RFA Nos. 4-9, 29) (AL RFA No. 17) (Exhs. 3, 5, 10-12, 15-17, 28). The reference to "Calvary" is a Christian one. (Exh. 3) (Piehler Rep. 26) (Piehler Rebuttal 4-7). As Piehler testified, the Bible names Calvary as the place of the crucifixion of Jesus Christ, and is used by Christian to evoke the sectarian significance of this event in their religion. (*Id.*). On May 25, 1919, *The Washington Times* reported: "A mammoth cross, a likeness of the **Cross of Calvary, as described in the Bible**, will be built at the beginning of the highway at Bladensburg. . . ." (Exh. 3) (emphasis added). On June 3, 1919, the *Washington Herald* reported: "Residents of Prince George County, Maryland, are developing plans for the erection of a monster calvary cross at Bladensburg . . ." (*Id.*).

The *Washington Post*, on July 11, 1919, referred to the Cross as "the big sacrifice cross" (*Id.*) (D.

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<sup>6</sup> Defendant's records state: "In January 1919 it had been proposed that an appropriate war memorial be erected in Upper Marlboro . . . Their campaign was far more successful and on October 7, 1919, a little over a week after the ground-breaking for the Peace Cross, a bronze plaque, bearing the names of forty-seven war dead, was unveiled in the Court House yard . . . [M]any citizens, aware the county already had a war memorial, deemed it unnecessary to support further attempts to complete the Peace Cross." (*Id.*)

RFA No. 9). On July 14, 1919, *The Washington Herald* referred to it as a “huge sacrifice cross.” (Exh. 3). Some articles made reference to the “supreme sacrifice.” (Exhs. 3, 5, 14-15, 17). The Town and American Legion have continued to use the word “sacrifice” in connection with the Bladensburg Cross. (Exh. 28). Piehler testified that the term “sacrifice,” like the term “Calvary,” has a distinct religious meaning, and obviously so in the context of a Christian cross. (Piehler Rebuttal 4; 6). The “History of the Snyder-Butler Post No. 3” records confirm that the use of the word “sacrifice” has a religious connotation. (Exhs. 12, 15). The records state: “In memorial to their **supreme sacrifice for God** and for Country, the Post became known as Snyder-Farmer Post, and the charter was applied for in this name.” (*Id.*) (emphasis added). Post 3 was sectarian. In addition to having a Chaplain, (*id.*), its records provide: “‘Legion Sunday,’ [was] when all members of the Post were to meet and march in a body to the Episcopal Church to attend services.” (*Id.*). Christian services were held for Snyder and Farmer. (*Id.*).

Religious Rites and Exercises. After the Cross was formally dedicated, numerous religious “rites” “exercises” and “services” took place at it. (Exh. 18) (VC ¶¶33-34; ¶41) (AL Ans. ¶41) (D. RFA Nos. 34-35; 37-38) (Piehler Rebuttal 8). For instance, on May 31, 1928, the *Washington Post* reported: “exercises at the foot of the Memorial Cross in Bladensburg.” (Exh. 18). An “Invocation” was given by Rev. Andrew J. Carey of St. Jerome’s Catholic Church and a benediction was given by Rev. B.P. Robertson of the First Baptist Church of Hyattsville. (*Id.*). In May 1929, Prince George’s County held memorial “exercises” at the Cross. (*Id.*) (D. RFA Nos. 34-35). As part of the ceremony, “prayers” were delivered by Rev. Morris W. Derr, rector of St. Luke’s Protestant Episcopal Parish. (*Id.*). The Captain Frank Mountford, lauded as a leading evangelist, held at least three “Sunday services” at the Cross in August 1931. (Exh. 18) (D. RFA Nos. 37-38). Services held at the Cross by the American Legion included, and continue to include, a religious component. (VC ¶41) (AL Ans. ¶41) (Holdcraft Dep. 45 & Exh 8) (Bradley Dep. 7-8) (Exhs. 68, 73).

“Desecration,” “Salvation” and “Shrine.” The Cross continued to be viewed as a Christian symbol throughout the 1930s and 1950s. (Exhs. 19-21). On March 3, 1935, *The Washington Post*

reported: “Gov. Harry W. Nice has asked the Maryland State roads commission to take action to prevent the ‘desecration’ of the Memorial Cross at Bladensburg by proposed erection of a service station on the property . . .” (*Id.*). The Cross was also described as a “Shrine” and as a “Salvation” cross. (*Id.*).

Ku Klux Klan. The Bladensburg Cross was erected in an era when the Cross would be appropriated by the Klan as a sectarian symbol to intimidate Jews and African Americans. (Piehler Rep. 3; 26-28).<sup>7</sup> The Latin cross had significant theological meaning in Klan ideology. (*Id.*). The Klan made use of the Bladensburg Cross for some of its rituals. (*Id.*) (Exhs. 22-23) (D. RFA Nos. 40-41).

Events at Cross: 1960s – Present. In 1965, Defendant created a lighting system for the Cross and illuminated it on April 1, 1965, during a dedication ceremony. (VC ¶¶45-46) (Ans. ¶¶45-46) (AL Ans. ¶¶45-46) (Exh. 24) (Quarrick Dep. 23). On July 12, 1975, at a 50th anniversary celebration “of the dedication of the Memorial Cross was held.” (Exhs. 10, 26). Prayers by a Christian Reverend (of St. Luke’s Episcopal Church) were included in ceremony. The guest speaker was a Chaplain who delivered the closing prayer. (*Id.*). On November 11, 1985, Defendant and the Town organized a ceremony rededicating the Cross (D. Int. Nos. 7-8) (Exh. 27) (Lewis Dep. 15-19; 26; & Exhs. 3-6). Prayers were delivered by a Catholic priest, Father Karl A. Chimiak of St. Matthias Catholic Church. (*Id.*).<sup>8</sup>

The Town and Post 131 regularly co-sponsor services at the Cross. (Exhs. 28, 68, 73) (Holdcraft Dep. 25-31; 41-43; Exhs. 5-7) (Bradley Dep. 12) (Lewis Dep. 27; 31-32; Exh. 7) (Piehler Rebuttal 7-8) (AL Int. Nos. 3 & 6) (D. Int. No. 7). Virtually all of these services include prayers. (*Id.*). On July 4, 1984, the Town held a “Salute to America” Ceremony at the Bladensburg Cross. (Exh. 28). Prayers were delivered by Father Chimiak. (*Id.*). On May 31, 2004, the Memorial Day Ceremony included an “Opening Prayer” and “Closing Prayer” by a “Pastor Curtis Robinson” of the “Faith-Deliverance-Soul Saving Station.” (*Id.*). On May 31, 2010, the Memorial Day Ceremony at the Cross

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<sup>7</sup> Piehler testified: “For most Jews, especially observant Jews, it would be surprising if they did not view the Bladensburg Peace Cross as an overtly hostile Christian symbol, especially if they were driving by this monument in an automobile.” (*Id.*).

<sup>8</sup> Defendant sent a letter to Chaplain Brenza thanking him for “providing the presence of Chaplain Captain Father Karl Chimiak.” (*Id.*). Defendant added: “We . . . trust we may assimilate this relationship again.” (*Id.*).



included prayers by Keith Hurst, a Catholic. (*Id.*) (Holdcraft Dep. 18-19; 31-32). Prayers were also delivered by Keith Hurst at the May 2011, Memorial Day Ceremony at the Cross. (Exh. 28). Prayers were also included in the November 2012 Veterans Day Ceremony, the May 2013 “Memorial Day Services,” the 2013 and 2014 Veterans Day Ceremonies, and the 2014 Memorial Day Ceremony. (*Id.*) In the past nine years, none of the prayers delivered at the Veterans and Memorial Day events have been delivered by a rabbi, imam, or non-theist. (Holdcraft Dep. 52).

On October 13, 2012, there was a “Save the Peace Cross Demonstration” in response to AHA’s letter. (Exhs. 28-29) (Lewis Dep. 27). On May 31, 2014, “Friends of Peace Cross” organized another “Save the Peace Cross Demonstration” at the Cross (Exh. 31) (Waters Dep. 25-29). On December 13, 2014, a Pastor Williams reportedly “organized a march” that would “end at the Peace Cross.” (Exh. 32).

**Public Perception: A Religious Symbol.** Non-Christian service members see the Bladensburg Cross as an alienating and exclusionary Christian symbol. (Torpy Decl. ¶¶6-10) (Weinstein Decl. ¶¶4-5) (Exh. 38). Jason Torpy, President of the Military Association of Atheists & Freethinkers (MAAF) and an Iraq War veteran, testified that he perceives the Bladensburg Cross as the “traditional symbol of Christianity: a Latin cross.” (Torpy Decl. ¶¶6-9). MAAF has over 4,000 active and prior military personnel members. (*Id.*) Torpy testified in part: “My military service, as well as the service of other non-Christians and that of members of the MAAF, is excluded and disrespected when a Christian cross is presented as a public memorial to defending.” (*Id.*) Michael L. Weinstein, a veteran and Founder and President of the Military Religious Freedom Foundation (MRFF), testified: “Because the Bladensburg Cross is a Christian symbol, it sends a message to all of our non- Christian MRFF clients that they are outsiders.” (Weinstein Decl. ¶¶1-5)

Other non-Christian citizens and local residents perceive the Bladensburg Cross as a religious symbol. (Exh. 35). Christian leaders do too. (Exh. 36). Rev. Brian P. Adams, then pastor of Mount Rainier Christian Church, wrote an article on the Bladensburg Cross which stated: “I believe that using the cross as a symbol of what our military did is blasphemy, equivalent to taking the Lord's name in

vain . . . The Peace Cross is there as a Christian symbol.” (*Id.*)

Citizens who *support* the government’s ownership of the Bladensburg Cross also see it as a religious symbol. (Exhs. 34, 38) (Lewis Dep. 36; 41-45; Exhs. 12-13). For instance, Defendant received an email from a Nathan Solomon who wrote: “It [the Bladensburg Cross] represents death of Jesus Christ and the after-life. . . . It is simply a symbol of a faith.” (Exh. 34). A Greg Spangler wrote: “The Peace Cross has a deep spiritual value as well as being a significant historical landmark.” (*Id.*). A Florida citizen wrote: “There is no religion that is offended by the Cross except the Muslims.” (*Id.*).

Defendant, Intervenors, and Amici perceive the Bladensburg Cross as a Christian symbol, *infra*.<sup>9</sup> Renee Green, the producer of the “Save the Peace Cross” documentary likewise perceives the Bladensburg Cross as religious. (Green Dep. 23; 25-27; 30; 36-37; 39; 42-44, 57-61; Exh. 9).

**Condition and Status of the Cross.** The Cross is in need of “urgent” repairs. Large chunks of it have fallen off over the years and it poses a safety hazard. (Exhs. 8, 52, 53, 55, 56, 58, 60) (D. RFA No. 23) (Stachura Dep. 11; 23-25; 51) (Holdcraft Dep. 50-51) (Green Dep. 29-30). It is hollow, cracking and “rapidly deteriorating.” (*Id.*). In July 2009, Defendant reported: “There are two cracks that are getting worse which potentially will cause a face of the Peace Cross to fall off.” (Exh. 56). Defendant has spent years trying to find a suitable contractor but has thus far been unsuccessful. An M-NCPPC official explained: “vertical exposed master artisans are going to be hard to find.” (Exh. 55). Defendant has admitted, rather fervently, that the Cross might just come down on its own. In an email dated September 6, 2012, Jennifer Stabler, an M-NCPPC official, wrote: “Wow. Looks like another big chunk fell off it, so it may come down on it’s [sic] own!!” (Exh. 58) (Stachura Dep. 51). On November 4, 2013, Catherine Allen, an M-NCPPC official wrote: “the Peace Cross is falling down and we are struggling with trying to figure out how to solve this problem. . . . At what point does one stop making repairs, and consider whether it makes more sense to start from scratch or not...” (*Id.*). Stachura testified: “As a

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<sup>9</sup> (Exhs. 38-39, 41-42, 46, 48, 50-51 68, 73) (Stachura Dep. 47-48) (Green Dep. 48-50 & Exh. 3) (Onderdonk Dep. 26; 37) (Holdcraft Dep. 51) (Douglas Dep. 27-29; 38-39; 41-42; Exhs. 3- 4) (ECF Dkt. 11-2 p.7-8).

matter of fact, the Peace Cross is coming down now.” (*Id.*).

Since 1960, Defendant has spent at least \$117,000 to maintain and renovate the Cross – \$100,000 of which was spent in 1985 on substantial renovations. (D. Int. No. 9) (Quarrick Exh. 2) (Exhs. 27, 52-53). However, in 1997, the Cross was still cracking. (Exh. 8). In a 1997 report, it was stated that “[t]he repair of the cracks may make the monument look worse.” (*Id.*). The Cross is also discoloring and the colors are hard to match. (Exh. 53). In 2008, Defendant allocated \$100,000 for renovation and structural work on the Cross. (Quarrick Dep. 16-18). In 2010, Defendant advertised “Requests for Proposals” to restore the Cross. (Exh. 54) (Quarrick Dep. 27-29; Exh. 3). None of the proposals were within budget. (Exhs. 55-56) (Quarrick Dep. 33).

The Cross is less than a 100 years old. It wasn’t until 2010 that Prince George’s County listed it under the County’s historic sites and districts plan amendment. (Stachura Dep. 14). The Cross is not listed in the National Registry of Historic Places despite several attempts to nominate it (one such application submitted by self-proclaimed “radical” Christian, Renee Green, is currently pending). (Exhs. 62, 64) (Stachura Dep. 11; 17-18; 46-47; Exh. 12) (Green Dep. 32-34; 67). Prior to this lawsuit, Defendant had little information about the Cross and the motivation behind it. (Exhs. 53, 63). Defendant’s officials have expressed apathy about retaining the Cross and are willing to transfer it to a private entity. (Exhs. 58, 62) (Stachura Dep. 51). Moreover, John Earley, the designer of the Cross, was not mentioned in any of the 30(b)(6) depositions of Defendant and Intervenors, nor was he mentioned by Richard Douglas, despite each being asked about the history and importance of the Cross.

There are no other monuments on the traffic island on which the Cross sits. (VC ¶¶47-53; Exhs. E-H) (Ans. ¶¶47-51) (AL Ans. ¶¶47-48; ¶51) (Exh. 71). Three small monuments were placed later in a separate area in a park across the street. A fourth was added to the area after the commencement of this litigation. None of these new monuments remotely resemble the size and prominence of the cross. (*Id.*) (Douglas Dep. 37) (Lewis Dep. 23-26; Exh. 2). According to Douglas, counsel for Amici, comparing the Cross to these other monuments is “comparing apples and oranges.” (Douglas Dep. 21; 24).

### III. ESTABLISHMENT CLAUSE AND LATIN CROSS OVERVIEW

The Establishment Clause “commands a separation of church and state.” *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). The “clause is broadly written . . . and has been broadly interpreted.” *Hall v. Bradshaw*, 630 F.2d 1018, 1019-20 (4th Cir. 1980). Not only must the government not advance, promote, affiliate with, or favor any particular religion, it “may not favor religious belief over disbelief.” *County of Allegheny v. ACLU*, 492 U.S. 573, 593, 610 (1989) (citation omitted). Defendant’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 (1989) (“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).

The courts have been virtually unanimous in holding that a government display of the cross, including a war memorial cross, is unconstitutional. *See, e.g., Trunk v. City of San Diego*, 629 F.3d 1099, 1066 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2535 (2012) (longstanding war memorial cross with plaque); *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); *Buono v. Norton*, 371 F.3d 543, 545-46 (9th Cir. 2004) (seven-foot tall cross war memorial), *rev’d on other grounds by Salazar v. Buono*, 559 U.S. 700 (2010) (plurality) (questioning need for injunction after transfer of land to private entity); *Carpenter v. City & Cnty. of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996) (concrete Latin cross in park); *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) (war memorial cross); *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995) (cross on city seal); *Ellis v. La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993) (cross in a public park); *Gonzales v. North Twp. of Lake Cnty.*, 4 F.3d 1412, 1418 (7th Cir. 1993) (war memorial crucifix in park); *Harris v. City of Zion*, 927 F.2d 1401, 1414 (7th Cir. 1991) (cross on seal); *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (cross on government building); *Friedman v. Bd. of Cnty.*

*Comm'rs*, 781 F.2d 777, 782 (10th Cir. 1985) (en banc) (cross on seal); *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (war memorial cross); *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 930 (3d Cir. 1980) (platform containing cross); *Am. Humanist Ass'n v. City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, \*23-24 (C.D. Cal. 2014) (war memorial depicting cross headstones); *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018, 1029 (S.D. Ind. 2013), *app. disp.*, 759 F.3d 639 (7th Cir. 2014) (six-foot crosses within “Veterans Memorial Parkway.”); *Am. Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512, \*14 (M.D. Fla. 2007) (cross on city water tower); *ACLU v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998) (cross on city seal); *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 cross); *Mendelson v. St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989) (cross on building); *Jewish War Veterans v. U.S.*, 695 F. Supp. 3 (D.D.C. 1988) (war memorial cross on military base); *ACLU v. Mississippi State General Services Admin.*, 652 F. Supp. 380, 382 (S.D. Miss. 1987) (cross on building); *Libin v. Greenwich*, 625 F. Supp. 393, 399 (D. Conn. 1985) (3-by-5 cross on firehouse); *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 crosses in public park); *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) (cross on city hall); *see also Joki v. Bd. of Educ.*, 745 F. Supp. 823, 829-30 (N.D. N.Y. 1990) (“There is abundant case law holding unconstitutional the prominent display of a cross”).<sup>10</sup>

Many of these courts, including but not limited to the Seventh, Ninth, Tenth, and Eleventh Circuits, have specifically ruled that a government **war memorial** or similar memorial, featuring a cross, is unconstitutional. *See Trunk*, 629 F.3d 1099; *Eugene*, 93 F.3d at 620; *Buono*, 371 F.3d at 545-46; *Gonzales*, 4 F.3d at 1418; *Duncan*, 616 F.3d at 1162; *Rabun*, 698 F.2d 1098; *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, \*23-24; *Jewish War Veterans*, 695 F. Supp. 3; *Eckels*, 589 F. Supp. 222; *cf. Cabral*, 958 F. Supp. 2d at 1021; 1029 (crosses in “Veterans Memorial”). Plaintiffs are not aware of a single

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<sup>10</sup> *Cf. Hewett v. City of King*, 29 F. Supp. 3d 584, 619 (M.D.N.C. 2014) (“most of the current jurisprudence analyzing the Latin cross, in light of asserted Establishment Clause violations, is all but decidedly against the City and Defendant-Intervenors' position.”).

case upholding a war memorial cross on government property.

To comply with the Establishment Clause, a “publicly displayed religious symbol” must pass the *Lemon* test, pursuant to which it must (1) “have a secular purpose;” (2) not have the “effect” of advancing or endorsing religion; and (3) “not foster an excessive entanglement with religion.” *Gonzales*, 4 F.3d at 1418. State action “violates the Establishment Clause if it fails to satisfy any of these prongs.” *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). The Fourth Circuit has consistently adhered to the *Lemon* test<sup>11</sup> and applies it to religious displays specifically. See *Lambeth v. Bd. of Comm’rs*, 407 F.3d 266, 267 (4th Cir. 2005) (“Under our precedent, the Establishment Clause issue presented here [a religious monument] is properly analyzed . . . under the *Lemon* test”); *Smith v. Cnty. of Albemarle*, 895 F.2d 953, 958 (4th Cir. 1990) (creche unconstitutional pursuant to *Lemon*). In fact, “the Fourth Circuit has consistently applied the *Lemon* test more stringently when evaluating . . . inherently religious acts or symbols.” *Lambeth v. Bd. of Comm’rs*, 321 F. Supp. 2d 688, 705 (M.D.N.C. 2004) (citations omitted).

Tellingly, in *Trunk*, the Ninth Circuit applied *Lemon* to a nearly identical case and concluded that the government’s longstanding display of a Christian cross war memorial violated the Establishment Clause because “a reasonable observer would perceive the Memorial as projecting a message of religious endorsement.” 629 F.3d at 1106; 1118. It reached this conclusion even though “the Cross was dedicated as a war memorial” and later became “a site for secular events honoring veterans.” *Id.* The court reasoned that a war memorial cross “carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion.” *Id.* at 1102.<sup>12</sup>

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<sup>11</sup> See, e.g., *Mellen v. Bunting*, 327 F.3d 355, 367, 370-71 (4th Cir. 2003); *North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1149 (4th Cir. 1991); *Hall*, 630 F.2d 1018.

<sup>12</sup> Although the *Trunk* court also looked to factors set forth in Justice Breyer’s concurrence in *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality), it refused to abandon *Lemon* and adopt *Van Orden* in its place. 629 F.3d at 1107. The court seriously doubted that *Van Orden* applied, explaining that the “wide recognition of the Cross as a religious symbol . . . distinguishes the Memorial from the [small Ten Commandment] displays in *Van Orden* and *Card*.” *Id.* at 1120. Regardless, no court is actually bound by *Van Orden* because a majority could not be reached on the applicable standard. Other courts reviewing cross monuments have refused to apply *Van Orden* altogether. See *Duncan*, 616 F.3d at 1162 (applying *Lemon* and holding that “the memorial crosses at issue here cannot be meaningfully compared to the Ten Commandments display . . . in *Van Orden*”); *City of Starke*, 2007 U.S. Dist.

#### IV. THE BLADENSBURG CROSS VIOLATES THE ESTABLISHMENT CLAUSE.

##### A. The Bladensburg Cross lacks a valid secular purpose.

In evaluating Establishment Clause challenges, the courts “look first to the question whether the challenged state action reflects a secular purpose.” *Hall*, 630 F.2d at 1019. When the government permits “religious symbols to be constructed on public property, its ability to articulate a secular purpose becomes the crucial focus under the Establishment Clause.” *Rabun*, 698 F.2d at 1110 (internal footnote omitted). Many “courts addressing . . . challenges to the maintenance of religious symbols” have ruled that the symbols fail *Lemon* upon the “finding of a religious purpose.” *Id.* at 1110 n.23.<sup>13</sup>

Furthermore, the “Supreme Court has placed the burden on the government to articulate a predominantly secular purpose for using the symbols under *Lemon*.” *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*21. *See McCreary*, 545 U.S. at 870-72 (government failed to articulate a secular purpose for Ten Commandments); *Stone*, 449 U.S. at 41-42 (same); *see also Metzler v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995) (a secular purpose “is in the nature of a defense, and the burden of producing evidence in support of a defense is . . . on the defendant”); *O’ Bannon*, 259 F.3d at 770-71. This secular

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LEXIS 19512, \*14. Significantly, numerous courts faced with challenges to religious monuments have applied *Lemon* to the exclusion of *Van Orden*, **even in cases involving Ten Commandments**. *See ACLU v. DeWeese*, 633 F.3d 424, 431 (6th Cir. 2011); *ACLU v. Grayson Cnty.*, 591 F.3d 837 (6th Cir. 2010); *ACLU of Ky. v. McCreary Cnty.*, 607 F.3d 439, 445 (6th Cir. 2010) (“the governing standard . . . remains *Lemon*.”); *Green v. Haskell Cty. Bd. of Comm’rs*, 568 F.3d 784, 797-798, and n.8 (10th Cir. 2009) (applying *Lemon* to Ten Commandments concluding “this court is not” free “to ignore *Lemon*” and cannot be guided “by the *Van Orden* plurality”); *Skoros v. New York*, 437 F.3d 1, 17, & n.13 (2d Cir. 2006); *ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005); *O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1224 (10th Cir. 2005). *See also Ahlquist v. City of Cranston*, 840 F. Supp. 2d 507, 521 (D.R.I. 2012).

<sup>13</sup> *See McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005) (Ten Commandments); *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (same); *Deweese*, 633 F.3d at 434 (same); *ACLU v. Ashbrook*, 375 F.3d 484, 492 (6th Cir. 2004) (same); *Baker v. Adams County/Ohio Valley Sch. Bd.*, 86 Fed. Appx. 104 (6th Cir. 2004) (same); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (same); *Ind. Civ. Liberties Union v. O’ Bannon*, 259 F.3d 766, 770-71 (7th Cir. 2001) (same); *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2000) (same); *Washegesic v. Bloomington Pub. Sch.*, 33 F.3d 679 (6th Cir. 1994) (portrait of Jesus); *Gonzales*, 4 F.3d at 1421 (cross); *Harris*, 927 F.2d at 1414 (cross); *Rabun*, 698 F.2d at 1110 (cross); *Eckels*, 589 F. Supp. 222 (cross); *Gilfillan*, 637 F.2d at 930 (cross); *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, \*19 (cross); *Kimbly v. Lawrence Cnty.*, 119 F. Supp. 2d 856 (S.D. Ind. 2000) (Ten Commandments); *Mendelson*, 719 F. Supp. 1065 (cross); *Mississippi State*, 652 F. Supp. at 382 (cross); *Libin*, 625 F. Supp. at 399 (cross); *Fox*, 22 Cal.3d 792 (1978) (cross); *CCSCS v. Denver*, 481 F. Supp. 522 (D.C. Colo.1979) (creche); *Ahlquist*, 840 F. Supp. 2d at 522 (prayer mural); *Doe v. Cnty. of Montgomery*, 915 F. Supp. 32, 37 (C.D. Ill. 1996) (religious sign); *Burrelle v. Nashua*, 599 F. Supp. 792, 797 (D.N.H. 1984) (creche).

purpose must be the “pre-eminent” and “primary” force driving the government’s action, and “has to be genuine, not a sham, and not merely secondary to a religious objective.” *McCreary*, 545 U.S. at 864. Courts can “infer[] purpose from” the “public comments of its sponsor,” or other “openly available data.” *Id.* at 862-63 (citations omitted). Religious intent may also be inferred where “the government action itself besp[eaks] the purpose . . . [because it is] patently religious.” *Id.*

### **1. The Bladensburg Cross is patently religious.**

First, due to its patently religious nature, the “only purpose which can be ascribed to the display of the cross is to either advance or endorse the Christian religion.” *Mississippi State*, 652 F. Supp. at 383. “When a state-sponsored activity has an overtly religious character, courts have consistently rejected efforts to assert a secular purpose for that activity.” *Mellen*, 327 F.3d at 373.

Where, as here, the government sponsors an “intrinsically religious” display, such as a Latin cross, it “cannot meet the secular purpose prong.” *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 829-30 (11th Cir. 1989). See *McCreary*, 545 U.S. at 862-63; *Stone*, 449 U.S. at 41 (“[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.”); *Constangy*, 947 F.2d at 1150 (“an act so intrinsically religious as prayer cannot meet . . . the secular purpose prong of the *Lemon* test.”); *Books*, 235 F.3d at 303-04; *Indiana Civ. Liberties Union, Inc. v. O'Bannon*, 110 F. Supp. 2d 842, 852 (S.D. Ind. 2000) (finding unconstitutional religious purpose based on “the very design”).

Federal courts have uniformly recognized that the “cross is the preeminent symbol of Christianity.” *Trunk*, 629 F.3d at 1110-11 (citing *Buono*, 371 F.3d at 544-45; *Eugene*, 93 F.3d at 620; *Carpenter*, 93 F.3d at 630; *Ellis*, 990 F.2d at 1525-27). 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”); *City of St. Charles*, 794 F.2d at 271 (“It is, indeed, the principal symbol of Christianity ”); *Friedman*, 781 F.2d at 782; *Rabun*, 698 F.2d at 1103 (“the latin cross is a universally recognized symbol of Christianity.”).



Consequently, numerous courts have ruled that the government has no secular purpose for displaying the cross. *See Gonzales*, 4 F.3d at 1421 (the court could find “no secular purpose served by a crucifix”); *Harris*, 927 F.2d at 1414; *Rabun*, 698 F.2d at 1110-11; *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, \*23-24; *City of Starke*, 2007 U.S. Dist. LEXIS 19512, \*14; *Eckels*, 589 F. Supp. 222; *Gilfillan*, 637 F.2d at 930; *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; *Libin*, 625 F. Supp. at 399; *Fox*, 22 Cal.3d 792. Finding a memorial cross unconstitutional pursuant to *Lemon*’s purpose prong, the Eleventh Circuit in *Rabun* relied on the fact that the “cross is universally regarded as a symbol of Christianity.” 698 F.2d at 1111. Similarly, in *Libin*, the court held that “[b]ecause the cross has no meaning . . . except as a religious symbol, there can be no secular purpose for including it in a . . . display.” 625 F. Supp. at 399. The same conclusion was reached in *Lake Elsinore* involving a war memorial depicting rows of crosses and Stars of David. 2014 U.S. Dist. LEXIS 25180, at \*32.<sup>14</sup>

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. Due to its plain religious nature, the “only purpose which can be ascribed to the display of the cross is to either advance or endorse the Christian religion.” *Id.*

## 2. The history of the Cross underscores its religious purpose.

The particular “history of this Cross only deepens its religious meaning” and purpose. *Trunk*, 629 F.3d at 1124. *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.”). Early newspaper accounts referred to the Bladensburg Cross as the “Calvary cross” and the “Sacrifice cross,” *supra*. The reference to “Calvary” is clearly a Christian one. (Piehler Rep. 26) (Piehler Rebuttal 4-7). On May 25, 1919, *The Washington Times* even reported: “A mammoth cross, a likeness of the Cross of Calvary, **as described in the Bible**, will be built . . .” (Exh. 3) (emphasis added). The term “Sacrifice,” like the term “Calvary,”

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<sup>14</sup> *See also Summers v. Adams*, 669 F. Supp. 2d 637, 658 (D.S.C. 2009) (a statute which exclusively enabled the display of a cross superimposed on a stained glass window on the license plates of privately-owned vehicles was “obvious[ly]” motivated by a religious purpose, despite various secular rationales put forward by the government)

has a distinct religious meaning, and obviously so in the context of a Christian Cross. (Piehler Rebuttal 4; 6). The “History of the Snyder-Butler Post No. 3” records confirm this: “In memorial to their supreme **sacrifice for God** and for Country, the Post became known as Snyder-Farmer Post[.]” (Exhs. 12, 15). In addition, the Bladensburg Cross was referred to as a “Shrine” and as a “Salvation” cross by major newspapers in the area. (Exhs. 20-21). And in the 1930s, the governor of Maryland “asked the Maryland State roads commission to take action to prevent the ‘desecration’ of the Memorial Cross.” (Exh. 19).

“Public 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; *City of Starke*, 2007 U.S. Dist. LEXIS 19512, \*14. When the Prince George’s County Memorial Committee raised funds to construct the Cross, contributors signed an overtly religious pledge: “WE, THE CITIZENS OF MARYLAND, TRUSTING IN GOD, THE SUPREME RULER OF THE UNIVERSE . . .” (Exh. 9). The “reasonable observer would be aware of [the donors’] religious motivation.” *Green*, 568 F.3d at 800.

As part of the Cross’s formal dedication ceremony in 1925, Representative Gambrill, the keynote speaker, declared: “You men of Prince Georges county fought for the **sacred right** of all to live in peace and security and by the token of this cross, **symbolic of Calvary**, let us keep fresh the memory of our boys who died for a righteous cause.” (Exhs. 5, 10-11) (emphasis added). The dedication ceremony included prayers delivered by Christian clergy. (Exhs. 5-6). After it was dedicated, religious “rites” “exercises” and “services” took place at the Cross. (Exh. 18). For instance, Captain Frank Mountford, lauded as a leading evangelist, held at least three Sunday services at the Cross in 1931. (*Id.*). In May 1929, the County held a memorial service at the Bladensburg Cross, in which “prayers” were offered by Rev. Morris W. Derr, rector of St. Luke’s Protestant Episcopal Parish. (*Id.*).

This history clearly casts “serious doubt on any argument that it was intended as a generic symbol, and not a sectarian one.” *Trunk*, 629 F.3d at 1124. Moreover, as made clear in *McCreary*, any “new statements of purpose” do not erase the past. 545 U.S. at 871, 873. See also *Mississippi State*, 652

F. Supp. at 383. Additionally, the religious motivation of the Cross’s sponsors, including the American Legion, can be imputed on Defendant. *See Gonzales*, 4 F.3d at 1418; *Books*, 235 F.3d at 296, 303 (“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”). For example, in *Harris*, the Seventh Circuit held that the City of Zion’s seal depicting a cross failed the purpose and effect tests. 927 F.2d at 1403-04. Even though the seal was not designed by the government and the city adopted a resolution purporting, “to retain the seal for historical reasons,” the court concluded that the “purpose for the adoption of Zion’s unique seal was primarily sectarian.” *Id.* at 1413-14.

Indeed, a number of cross displays have failed the purpose test despite the government having *no role* in the design whatsoever. *E.g.*, *Gonzales*, 4 F.3d at 1418; *Harris*, 927 F.2d at 1403-04; *Rabun*, 698 F.2d at 1110; *Mendelson*, 719 F. Supp. at 1066 (cross given as gift to city). The most notable authority is *Gonzales*, which involved war memorial crucifix erected by the Knights of Columbus, “a fraternal organization.” 4 F.3d at 1414. The town claimed that the “crucifix was intended to act as a war memorial, not a religious icon, and that this purpose prevails.” *Id.* at 1419. Holding that the cross lacked a secular purpose, the court imputed the Knights’ purpose onto the town, noting: “The record illustrates that the *Knights’ goal* was to spread the Christian message.” *Id.* at 1421 (emphasis added).

### **3. The use of religious means to achieve a secular end is unconstitutional.**

The Bladensburg Cross fails the purpose prong for a second independent reason. That is, the government’s choice to make “use of religious means to achieve secular goals where nonreligious means will suffice is forbidden.” *Eckels*, 589 F. Supp. at 234 (citing *Larkin v. Grendel’s Den*, 459 U.S. 116 (1982)). “[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). Stated differently, “the use of a religious symbol where one is not necessary evidences a religious purpose.” *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*22. *See also Rabun*,

698 F.2d at 1111; *Mendelson*, 719 F. Supp. at 1070. In *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222-23 (1963), a school argued that the practice of Bible reading served secular purposes including “the promotion of moral values.” Without discrediting these ends, the Court held the practices furthered religious purposes: “Even if its purpose is not strictly religious, it is sought to be accomplished through readings . . . from the Bible.” *Id.* The Fourth Circuit followed this rationale in *Hall*, ruling that a prayer displayed on a state map failed the purpose test. 630 F.2d at 1020-21. The state contended that the prayer “promoted safety, which is a legitimate secular purpose.” *Id.* While the court agreed that the “prayer may foster the state’s legitimate concern for safety of motorists,” it ruled that “the state has chosen a clearly religious means to promote its secular end.” *Id.* (citation omitted).

The Eleventh Circuit in *Rabun* also 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 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 court 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). More recently, in *Lake Elsinore*, the court held: “Although the cross serves as a tombstone, . . . the use of a religious symbol where one is not necessary evidences a religious purpose.” 2014 U.S. Dist. LEXIS 25180, at \*22-23.

There “are countless ways that we can and should honor [veterans], but without the imprimatur of state-endorsed religion.” *Trunk*, 629 F.3d at 1102. *See also Gonzales*, 4 F.3d at 1421; *Eckels*, 589 F. Supp. at 234 (“The removal of these four symbols, [viz. Latin crosses and Stars of David] . . . would in no way hinder the county’s ability to honor its war dead.”). In fact, “this war memorial—with its imposing Cross—stands as an outlier among war memorials.” *Trunk*, 629 F.3d at 1101. Because the

government “can effectively recognize its war dead without resort to the use of [] religious symbols, *it must do so.*” *Eckels*, 589 F. Supp. at 234 (emphasis added).

**4. That the Cross serves as a war memorial and may have some historic value does not negate its overwhelmingly religious purpose.**

Defendant will inevitably aver the following “secular purposes” for the Cross: (1) it is a war memorial; (2) it is historic; and (3) it is art. However, 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.

First, as noted above, a number of courts have explicitly held that a government war memorial cross violates the Establishment Clause under the purpose prong. *E.g.*, *Gonzales*, 4 F.3d at 1421; *Eckels*, 589 F. Supp. at 234; *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*22. See also *Rabun*, 698 F.2d at 1111 (general memorial). And any contention that the Cross serves the purpose of honoring *all* service members is a sham. See *Trunk*, 629 F.3d at 1112, 1124 (“the cross is ‘not a generic symbol of death’ but rather ‘a Christian symbol of death that signifies or memorializes the death of a Christian.’”).<sup>15</sup>

Second, preservation of history cannot serve as a valid secular purpose here. See *Gonzales*, 4 F.3d at 1421 (despite government’s claim that “the monument is intended to honor our history” it failed to meet its burden of proving a secular purpose); *Harris*, 927 F.2d at 1414-15 (“the City may not honor its history by retaining the blatantly sectarian seal.”); *Mendelson*, 719 F. Supp. at 1070 (rejecting the city’s proffered secular purpose that “cross has historical value to the community”); *Ahlquist*, 840 F. Supp. 2d at 522 (“no amount of history and tradition can cure a constitutional infraction”); *Washegesic*, 813 F. Supp. at 563 n.9 (“[t]his Court’s analysis does not depend upon the length of time the picture [of

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<sup>15</sup> That the Ninth Circuit found a permissible purpose in *Trunk* does not change this conclusion. In *Trunk*, the focus of the purpose prong was on the federal government’s purpose in acquiring the *land* containing the cross. *Trunk*, 629 F.3d at 1101-02. The court, evaluating the “purpose of the legislation,” found that the statute did not “require the continued presence of the cross as part of the memorial.” *Id.* at 1108 (emphasis added).

Jesus] has hung on the school wall.”). In *Rabun*, the Eleventh Circuit held that a cross failed the purpose prong, noting:

For many years, a cross on Black Rock Mountain State Park has shone over the North Georgia mountains. Yet ‘historical acceptance without more’ does not provide a rational basis for ignoring the command of the Establishment Clause that a state ‘pursue a course of ‘neutrality’ toward religion.’ . . . Accordingly, the cross must be removed.

698 F.2d at 1111 (internal citations omitted). Ruling that a longstanding war memorial crucifix lacked a secular purpose, the Seventh Circuit in *Gonzales*, 4 F.3d at 1422, declared:

the crucifix has stood for nearly forty years . . . [T]he Township] argue[s] that the duration of its display reinforces its secular effect. It claims that “the very essence” of a memorial is its permanency . . . [and that] the longer the violation, the less violative it becomes. . . . We do not accept this sort of bootstrapping argument as a defense to an Establishment Clause violation [].

Furthermore, to argue that the Cross was intended to reflect “history and tradition . . . ignores the original” motivation for placing it on the Property. *Cnty. of Montgomery*, 915 F. Supp. at 36. In *Kimbley*, the government averred that the Ten Commandments Monument “is on the Courthouse lawn to honor the importance of the limestone industry in the County[.]” 119 F. Supp. 2d at 868. However, this failed to explain “why the documents depicted on the Monument were chosen.” *Id.*

Lastly, “[w]hen a religious symbol is erected for a religious purpose, the fact that it is also a ‘work of art’ designed by a noted architect and approved by an art commission does not change its purpose. It simply is an attempt to create an aesthetically pleasing religious symbol; it does not obviate its religious purpose.” *Gonzales*, 4 F.3d at 1421. Like the Seventh Circuit, the Ninth Circuit in *Carpenter* also found no merit to the government’s contention that the cross ““can be properly viewed as one of the works of art in [San Francisco’s] public art collection.”” 93 F.3d at 631-32 (citation omitted). The court made clear: “The beauty of the Cross, however, has little bearing on its validity.” *Id.* Thus, the “argument that a religious display is art or a tourist attraction will not protect the display from restrictions on government-sponsored religion.” *Hewitt v. Joyner*, 940 F.2d 1561, 1572 (9th Cir. 1991).<sup>16</sup>

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<sup>16</sup> See also *Washegesic*, 33 F.3d 679; *Joki*, 745 F. Supp. at 830 (“the quality of the painting [of the crucifix] and its location are features which do not negate endorsement of the religious message.”).

It bears emphasis that not a single deponent, other than non-party Renee Green, even mentioned John Earley (the designer) in discussing the Bladensburg Cross and its history and importance, *supra*.

**B. The Bladensburg Cross has the primary effect of advancing, endorsing, and affiliating the government with Christianity and religion over non-religion.**

Regardless of the purposes motivating it, *supra*, the Bladensburg Cross violates the Establishment Clause under the second prong of *Lemon*. See *Trunk*, 629 F.3d at 1109-10; *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*33 (“even if Lake Elsinore had shown a predominant secular purpose . . . the primary effect of the memorial is also to advance religion.”); *Jewish War Veterans*, 695 F. Supp. 3 (same). The “effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement.” *Constangy*, 947 F.2d at 1151. The “Establishment Clause is violated when a given governmental practice has the appearance or effect of endorsing religion.” *Smith*, 895 F.2d at 956.<sup>17</sup> The “advancement need not be material or tangible.” *Friedman*, 781 F.2d at 781. Even the “*mere appearance* of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit” and is therefore unconstitutional. *Larkin*, 459 U.S. at 125-26 (emphasis added). By way of illustration, in *Granzeier*, the court held that a government sign depicting a small (**4-inch**) “clip art” cross violated the Establishment Clause because, “the sign could be, and was in fact, perceived by reasonably informed observers, to be a government endorsement of the Christian religion.” 955 F. Supp. at 746-47, *aff’d*, 173 F.3d 568 (6th Cir. 1999).

**1. The physical appearance of the Cross unconstitutionally endorses religion.**

“[E]very single court of appeals that has considered challenges to Latin crosses has concluded that the Latin cross is a Christian symbol.” *Am. Humanist Ass’n v. City of Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, \*40 (C.D. Cal. July 16, 2013). See also *Jewish War Veterans*, 695 F. Supp. at 12 (same). “The religious significance and meaning of the Latin or Christian cross are unmistakable.” *Robinson*, 68 F.3d at 1232. As the Ninth Circuit explained in *Trunk*, it has “repeatedly recognized that “[t]he Latin

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<sup>17</sup> The Fourth Circuit treats “the endorsement test as a refinement of *Lemon*’s second prong.” *Mellen*, 327 F.3d at 371 (citation omitted).

cross is the preeminent symbol of Christianity” and the other “courts of appeals . . . have unanimously agreed with our characterization.” 629 F.3d at 1110-11 (citations omitted). The cross is also “exclusively a Christian symbol[.]” *Buono*, 371 F.3d at 545. *See also Cabral*, 958 F. Supp. 2d at 1026-27. It “carries deeply significant meaning for those who adhere to the Christian faith.” *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 852 (7th Cir. 2012) (en banc), *cert. denied*, 134 S. Ct. 2283 (2014). Due to its inherently religious nature, the government’s prominent display of it inevitably advances religion and conveys the message that Christianity is preferred. *See Trunk*, 629 F.3d at 1109.

Federal courts have been virtually unanimous in concluding that the government’s display of a cross unconstitutionally endorses Christianity. *See Trunk*, 629 F.3d at 1110-11; *Duncan*, 616 F.3d 1145 (individualized memorial crosses for state troopers); *Eugene*, 93 F.3d 617 (war memorial); *Gonzales*, 4 F.3d 1412 (same); *Carpenter*, 93 F.3d at 630; *Ellis*, 990 F.2d at 1525- 27; *Rabun*, 698 F.2d 1098 (memorial cross); *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*32-33 (war memorial); *Cabral*, 958 F. Supp. 2d at 1026 (crosses in a veterans’ park); *Jewish War Veterans*, 695 F. Supp. at 8 (war memorial cross on military base); *Eckels*, 589 F. Supp. 222 (three crosses and Star of David war memorial in public park); *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”); *Mississippi State*, 652 F. Supp. at 384-85 (same); *Granzeier*, 955 F. Supp. at 746. *See also Allegheny*, 492 U.S. at 599.

Here, as in the above cases, “a reasonable observer would perceive [the Cross] as projecting a message of religious endorsement.” *Trunk*, 629 F.3d at 1118. The use of the “Christian symbol to honor all veterans sends a strong message of endorsement.” *Id.* at 1124-25.

“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. The Seventh Circuit held in *City of St. Charles*: “When prominently displayed on [government property] . . . the cross dramatically conveys a message of governmental support for Christianity.” 794 F.2d at 271. *See Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*39 (the “physical appearance of the memorial also has the principal effect



of advancing religion.”). “Because of the Latin cross's strong ties to Christianity, even when a cross occupies only one part of a larger [sic] display, courts have almost unanimously held that its effect is to communicate that the display as a whole endorses religion.” *Id.* at \*39-40 (citations omitted).

While the Fourth Circuit has yet to rule on a cross case, it has found other Christian-themed religious displays unconstitutional. In *Smith*, the Fourth Circuit ruled that a privately donated nativity scene displayed on the front lawn of a government building failed the second prong of *Lemon*. 895 F.2d at 955-58. Notwithstanding the fact that the display was temporary, that it had a disclaimer stating it was “Sponsored by Charlottesville Jaycees,” and that it “involved no expenditure of County funds,” the Fourth Circuit concluded that it sent the “unmistakable message” of endorsement of religion. *Id.* at 958. The 40-foot Bladensburg Cross is even more egregiously unconstitutional than the crèche in *Smith*: it is permanent, there is no disclaimer (as the government in fact owns it), and the government financially supports it. (D. Int. No. 9) (Exh. 52). *See also Allegheny*, 492 U.S. at 606-07 (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.’”). In *Harris*, the Seventh Circuit held that a city seal within which the Latin cross was no more prominent than several secular images was unconstitutional, noting that because the seal is “viewed year-round,” the cross “brings together church and state in a manner that suggests their alliance . . . even more ardently than the unconstitutional crèche display[] in . . . *Allegheny*.” 927 F.2d at 1412.<sup>18</sup> *A fortiori*, the Bladensburg Cross is unconstitutional.

**2. The Bladensburg Cross sends a message that Christians are preferred and a stigmatic message to non-Christians that they are outsiders.**

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<sup>18</sup> *See also Gonzales*, 4 F.3d at 1423 (“It is not seasonally displayed in conjunction with other holiday symbols.”); *City of St. Charles*, 794 F.2d at 273; *Cnty. of Montgomery*, 915 F. Supp. at 38, n.16 (“[u]nlike the vast majority of Establishment Clause cases [] where a particular religious symbol is intended to be displayed for a short period of time, usually around the Christmas season[], the sign here is displayed on the Courthouse 24 hours a day and 365 days a year.”); *Eckels*, 589 F. Supp. at 235 (“There is no danger here that the government’s use of these symbols [the cross and Star of David] will be mistaken as merely a temporary governmental celebration of a religious holiday that has acquired some secular flavor.”).

The Bladensburg Cross also fails the effect prong because Defendant, by “claiming to honor all service members with a symbol that is intrinsically connected to a particular religion,” 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 Eckels*, 589 F. Supp. at 235 (the primary effect of crosses and Stars of David used as war memorials “is to give the impression that only Christians and Jews are being honored by the country”).

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.” *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985). And “actions which have the effect of communicating governmental endorsement or disapproval, ‘. . . make religion relevant, in reality or public perception, to status in the political community.’” *Green*, 568 F.3d at 799 (citations omitted). The Bladensburg Cross thus fails the effect test because it sends the unequivocal message to Christians that they are preferred and worthy of veneration and a concomitant message to non-Christians that they are not. A “sectarian war memorial . . . honor[s] only those servicemen of that particular religion.” *Ellis*, 990 F.2d at 1528. This use of a

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.

*Trunk*, 629 F.3d at 1124-25. *See also City of St. Charles*, 794 F.2d at 273 (“[T]he story of the death and resurrection of Christ, the story that the cross calls to mind, moves only Christians deeply.”); *Washegesic*, 33 F.3d at 684 (“Christ is central only to Christianity, and his portrait has a proselytizing, affirming effect that some non-believers find deeply offensive. . . . [I]t [i]s a governmental statement favoring one religious group and downplaying others.”).

Clearly then, the fact that the Cross is “recognized and referred to as a war memorial, [does] not obviate the appearance of [religious] preference.” *Ellis*, 990 F.2d at 1528. As the Tenth Circuit explained in *Duncan*, memorial status does not nullify a cross’s “religious sectarian content because a memorial cross is not a generic symbol of death; it is a Christian symbol of death.” 616 F.3d at 1161. “*Lemon* does not permit a municipality to exempt a obviously religious symbol from constitutional strictures by attaching a sign dedicating the symbol to our honored dead.” *Gonzales*, 4 F.3d at 1421.<sup>19</sup>

The fact that the Cross is a memorial for veterans actually *heightens* the stigmatic message associated with its sectarian symbolism. Such a “needless use of means that are inherently religious makes a message of endorsement likely if not unavoidable.” *Jewish War Veterans*, 695 F. Supp. at 14.

As previously noted, numerous courts have held government war memorial crosses unconstitutional under *Lemon*’s second prong in analogous factual circumstances. In *Eugene*, for instance, 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 at 617. There as here, “[m]emorial ceremonies were [] conducted by the American Legion” for many years. *Id.* at 625 n.9 (O’Scannlain J., concurring). Additionally, there was a “plaque on the cross [that] clearly show[ed] its status as a war memorial.” *Id.* From these facts, the “City maintain[ed] that a reasonable observer would recognize the cross for what it is - a war memorial[.]” *Id.* The Ninth Circuit disagreed, stating that despite being a war memorial, it “*clearly* represents governmental endorsement of Christianity[.]” *Id.* at 619 (emphasis added). While finding some merit to the city’s argument, even the concurrence agreed, “*Allegheny* nevertheless compels the conclusion that the City’s display of the cross is unconstitutional.” *Id.* at 626 (O’Scannlain J., concurring). He reasoned: “the City’s use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans.” *Id.* In addition to *Trunk*, and *Eugene*, the Ninth Circuit in *Carpenter* ruled that a 60-year old cross, which had

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<sup>19</sup> Of course, given the placement of this cross, on a busy traffic median with no pedestrian access, many would be oblivious to the fact that it is a war memorial. (Green Dep. 28; 30; 42-44 & Exh. 11) (“I did not know that much about the Peace Cross. I . . . thought it was to promote world peace.”).

achieved historical significance, was unconstitutional. 93 F.3d at 629.

In *Jewish War Veterans*, the court held that a cross displayed as a “war memorial at Camp H.M. Smith, a United States Marine Corps base in Hawaii” failed the second and third prongs of *Lemon*. The government asserted that the cross ““was a recognizable, secular symbol of sacrifice, pure and simple.”” 695 F. Supp. at 7. Despite factual disputes regarding the origins and usage of the cross, the court concluded that it clearly “convey[ed] a message of governmental endorsement of Christianity.” *Id.* at 14.

In *Gonzales*, the Seventh Circuit ruled that a display of a war memorial cross, dedicated in 1927, unconstitutionally advanced religion. 4 F.3d 1412. There, as here, the cross was “located in . . . a busy intersection.” *Id.* at 1414. The cross was donated to the government by a fraternal organization, but unlike here, that organization was expressly named on the plaque. *Id.* Notwithstanding its historical significance and war memorial status, the court concluded: “Not only do we believe that the primary message the crucifix conveys is a government endorsement of religion, we believe that the crucifix does not convey any secular message, whether remote, indirect, or incidental.” *Id.* at 1423.

And in *Eckels*, a county maintained three Latin crosses and a Star of David as part of a war memorial. 589 F. Supp. at 234-35. “The Court [could] reach no other conclusion but that the symbols' primary or principal effect, like their purpose, is religious.” *Id.* The court added: “The messages conveyed by these symbols are not lost when they are removed from the churches and synagogues with which they are traditionally associated.” *Id.* Finally, the court in *Lake Elsinore* concluded that a war memorial with crosses and Stars of David failed the effect prong, reiterating that “although the cross can be used to pay homage to the deceased, it remains the symbol of only one religion, and thus gives the effect of memorializing only the Christian deceased.” 2014 U.S. Dist. LEXIS 25180, at \*40-41.

Defendant will argue that the Bladensburg Cross is essentially a tombstone and is an acceptable symbol for a war memorial. However, the courts have uniformly distinguished a freestanding government cross from an individual headstone. The latter are the “marker of an individual grave” and are “not a universal monument,” which must be secular. *Trunk*, 629 F.3d at 1113. The Ninth Circuit

observed: “The fact that *individual* veterans can purchase plaques representing *their own beliefs* does not cure the constitutional problem with the Memorial.” *Id.* at 1125 n.25 (emphasis added).

Significantly, the cross never became a default headstone in military cemeteries in the United States. A visitor to Arlington or another national cemetery does not encounter a multitude of crosses . . . Symbols of faith are carved into the headstones, but those symbols are not restricted to crosses and now include everything from a Bahai nine-pointed star to a Wiccan pentacle. See *id.* **The cross, in other words, has never been used to honor all American soldiers in any military cemetery, and it has never been used as a default gravestone in any national cemetery in the United States.**

*Id.* at 1113 (emphasis added). In *Duncan*, the Tenth Circuit held that twelve-foot tall cross-shaped memorials placed on side of public roadways had the unconstitutional effect of endorsing Christianity, even though the crosses included biographical information about the troopers. 616 F.3d at 1161-62. See *also id.* at 1151 (“the UHPA obtained the consent of the fallen trooper’s family.”).

Notably, the monument found unconstitutional in *Lake Elsinore* actually depicted “a historic image of a World War II cemetery, with two rows of white crosses and scattered Stars of David.” 2014 U.S. Dist. LEXIS 25180, at \*40-41. But the court explained: “Although the cross is a component of the imagery of World War II cemeteries such as Normandy, it remains ‘a marker of an individual grave, not a universal monument to the war dead.’” *Id.* at \*42 (citing *Trunk*). In a similar vein, the Seventh Circuit in *Harris* ruled that a city’s seal, which depicted the cross in only one quadrant, along with other “snapshots of the community” had the effect of endorsing religion. 927 F.2d at 1412-13. The court reasoned: “The images on the seal are not just neutral snapshots of the community . . . To any observer, the Rolling Meadows seal expresses the City’s approval of those four pictures of City life—its flora, its schools, its industry and commercial life, and its Christianity.” *Id.*<sup>20</sup>

Defendant will also point to several rare standalone crosses in U.S. cemeteries (such as the Argonne cross and Canadian Cross of Sacrifice in Arlington Cemetery), the constitutionality of which have never been challenged. See *Trunk*, 629 F.3d at 1115. Yet even assuming, *arguendo*, that the crosses

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<sup>20</sup> See *also Robinson*, 68 F.3d at 1232 (cross on seal unconstitutionally endorsed religion even if it reflected the importance of the Catholic Church in the Southwest); *Ellis*, 782 F. Supp. at 1434-35 (cross on insignia unconstitutional even though it depicted an actual cross in the city, which was “a prominent local landmark.”).

in the Arlington Cemetery are constitutional, they are vastly distinguishable from the standalone Bladensburg Cross inexplicably situated on a median island in the midst of a busy traffic thoroughfare. (Piehler Rep. 3, 5, 7-8, 21) (Piehler Rebuttal 24-25). The Ninth Circuit expressly distinguished the standalone Mt. Soledad cross from the crosses in the Arlington Cemetery:

All three crosses stand among, if not immediately next to, the countless headstones of soldiers buried in Arlington and alongside a large number of other monuments that do not incorporate religious imagery . . . **These crosses are not comparable to the Mount Soledad Cross, which dominates the small park of which it is the centerpiece and can be seen from miles away.**

*Id.* at 1114-15 (emphasis added). Like the Mt. Soledad Cross, the Bladensburg Cross is not a headstone and is not in a cemetery. (VC ¶¶12-13) (Ans. ¶¶12-14) (AL Ans. ¶12) (Exhs. 8, 53, 63, 71).

### **3. The history and usage of this Cross deepens its religious message.**

As discussed below, “[t]he particular history of this Cross only deepens its religious meaning.” *Trunk*, 629 F.3d at 1124. The Court conducts the effect-prong “inquiry from the perspective of an ‘informed and reasonable’ observer who is ‘familiar with the history of the government practice at issue.’” *Id.* at 1110 (citations omitted). First, a “reasonable observer would be aware of” the founder’s “religious motivation.” *Green*, 568 F.3d at 800-01. *See also Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*34. Thus, the observer would be aware of: (1) the fact that the funders signed a religious pledge; (2) the American Legion and Post 131’s religious practices and beliefs; (3) the fact that the “keynote” speaker at the dedication ceremony declared that the Cross is symbolic of “Calvary”; and (4) the newspaper articles referring to the Cross with terms such as “Calvary,” “Bible,” “Sacrifice,” “Shrine,” and “Salvation.” The observer would also take note of the fact that the Cross faced keen competition with a secular WWI memorial at the courthouse. (Exh. 13) (Piehler Rep. 21-22).

Second, the reasonable observer would be aware of the religious events that have taken place at the Bladensburg Cross from its inception until present. The Cross “is not only a preeminent symbol of Christianity, it has been consistently used in a sectarian manner.” *Trunk*, 629 F.3d at 1124. The reasonable observer would be aware of, *inter alia*: (1) the religious “rites” and “services” at the Cross;

(2) the Sunday Services held at the Cross; (3) the inclusion of prayers in the semi-annual Post 131 and Town events; (4) the use of the Cross for Klan rituals (*e.g.*, *id.* at 1121); (5) Defendant’s 1975 “50<sup>th</sup> Anniversary” celebration of the dedication of the Cross, which included prayers by Christian leaders; and (6) Defendant’s 1985 “Rededication Ceremony” of the Cross, which included prayers by a Catholic priest, *supra*. The observer would take additional note of the fact that none of the prayers delivered at the semi-annual events have been delivered by a rabbi, imam, or non-theist. (Holdcraft Dep. 52).<sup>21</sup> This history results in the conclusion that “a reasonable observer would perceive the Memorial as projecting a message of religious endorsement, not simply secular memorialization.” *Id.* at 1118.

As Jason Torpy, president of MAAF, testified: “When the government, including the Town of Bladensburg, regularly sponsors Veterans Day and Memorial Day events at the Bladensburg Cross, it is a constant reminder that we, MAAF members and other non-Christian veterans, are outsiders and are unwelcome in the community. . . . This is especially so considering the fact that the . . . events held at the Bladensburg Cross include prayers as part of the official ceremony.” (Torpy Decl. ¶10).

#### **4. Citizens in fact perceive the Bladensburg Cross as religious.**

To reiterate, “under the second prong of *Lemon*, [the government’s] intent is irrelevant. Rather, [the Court] must focus on how his [display is] perceived.” *Constangy*, 947 F.2d at 1151. The “actions and statements of . . . the community at large . . . also contribute to the perception that the memorial [is] viewed as endorsing religion.” *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*35-36. *See Trunk*, 629 F.3d at 1119-20 & n.19. In *Trunk*, a local law center declared that “Christ won the war on Calvary.” *Id.* Other groups launched petition campaigns to save the cross, as is the case here. *Id.* The court explained that “[t]he starkly religious message of the Cross’s supporters would not escape the notice of the reasonable observer.” *Id.* at 1120. Likewise, in *City of Starke*, the court observed: “While the City may

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<sup>21</sup> On the other hand, the reasonable observer would most likely *not* be aware of John Earley or his work with exposed aggregate concrete. *See Joki*, 745 F. Supp. at 829 (“The court cannot impute complete knowledge of the artist’s theme to the average observer of the painting.”). This is especially so considering the fact that the 30(b)(6) designees failed to mention his work once. The only deponent to mention Early was non-party Renee Green, who admitted she did not know about Early until this case. (Green Dep. 18; 28; 30; 42-44 & Exh. 11).

attempt to deny the fact that it is indeed a Cross on top of the water tower . . . the attitudes and comments of the citizens of and an official in the City contradict any such notion.” 2007 U.S. Dist. LEXIS 19512, \*14. As in *Trunk, Lake Elsinore*, and *City of Starke*, statements of community members reveal that they perceive it as a Christian symbol. (Exhs 34; 36-39). For example:

- Nathan Solomon (3/5/14): “It [the Bladensburg Cross] represents death of Jesus Christ and the after-life. . . . It is simply a symbol of a faith.” (Exh. 34)
- Greg Spangler (9/11/12): “The Peace Cross has a deep spiritual value” (*Id.*)
- John M. Deck (9/14/12): “There is no religion that is offended by the Cross except the Muslims. They do not recognize any religion or Church or representation of Christianity.” (*Id.*)
- Travis Jones (3/17/14): “. . . they do this to hurt you and help their cause, while removing God and Jesus from our lives . . . Christians have rights. God rules this country. Not left wing God hating homosexual atheists trying to destroy it like cancer. . . . If all else fails, donate the land to a private party, and then let 3 or 4 young conservative kids mow it, and the town to take care of it, and shove it back in the faces of the lazy, non productive homosexual atheists” (*Id.*)
- Elaine Lynch (9/18/12): “This country was founded on GOD” (*Id.*)
- Deb Schwalenberg (6/11/14): “Wouldn't tearing it down be prohibiting the free exercise of religion?? Please don't be bullied by the mistaken opinion of a minority.” (*Id.*)
- Ross (9/11/12): “This Nation doesn't cater to commies, do you ?” (*Id.*)
- Steve Hunter Smith (3/6/14): “I am very upset that our Country is being systematically dismantled by people who seem bent on changing or disguising our Nation's military and religious history. . . . Maryland, a State that was once known as the MOST Catholic State in the Nation! . . .” (*Id.*)
- Gloria Moyer (2/28/14): “This is purely a case of religious intolerance and must not be allowed to prevail. . . . We apparently are the only unprotected class left and can be victimized by the bigotry of secular activists at any time.” (*Id.*)
- Joseph Apichella (9/12/12): “LET'S STOP THESE ATHIESTS [sic] FROM GETTING THEIR WAY; THEY WILL BE JUDGED BY GOD ONE DAY!” (*Id.*)
- Bill Woodside (9/8/12): “This nation was built on Christian values.” (*Id.*)
- John (9/11/12): “in a country that was founded on Christian principles by Christian men” (*Id.*)
- Connie (9/12/12): “Every Monument in DC has a Christian Scripture of some kind” (*Id.*)
- Gary E. Neff (9/7/12): “The American Humanist Association's desires violates the majority rights per other articles of the Constitution known as the Freedom of Religion” (*Id.*)



- Andy Carruthers (3/4/14): “Truly, though, if, as claimed, Edwards and co-plaintiffs do ‘not wish to encounter the [Peace] Cross in the future,’ I’ve got a few terse but respectful options which follow, all of which are far cheaper than litigation: . . . Find God” (*Id.*)
- Rich (9/26/14): “Funny how everyone from muslims [sic] to you atheists have rights protected by the first amendment but Christians don’t.” (*Id.*)
- Joe White to Edwards (5/29/14): “Leave it alone you piece of trash. May God, yes GOD, have mercy on your soul. Even though you are heartless.” (*Id.*)
- Ray Aaron (9/14/12): “How dare them put up a religious symbol to honor our fallen troops. Who says that we should honor them with religious symbol. Those lousy Christians. Who do they think that they are anyway. Who cares if our Country was founded on a Christian way of life. Sure it’s ok to speak openly about safe sex, and the Government should pay for abortions. Let’s have it all then. Let’s start banning out currency that has God on it. . . . Yes, let’s do this and while we are at it why not be one a [sic] Communist Country [sic] too. . . . GOD BLESS OUR COUNTRY” (*Id.*)
- Debbie (3/6/14) to Edwards: “I am a Christian . . . I am praying that your group stops worrying about offending people with a cross on a WWI memorial and starts being concerned with something that truly matters. Jesus commands His followers to love one another.” (*Id.*)
- Nancy Green (3/7/14): “This would be as blatant an act of religious destruction as the Taliban’s demolition in Afghanistan of two of the largest Buddhas [sic] in the world.” (Exh. 37)
- Bill (June 2014): “I am proud to be a Christian Conservative and an American Veteran” (Exh. 38)
- Jose A. Lugo (June 2014): “How about the many who believed and had faith in our country and God who believed in that the USA and that Cross” (*Id.*)

Renee Green, a citizen and producer of the “Save the Peace Cross” documentary also perceives the Bladensburg Cross as religious. (Green Dep. 23; 25-27; 30; 36-37; 39; 42-43; 46; 57-61; Exh. 9). Green is a practicing Catholic and attends mass regularly. (*Id.*) She testified that “[t]he Christian cross is a plain cross, or has Jesus on it, or maybe a shroud, and that’s it.” (*Id.* 39). Green pitched her documentary to the “Catholic Business Network” of Prince George’s County in November 2014 to “gather sponsors” and “funders.” (*Id.* 57-61; Exh. 9). In preparation for her presentation, Green drafted notes, which stated in part: “It upset me so much that a group of Atheist would remove it that I did something about it. Yes I am an Activist – In a good way. . . I will take the heat from the Atheist and other extremeist [sic] because of my Catholic upbringing + my Faith in God. Call me a Radical!” (*Id.*). Green revealed that she sees the Bladensburg Cross as a “religious symbol or a Christian symbol” and

described atheism and humanism as a “cult.” (*Id.* 23; 25-27; 30; 42-44; & Exh. 11) (Lewis Dep. 46-47) (Exhs. 70-71). In the documentary, Green approached the Cross and declared: “Now, if you’re a humanist or an atheist don’t worry, I believe in God and I have enough faith to know I’ll be okay gettin’ close to the Cross.” (Green Dep. 43-44).<sup>22</sup> In describing the dedication ceremony, Green opined: “The ceremony included prayers, an invocation and a benediction, which was all customary in the time. Especially since 96 % of the population were Christians.”<sup>23</sup> (*Id.*).

In her deposition, Green was shown a picture of a Star of David headstone with individual cross headstones in the background. (*Id.* 53-54 & Exh. 5). Green testified with regard to the crosses: “They are grave markers to me for individual people, individual soldiers who sacrificed their lives for our freedom.” (*Id.*). Green did not recognize the Islamic Star and Crescent and admitted she was not familiar with “the symbols of non-Christian faiths.” (*Id.* 56-57). When asked if the Star of David has religious significance, Green responded: “I just said the Jewish Star of David, does it have religious symbolism? It has many. You see that the Star of David is even on the emblem of the United States with the stars all around and it can form a Star of David if you want. Who cares?” (*Id.* 69-70). Mr. Doty asked, “So if a memorial had a Star of David –” and Ms. Green interjected: “That’s not a tombstone.” (*Id.*)

**Military Non-Christians.** As noted above, non-Christian service members perceive the Bladensburg Cross as an alienating and exclusionary Christian symbol. Jason Torpy, atheist and President of MAAF, and Iraq War veteran, testified that he sees the Bladensburg Cross as a Christian symbol and as the “traditional symbol of Christianity: a Latin cross.” (Torpy Decl. ¶¶3-9) MAAF has over 4,000 active and prior military personnel members, the vast majority of which are non-theists. (*Id.*). Additionally, an MAAF study of official Department of Defense demographics from 2002-2014 show more self-identified “atheists” than any non-Christian denomination and more “humanists” than most Christian denominations in the military. (*Id.*). Torpy testified: “Not only do I see a large Christian

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<sup>22</sup> Green also stated: “I have to admit, before doing this documentary, I did not know that much about the Peace Cross. I . . . thought it was to promote world peace.” (Green Dep. 28; 30; 42-44).

<sup>23</sup> <https://www.youtube.com/watch?v=67GtgUMBBvw> (last accessed April 16, 2015)

symbol on government property, but I also see the government sending a message to me and my fellow non-Christian service members that our service is less important than the service of Christian military personnel. It communicates to me that . . . non-Christian soldiers may just as well be forgotten.” (*Id.*).

Michael Weinstein is a veteran and the Founder and President of MRFF, which has approximately 41,000 clients from all branches of the US military who represent a myriad of faith and non-faith groups. (Weinstein Decl. ¶¶1-3). Weinstein testified: “The Bladensburg Cross does not represent our tens of thousands of MRFF clients because they strongly support separation of church and state.” (*Id.* ¶¶4-5). He added: “Because the Bladensburg Cross is a Christian symbol, it sends a message to all of our non- Christian MRFF clients that they are outsiders and unwelcome in the Town of Bladensburg. . . . It sends a clear signal to all the mothers and fathers of non-Christian service members that their sons and daughters are less important than those Christian service members.” (*Id.*).

A Yochanan Hardisty commented on an article about the Cross: “My Great Grand-father, served in WW1, and he was Jewish. My father served in the US Navy WW!!, [sic] and he was Jewish. I did my time also in the US Navy.Viet-Vet, and I am Jewish. My son has served along-side Buddhists, Hindis, Muslims, Christians, believers, and Atheists, in Iraq. Don't we all deserve respect for our service to our country? Or are only Christian Veterans deserving of our Country's Respect.?” (Exh. 38).

**Citizens against the Cross.** Other citizens see the Bladensburg Cross as a religious symbol rather than a secular one. (Exhs. 35, 38). For instance, a local resident named Jen wrote in an email to AHA on February 26, 2014, in part: “I am appalled to learn that the cross is owned by the State of Maryland. As a member of a religious minority (Jewish) and as an attorney, I have become increasingly concerned about the attempts to impose so-called ‘Christian values’ on Americans.” (*Id.*). In June 2014, a Jeffery Brown wrote: “The argument that the cross has no religious significance is disingenuous.” (Exh. 38). Another person said: “There is no such thing as a PEACE cross. A cross is a cross. It is a religious symbol and have no place in a public area.” (*Id.*). On September 8, 2012, a woman named Elizabeth wrote: “Is there no other way to honor our war dead than by erecting a cross? The dead are

from all religious persuasions, including atheists.” (Exh. 35). On February 25, 2014, a resident wrote: “I am an atheist who has lived in Hyattsville for 15 years. I was always bothered by the giant cross so prominent that people give driving directions relative to ‘Peace Cross,’ . . .” (*Id.*).

Rev. Brian P. Adams, then pastor of Mount Rainier Christian Church, wrote an article: “Cross should not be used as symbol for military actions.” (Exh. 36). The Reverend wrote: “As a Christian, . . . I do not want the cross of Christ to be used for militaristic and patriotic purposes. . . . I believe that using the cross as a symbol of what our military did is blasphemy, equivalent to taking the Lord's name in vain . . . The Peace Cross is there as a Christian symbol. It is not just a ‘t’ or a plus sign.” (*Id.*)

##### **5. Defendants, Intervenors, and Amici perceive the Cross as religious.**

Statements and actions by Defendant and Intervenors, “contribute to the perception that adherents of Christianity are favored members of the [Prince George’s] community.” *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*34. *See Green*, 568 F.3d at 800-01. The evidence reveals that Defendant, Intervenors, and Amici perceive the Bladensburg Cross as a religious Christian symbol.

American Legion, whose preamble and motto is “For God and Country” published an article on June 1, 2014, stating in part that the “the monument is undeniably in the shape of a Latin cross[.]” (Exh. 38). A Legion article published on May 26, 2014, on the Bladensburg Cross, starts off: “The secular extremists are at it again.” (Exh. 39). In addition to admitting that the Bladensburg Cross is “in the shape of a Latin cross, of course,” the article states: “The cross as a symbol of death and sacrifice has its roots firmly in the cultural heritage of Christianity.” (*Id.*). The article concludes: “let’s honor the memory of those who have paid the ultimate sacrifice to protect our freedom to worship God . . . For God and country.” (*Id.*). On September 17, 2012, Intervenors received an email from “Cheverly American Legion” which stated: “Please go to this site (if you want to help save Peace Cross) and sign the petition. . . . For GOD and Country” (Exh. 34). When asked whether Post 131 would object to the removal of the arms of the Cross to make it secular, Post 131’s adjutant answered that they would object, because “[i]t would not be a cross.” (Holdcraft Dep. 51).

The American Legion is centered on theism and Judeo-Christian beliefs.<sup>24</sup> Prayers are regularly included in American Legion and Post events, including at the Cross. (Onderdonk Dep. 32) (Myers Dep. 26-27; 30; 43-44) (Holdcraft Dep. 18-19; 25-32; 45; Exh. 8) (Bradley Dep. 7-8; 11-12) (Exhs. 68, 73) (VC ¶41) (AL Ans. ¶41) (AL Int. Nos. 3 & 6). The prayers are consistent with the Judeo-Christian faith and make frequent references to “Heavenly Father” “Lord” and “Almighty God.” (*Id.*). None of the prayers are polytheistic or refer to Allah. In the past nine years, none of the prayers delivered at the Cross have been delivered by a rabbi, imam, or non-theist. (*Id.*). Post 131’s adjutant was unaware of whether any of the Post’s members are atheist or Muslim. (Holdcraft Dep. 16-17).

The programs for the Town/Post 131 events at the Cross make use of the Christian symbol in connection with religious language. For instance, the program for the May 30, 2011, Memorial Day Ceremony features a clip-art Latin Cross with the words “BLESS THEM ALL” inscribed across the arms of the cross. (Exh. 28). A Post 131 invitation to promote the November 2012 Veterans Day Service provides: “please come out and join us and show how important the Peace Cross is to the Veteran’s [sic]” and “God Bless our Troops and God Bless America.” (*Id.*). A flyer used to promote the May 27, 2013, “Memorial Day Services” provides: “Come out and pay tribute to our Veteran’s [sic] that have given the supreme sacrifice.” (*Id.*). Another flyer features an illustration of rows of Christian crosses, but notably, no Stars of David. (*Id.*). The May 26, 2014, program for the Memorial Day Ceremony depicts the Bladensburg Cross on the first page and a different Christian cross on the second page. (*Id.*). A separate letter promoting the event includes a picture of the Bladensburg Cross and the words, “God Bless our Troops, Veterans and America.” (*Id.*).

The American Legion lists “Establishment-Clause Lawsuits” as one of its “Americanism” programs. (Exh. 41) (Onderdonk Dep. 42). It states: “The American Legion is dedicated to combating

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<sup>24</sup> The 2014 American Legion “Officer’s Guide And Manual Of Ceremonies” states: “The American Legion recognizes the influence of Almighty God in all worthwhile endeavors and declares the allegiance of Legionnaires to both God and nation.” (Exh. 68). The Manual also provides: “Americanism is . . . belief in God.” (*Id.*). American Legion and Post 131 have official Chaplains who are Christians, *supra*.

the secular cleansing of our American heritage, performed by lawsuits that attack the Boy Scouts, the public display of the Ten Commandments and other symbols of America's religious history." (Exh. 41). The American Legion played an instrumental role in adding the language "under God" to the Pledge of Allegiance in the 1950s. (Exh. 44) (Onderdonk Dep. 38-39). In December 2013, the American Legion Illinois Post 134 announced that it was withholding financial support for the Morton Grove Park District because an atheist park commissioner refused to Pledge allegiance to the United States flag "under God." (Exh. 45). The Legion has inserted itself into other litigation involving Latin crosses (Exhs. 46-47) (Onderdonk Dep. 26; 37; 43-44), and other Christian displays. (Exh. 67). For example, it filed an amicus brief in support of the Ten Commandments display in *Green*, and wrote: "**Religious imagery serves to acknowledge that most people served by the memorial rest their eternal hopes on God or some religious sentiment.**" (*Id.*). (emphasis added).<sup>25</sup>

The Liberty Institute is a Christian legal group dedicated to restoring "religious liberty across America." (Exhs. 43, 48, 72). The Liberty Institute stated in an email in June 3, 2014, that the AHA and other legal organizations have "sued to tear down veterans' memorials that contain religious images." (Exh. 48). It sent another email stating: "We are: Defending historic veterans memorials that contain religious imagery from cold-blooded attempts to tear them down." (*Id.*). The Liberty Institute launched a campaign, "Don't Tear Me Down," to help stop "anti-religious freedom groups from denying Americans their constitutional rights to religious expression in the public square." (Exh. 72).

Richard Douglas, who represents Amici, is a religious man. (Douglas Dep. 27-29; Exh. 4). He also served several years as a prison chaplain. (*Id.*). The Amicus Brief concedes that this Cross has some "sacred meaning" and that it is "a latin cross." (Douglas Dep. 39; 41; Exh. 3).

Defendant and its agents perceive the Bladensburg Cross as a religious symbol too. On September 19, 2012, Stachura stated in an email: "There is in interesting intersection between religious

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<sup>25</sup> Of all of the monument-related litigation that the American Legion has interjected itself into, it could not think of a single "example of where [it] supported such a monument to atheist veterans or to Jewish veterans," except that it "believe[s] the Soledad Cross does show the Hebrew Star." (Onderdonk Dep. 26; 37).

liberty and preservation issues.” (Exh. 50). Stachura testified that while it is possible to remove the arms of the cross: “the preservation commission would not support, would not accept any modification **to the form of that cruciform** because that's what that monument is. **That is an integral part of what that is.**” (Stachura Dep. 47-48). In searching for a contractor to renovate the Cross in 2014, Defendant’s agents recommended contractors who had previously worked on other *religious* symbols, and crosses in particular. (Exh. 51). One contractor was recommended because it did “a roof mounted stone cross at All Souls” Memorial Episcopal Church. (*Id.*). Another was recommended because it worked on the steel Trade Center beams which took the form of a cross. (*Id.*).

For the foregoing reasons, Defendant’s prominent display of the Latin cross, the preeminent symbol of Christianity, unconstitutionally endorses Christianity and fails the second prong of *Lemon*.

**C. The Bladensburg Cross fosters excessive entanglement with religion.**

The third *Lemon* prong 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.” *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948). 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. *See Constangy*, 947 F.2d at 1152 (“[unconstitutional] entanglement may result when the challenged practice leads to divisiveness along religious lines”); *Hall*, 630 F.2d at 1021 (same); *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*42. Because of its divisiveness, numerous courts have ruled that government cross displays violate the Establishment Clause under the third prong of *Lemon*. *See Rabun*, 698 F.2d at 1109-10 (affirming district court ruling that “the presence of the cross created a potential for political divisiveness” under the third prong); *City of Starke*, 2007 U.S. Dist. LEXIS 19512, \*19; *Mendelson*, 719 F. Supp. at 1071 (placement of the cross on city water tower fostered an excessive government entanglement with religion); *Jewish War Veterans*, 695 F. Supp. at 14

(war memorial cross was unconstitutional because it generated “religion-based political division.”)<sup>26</sup>

The Fourth Circuit has made clear that the “Establishment Clause is intended to protect our society from the threat of political division along religious lines” and that no “de minimis exception is tolerable.” *Hall*, 630 F.2d at 1021. In *Hall*, the court was persuaded by the fact that “the threat of political divisiveness inherent in any form of officially composed prayer is so palpable as necessarily to invoke the prohibition of the Establishment Clause.” *Id.* at 1022.<sup>27</sup> A large Christian cross prominently affixed on government property has the same, if not greater potential to lead to political divisiveness than a prayer. *See Denver*, 481 F. Supp. at 531; *Fox*, 22 Cal. 3d at 811 n.14 (Bird, J., concurring) (explaining that the Supreme Court has “been most likely to find potential for political division when the state involvement with religion takes on a self-perpetuating quality.”).

Defendant’s expenditure of funds to maintain and light the Cross also fosters unconstitutional entanglement. *See Jewish War Veterans*, 695 F. Supp. at 14; *Mendelson*, 719 F. Supp. at 1071 (the city “is entangled with religion because it funded the illumination of the cross during the six month period”). In *City of Starke*, the court held that a city’s “maintenance and illumination of the Cross [fosters] ‘excessive governmental entanglement,’” and proclaimed that if “ever there were a clear case of ‘excessive governmental entanglement’ with religion, this is it.” 2007 U.S. Dist. LEXIS 19512, \*19. In *Denver*, the court ruled that a city’s crèche failed the third prong because, in addition to being divisive, the city provided the “space, placement and maintenance for [the] display of an inherently religious symbol.” 481 F. Supp. at 530. *See also County of Montgomery*, 915 F. Supp. at 38 (same).

#### **V. CASES DEFENDANT WILL RELY UPON ARE INAPPOSITE.**

Defendant and Intervenors will predictably rely on *dicta* from *Salazar*, 559 U.S. 700 (plurality), as well as on *Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227 (2d Cir. 2014) and *Weinbaum v. City of Las*

<sup>26</sup> *See also Washegesic*, 33 F.3d at 683 (“the display [of Jesus] entangles the government with religion.”); *Ahlquist*, 840 F. Supp. 2d at 522 (prayer mural); *Cnty. of Montgomery*, 915 F. Supp. at 37; *Denver*, 481 F. Supp. at 530 (crèche); *Baker v. Adams Cnty.*, 2002 U.S. Dist. LEXIS 26226, \*61-62 (S.D. Ohio 2002) (Ten Commandments).

<sup>27</sup> *See also Mellen*, 327 F.3d at 375; *Constangy*, 947 F.2d at 1151 (“when a judge prays in court, there is necessarily an excessive entanglement of the court with religion.”).



*Cruces*, 541 F.3d 1017 (10th Cir. 2008). Defendant may also urge that Justice Breyer’s concurrence in *Van Orden* is the governing test. But, as shown below, these cases are distinctly inapposite.

In *Salazar*, the only issue actually before the Court was the validity of a congressional land-transfer statute, adopted as a curative measure for a cross display found to violate the Establishment Clause. 559 U.S. at 706 (“The Court is asked to consider a challenge, not to the first placement of the cross . . . but to a statute that would transfer the cross and the land on which it stands to a private party.”). The Court did not reach the merits of the case **because the land where the cross was located had been transferred to a private party**. Justice Kennedy nonetheless commented on the context in which the statute was enacted. The plurality did *not* rule on any substantive matters. *Id.* at 721-22 (remanding for a new hearing without addressing the merits or “making sweeping pronouncements” because “this case is ill suited for announcing categorical rules”). Two other justices concurred in the remand because they concluded that the plaintiff lacked standing. *Id.* at 728. Consequently, anything Justice Kennedy said about substantive Establishment Clause issues (*e.g.*, *id.* at 720) therefore not only failed to garner a majority, it was clearly therefore also *dicta*.

Regardless, the factual context of the present case is quite different than in *Salazar*. The Bladensburg Cross is situated in a busy traffic intersection and cannot be overlooked. The Mojave cross was literally “in the middle of the desert.” *Id.* at 759 (Stevens, J., dissenting). That cross was also much smaller with “[t]he vertical bar” being “less than eight feet tall.” *Id.* 707. As Justice Kennedy acknowledged: “It cannot be seen from the nearest highway, which lies more than 10 miles away.” *Id.* This case is most analogous to the Ninth Circuit’s **subsequent** decision in *Trunk*. Significantly, the Ninth Circuit only quoted *Salazar* once and when it did, it distinguished the standalone Mt. Soledad Cross from Kennedy’s “thousands of small crosses” found in foreign *cemeteries*. 629 F.3d at 1113.<sup>28</sup>

*Port Authority* is also inapposite. There, the Second Circuit held that the decision to display “a

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<sup>28</sup> See also *Duncan*, 637 F.3d at 1113 n.5 (finding *Salazar* inapposite to roadside memorial crosses); *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, \*41 (disregarding Kennedy’s *dicta* on crosses *even though* the monument was an “historic image of a World War II cemetery, with two rows of white crosses”).

particular artifact recovered from World Trade Center debris, a column and cross-beam from one of the Twin Towers” in a public museum was not unconstitutional. 760 F.3d at 232. The “column and cross-beam” along with thousands of “other Ground Zero artifacts” were given to the “September 11 Memorial and Museum Foundation.” *Id.* 234-35. “Some 1,000 objects drawn from a collection of more than 10,000 artifacts are displayed.” *Id.* Some “objects are small and personal . . . Others are monumental, such as a 60-foot high section of the World Trade Center's slurry wall foundation[.]” *Id.* The 17-foot tall “column and cross-beam” was one of the many exhibits in the Museum. *Id.* at 236. Religious groups agreed not to offer “religious services in association with the artifact.” *Id.* at 240. The plaintiffs even conceded that the cross “is an historic artifact worthy of display[.]” *Id.* 233. They nevertheless argued that the cross was unconstitutional because the Museum refused to accept a plaque funded by American Atheists to “acknowledge that atheists were among the victims and rescuers on September 11.” *Id.* at 242. Taking the above into account, the court concluded that a “reasonable observer would view the primary effect of displaying The Cross at Ground Zero, amid hundreds of other (mostly secular) artifacts, to be ensuring historical completeness[.]” *Id.* at 243.

With regard to the American Atheist plaque, the court explained: “an objective observer would know both that such a plaque was not an ‘artifact[.]’” *Id.* at 242. While Plaintiffs sympathize with American Atheists, they respectfully agree with the court’s conclusion. The column and beam – literally rubble – were genuine artifacts from the September 11 tragedy and were portrayed in an exhibition akin to “religious paintings in governmentally supported museums.” *Id.* at 244 (citation omitted). The court even distinguished the case from one such as this when it said this “is not a case in which appellees have chosen to display a symbol of hope embraced by religious believers at Ground Zero while at the same time refusing to display a symbol of hope embraced by nonbelievers at Ground Zero.” *Id.* at 244.

In clear contrast, the Bladensburg Cross is not an *artifact*. It is a monument purposefully designed as a religious Latin cross, *supra*. It is also not displayed as a museum exhibition; it stands on a

traffic island of its own. It is dubiously even “open” to the public.<sup>29</sup> Nor are there thousands or even hundreds of secular exhibits surrounding the Cross. In fact, in *Green*, rendered after *Van Orden*, the Tenth Circuit held that a Ten Commandments display, which was “one of numerous other monuments and displays,” had the principle effect of advancing religion. 568 F.3d at 800, 804. The court reasoned, “the Monument is not a part of a unified exhibit in a ‘typical museum setting[.]’” *Id.* at 805 (citation omitted). The court added: “Nor is the courthouse lawn a setting that is typically associated with intellectual experimentation like [a] university setting.” *Id.* As in *Green*, the Bladensburg Cross is not part of a unified exhibit typical of a museum. Instead, it has been used almost exclusively by the Town and Post 131 (not the general public) for religious and ceremonial services since its inception.

Any reliance on *Weinbaum* would be misplaced. In that case, the court found that a city’s symbol, which included three crosses, represented the city’s name—which translated into “The Crosses”—and the city’s unique history, as the city was founded near the site of a cemetery. 541 F.3d at 1033-35. Even there, the court recognized: “The Christian or Latin cross -- a cross with three equal arms and a longer foot -- reminds Christians of Christ's sacrifice for His people. . . . [I]t is unequivocally a symbol of the Christian faith.” *Id.* at 1022-23. Notwithstanding other cases finding a cross on government insignia unconstitutional, the court emphasized that the symbolism “reflects the name of the City which, in turn, reflects a series of secular events that occurred near the site of the City.” *Id.*

Finally the constitutionality of the Cross is properly analyzed under *Lemon* and *Lemon* alone, *supra*. Justice Breyer’s so-called “legal judgment test” derived from his concurrence in *Van Orden* is inapposite. Of course, no court is actually bound by *Van Orden* because a majority could not be reached on the applicable standard. *See Mercer Cnty.*, 432 F.3d at 636, & n.11.<sup>30</sup> Moreover, the Bladensburg

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<sup>29</sup> Defendant admits that “[t]here are no specific pedestrian rights-of-way” and that “[n]o public access is possible.” (Exhs. 8, 31) (D. Int. No. 14). There is no designated parking lot. (*Id.*) (VC ¶19) (D. RFA No. 25). Defendant is not even sure whether permits are required for access. (Exhs. 29, 31) (D. Int. No. 5) (Waters Dep. 33) (Lewis Dep. 27).

<sup>30</sup> *See also* John E. Nowak and Ronald D. Rotunda, CONSTITUTIONAL LAW 1570 (8th ed. 2010) (“it is difficult to understand how anyone other than Justice Breyer could apply his analysis”).

Cross is not displayed in a “non-religious context.” See *Duncan*, 616 F.3d at 1162. In this case, the religious aspect of the display clearly “predominates” over any secular component, making it vastly distinguishable from *Van Orden*, which involved a small Ten Commandments monument situated “in a large park containing 17 [secular] monuments and 21 historical markers.” 545 U.S. at 702 (Breyer, J., concurring). Nor is this case, properly conceived, a “borderline case.” In the only Fourth Circuit case to even mention *Van Orden*, a case challenging the Pledge of Allegiance *and not a cross display*, the court articulated the applicability of *Van Orden* as follows: “in ‘borderline cases,’ there can be no ‘test-related substitute for the exercise of legal judgment.’” *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005). Unlike in *Myers* where there was no federal case declaring the Pledge of Allegiance unconstitutional (aside from the Ninth Circuit, which was reversed on standing grounds), the law here is as well-settled as law can be, *supra*. Thus, *Van Orden* may safely be disregarded.<sup>31</sup>

Nonetheless, applying Breyer’s “test” does not yield a different conclusion. *Trunk*, 629 F.3d at 1110. There is no question that the cross is “an iconic Christian symbol” and that its use as a war memorial does not change this conclusion. *Id.* at 1111-12. After conducting an exhaustive inquiry, the *Trunk* court concluded that the cross “does not possess an ancillary meaning as a secular or non-sectarian war memorial.” *Id.* at 1116. See also *Duncan*, 616 F.3d at 1161-62 (“it is a Christian symbol of death that signifies or memorializes the death of a Christian.”). In *Duncan*, the state advanced four “contextualizing facts” that it argued, rendered the “cross memorials sufficiently secular:”

(1) these displays are clearly intended as memorials; (2) they are located in areas where similar memorials have long been displayed; (3) many of the designers and producers of these displays do not revere the cross as a symbol of their faith; and (4) a majority of Utahns do not revere the cross as a symbol of their faith.

*Id.* The Tenth Circuit disagreed, ruling that the crosses had “the impermissible effect of . . . endors[ing] Christianity.” *Id.* The court added that “the mere fact that the cross is a common symbol used in roadside

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<sup>31</sup> See *Trunk*, 629 F.3d at 1120 (explaining that the “wide recognition of the Cross as a religious symbol and its . . . religious usage distinguishes the Memorial from the display[] in *Van Orden*”).

memorials **does not mean it is a secular symbol.**” *Id.* (emphasis added).<sup>32</sup> In fact, courts have concluded that the cross carries an inherently Christian message, *even* when the overall display purports to depict a historically accurate scene. *See Harris*, 927 F.2d at 1412-15 (the “images [of the cross] on the seal are not just neutral snapshots” of the region’s history); *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at \*7 (cross unconstitutional even though it is “a historical depiction of a World War II era soldier at a cemetery kneeling at the grave.”); *Joki*, 745 F. Supp. at 824-29.

In *Trunk*, *supra*, the Ninth Circuit went on to assess the “secularizing” elements, observing that the cross “does not stand alone. Instead, it is the overwhelming centerpiece of a memorial that now consists of approximately 2,100 plaques, six concentric stone walls, twenty-three bollards, and an American flag.” 629 F.3d at 1117. Yet these “secularizing” elements could not negate a finding that “a reasonable observer would perceive the Memorial as projecting a message of religious endorsement.” *Id.* at 1118. The same is true here. The Latin cross is by far the most “prominent and dominant feature” in the area. *Id.* at 1123 n.22. While there is a single plaque at the base (which pales in comparison to the 2,100 plaques in *Trunk*), it is often concealed by bushes, *supra*. Even when the bushes are cleared, “[i]t is the cross that catches the eye at almost any angle, not the memorial plaque[.]” *Id.* Regardless, the Plaque does nothing to diminish the religious message of the Cross. In *Duncan*, the Tenth Circuit made clear: “The fact that the cross includes biographical information about the fallen trooper does not diminish the governmental message endorsing Christianity.” 616 F.3d at 1160-61.<sup>33</sup>

Besides the Plaque, the only other “elements” are several distant memorials, erected on a separate area in a park across the street, added long after the Cross, *supra*. The Cross is situated centrally in a traffic island with the others off to the side of the road. For this reason, they should not even be

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<sup>32</sup> Because the Latin cross is inherently religious with no ancillary secular meaning, it is distinguishable from the Ten Commandments in *Van Orden* which the Court acknowledged: “have an undeniable historical meaning[.]” 545 U.S. at 690. The Court reasoned in part: “Moses was a lawgiver as well as a religious leader.” *Id.*

<sup>33</sup> Moreover, Holdcraft could only recall the names of two of the soldiers because “they are the individuals that Post 3 American Legion was named after.” (Holdcraft Dep. 24). Despite having visited the Cross multiple times a year for the past 30 years, Douglas could not recall *any* of the soldiers on the Plaque. (Douglas Dep. 24).

considered in the Court’s analysis. Most courts “have not looked beyond the immediate area of the display.” *Ellis*, 990 F.2d at 1526. *See Allegheny*, 492 U.S. at 581 (“[t]he creche, with its fence-and-floral frame, however, was distinct and not connected with any exhibit in the gallery forum [near the staircase.]”); *Carpenter*, 93 F.3d at 631; *Mississippi State*, 652 F. Supp. at 384 (“The addition of the new [secular] symbols does little to change the effect of the cross, because placed one on each side of the building the symbols appear less as one single than as four separate displays.”).

Even if the Court considers these remote displays, the 40-foot high Cross is clearly the predominant feature, as it is the oldest, largest, and most visible symbol. The relative size of this Cross is an important factor. In *Trunk*, the cross was the tallest (but not “largest”) symbol in the memorial display.<sup>34</sup> The distant 9/11 memorial stands less than one foot-tall and has its text facing away from the road. (VC ¶¶50-53) (Ans. ¶51) (AL Ans. ¶51). The Korea-Vietnam memorial is about 4 feet-tall. (*Id.*). The WWII memorial is about 10 feet-tall. (*Id.*). After this lawsuit commenced, in 2014, the Town erected a new monument to commemorate the Battle of 1812. That monument, like the others, is smaller and not located on the median. Obviously, these smaller, distant memorials do not detract from the giant religious symbol in the middle of the roadway or otherwise diminish the Cross’s religious message. A 2001 article refers to the “Peace Cross” as “the town’s most prominent symbol.” (Exh. 66). As Douglas put it, comparing the Bladensburg Cross to the few smaller memorials is like comparing “apples and oranges.” (Douglas Dep. 21; 24). Moreover, all of the Veterans Day ceremonies take place at the Cross and *not* the other monuments. (Exhs. 68, 73) (Holdcraft Dep. 25-31).<sup>35</sup>

In fact, these newer monuments simply highlight the prominence of the Cross, which dwarfs the subsequent memorials in size and visibility. *See Joki*, 745 F. Supp. at 829-831 (“the presence of the non-

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<sup>34</sup> *See also Duncan*, 616 F.3d at 1162 (explaining that “[t]he massive size of the crosses displayed on Utah’s rights-of-way and public property unmistakably conveys a message of endorsement . . . that is far different from the more humble spirit of small roadside crosses.”); *City of St. Charles*, 794 F.2d at 267 (holding cross in a multi-faceted Christmas display unconstitutional and noting that the cross was “an overpowering feature of the . . . decorations . . . and . . . there [was] no taller object in the city’s Christmas display”).

<sup>35</sup> The recent Memorial Day events (2010-2014) have been held at the Cross too. (Exh. 28).

religious figures, rather than neutralizing the religious effect of the painting [of a crucifix], blend into the scene. . . . Though some negating features may be present, the cross occupies a highly prominent place in the painting and draws the attention of the eye.”). In looking to the “physical setting” in the Mr. Soledad memorial, the Ninth Circuit in *Trunk* observed: “The Cross is placed in a separate, fenced off box, which highlights it, rather than incorporates it as a natural part of the Memorial.” 629 F.3d at 1123. The Bladensburg Cross is not simply in a “fenced off box” but occupies an entire traffic circle of its own. The “Cross’s central position . . . gives it a symbolic value **that intensifies the Memorial’s sectarian message.**” *Id.* at 1124 (emphasis added). Indeed, “[t]he centrality and prominence of the Cross” also “distinguishes [it] from other war memorials” including the “Argonne Cross and the Canadian Cross of Sacrifice” which are “located among the many secular monuments in those memorials.” *Id.*<sup>36</sup>

Lastly, history would further “lead the reasonable observer to perceive a religious message in the Memorial.” *Trunk*, 629 F.3d at 1118-19. In *Van Orden*, Justice Breyer observed that “[t]he setting does not readily lend itself to meditation or any other religious activity.” 545 U.S. at 702. By contrast, the Bladensburg Cross has been the site of regular services that include a religious component, including Sunday Services led by an evangelical Christian, Klan rituals, and bi-annual Town events that include prayers led by Christians, *supra*. Accordingly, unlike in *Van Orden*, a reasonable observer would know that it “functioned as a holy object” and a “place of religious observance.” *Trunk*, 629 F.3d at 1120.<sup>37</sup>

That being said, even if there were no history of religious activity at the Cross, that fact would be immaterial. “This kind of historical significance *simply exacerbates* the appearance of governmental preference for a particular religion.” *Carpenter*, 93 F.3d at 631 (citing *Ellis*, 990 F.2d at 1526) (emphasis added). A number of memorial cross displays have been held unconstitutional despite a *complete absence* of a history of religious usage at the site. *See Eugene*, 93 F.3d at 619-20; *Duncan*, 616

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<sup>36</sup> Although the Cross visibly dominates the area, it is noteworthy that “the sectarian features of a display need not dominate them to send a religious message.” *Lake Elsinore*, 2013 U.S. Dist. LEXIS 188202, \*52-54 (citing cases).

<sup>37</sup> The “fact that the Memorial also . . . serves as a site for secular ceremonies honoring veterans cannot overcome [its] religious history.” *Id.* at 1121. *See Jewish War Veterans*, 695 F. Supp. at 5, 13-14. *See also Carpenter*, 93 F.3d at 631 (its secular history was “intertwined with its religious symbolism”).

F.3d at 1151; 1154. In *Jewish War Veterans*, “[t]he parties agree[d] that Bordelon Field has been used as the site for religious services, but disagree[d] about whether the cross has served as a backdrop for those services.” 695 F. Supp. at 5. Yet the court ruled: “The differences cannot be resolved on this record, **but they are not material.**” *Id.* at 8 (emphasis added).

That the Cross may be deemed “historical” is also immaterial here. “[N]o one acquires a vested or protected right in violation of the Constitution by long use[.]” *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970). The Court in *Allegheny* stressed: “history cannot legitimate practices that demonstrate the government’s allegiance to a particular sect or creed.” 492 U.S. at 603. Such “heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause.” *Id.* at 604-05. The Ninth Circuit held the Mt. Helix and Mt. Soledad crosses unconstitutional despite the fact that both had strong “historical pedigrees” and “had been declared historical landmarks.” *Carpenter*, 93 F.3d at 631-32 (citation omitted). In *Carpenter*, the Ninth Circuit held a third cross unconstitutional even though it was “a cultural landmark.” *Id.* See also *Rabun*, 698 F.2d at 1111; *Gonzales*, 4 F.3d at 1422.

The longstanding nature of a religious display, in fact, exacerbates the injury because “religious outsiders [must] tolerate these practices . . . with the awareness that those who share their religious beliefs have endured these practices for generations.” Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2164 (1996). See, e.g., *Ellis*, 990 F.2d at 1525. As the Seventh Circuit declared in *Pitts v. City of Kankakee*, 267 F.3d 592, 596 (7th Cir. 2001): “The rights of such citizens do not expire simply because a monument has been comfortably unchallenged for twenty years, or fifty years, or a hundred years.”

## **VI. PLAINTIFFS ARE ENTITLED TO A PERMANENT INJUNCTION, NOMINAL DAMAGES AND DECLARATORY RELIEF.**

A party seeking a permanent injunction must demonstrate: “(1) that it has suffered an irreparable injury;” (2) that “remedies available at law, such as monetary damages, are inadequate;” (3) that, “considering the balance of hardships . . . a remedy in equity is warranted;” and (4) “that the public interest would not be disserved.” *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543



(4th Cir. 2007) (citation omitted). Plaintiffs easily satisfy the first element because a violation of First Amendment rights “unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The second factor is also met because “monetary damages are inadequate to compensate for the loss of First Amendment freedoms.” *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011). The balance of hardships weighs in Plaintiffs’ favor because the government is in no way harmed by an injunction which prohibits it from unconstitutional activity. *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). The final element is met because “upholding constitutional rights serves the public interest.” *Id.*<sup>38</sup> Once “a constitutional violation has been found, a district court has broad discretion to fashion an appropriate remedy.” *Karcher v. Daggett*, 466 U.S. 910 (1984) (Stevens, J., concurring). Plaintiffs deem the following solutions acceptable: immediate (1) removal of the Cross to a private location; (2) demolition; or (3) removal of the arms to form a rectangle block or obelisk.

Plaintiffs are also entitled to judgment on their claims for nominal damages and declaratory relief. By “making the deprivation of such rights actionable for nominal damages” the law “recognizes the importance to organized society that those rights be scrupulously observed.” *Carey v. Phipus*, 435 U.S. 247, 266 (1978). Nominal damages are particularly important in cases such as this. As Justice O’Connor powerfully put it: “Suing a State over religion puts nothing in a plaintiff’s pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent.” *Van Orden*, 545 U.S. at 747 (dissenting).

## VII. CONCLUSION

The Bladensburg Cross is unconstitutional pursuant to decades of Establishment Clause jurisprudence. For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment in its entirety. Respectfully submitted,

May 5, 2015

/s/ Monica L. Miller \_\_\_\_\_

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<sup>38</sup> See also *Allegheny*, 492 U.S. at 601 n.51 (“prohibiting the display of a creche in the courthouse deprives Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes.”).

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