

No. 18-18

In the
**Morris Tyler Moot Court of
Appeals at Dale**

MARYLAND-NATIONAL CAPITAL PARK
AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *ET AL.*,

Respondents.

**On Writ of Certiorari to the
United States
Court of Appeals for the Fourth Circuit**

BRIEF FOR PETITIONER

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QUESTION PRESENTED*

Nearly a century ago, the Bladensburg World War I Memorial was dedicated to the memory of 49 local men of Prince George's County, Maryland, who gave their lives in defense of our country's principles. Although this Court has long held that the Establishment Clause does not require the purge of religious symbols from the public sphere, the Fourth Circuit ordered the Memorial to be removed, solely because the Memorial bears the shape of a cross. The question presented is:

Whether the Fourth Circuit erred in holding that a 93-year-old war memorial dedicated to fallen veterans violated the Establishment Clause solely because the Memorial is in the shape of a cross.

* The American Humanist Association, Steven Lowe, Fred Edwards, and Bishop McNeill are Respondents. The Maryland-National Capital Park and Planning Commission is the Petitioner.

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The Fourth Circuit's opinion is reported at 874 F.3d 195. The opinion of the district court is reported at 147 F. Supp. 3d 373.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 18, 2017. A petition for rehearing was denied on March 1, 2018. After timely filing, the petition for a writ of certiorari was granted. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion" U.S. Const. amend I.

STATEMENT OF THE CASE**A. Factual Background**

More than 116,000 American soldiers lost their lives in World War I. See Nese F. DeBruyne, *American War and*

Military Operations Casualties, Cong. Res. Serv. 2 (2018), <https://fas.org/sgp/crs/natsec/RL32492.pdf>. Their sacrifices were famously memorialized in overseas cemeteries by “crosses, row on row.” John McCrae, *In Flanders Fields* (1915). In 1918, a group of private citizens in Bladensburg, Maryland raised money to construct a Cross Memorial (“Memorial”) to honor 49 men of Prince George’s County who lost their lives in World War I. *American Humanist Ass’n v. Maryland-Nat’l Capital Park*, 147 F. Supp. 3d 373 (D. Md. Nov. 30, 2015). The fundraising flyer stated the Memorial would “stand in a strategic position” at the base of the National Defense Highway to “renew the fires of patriotism and loyalty to the nation.” *Id.* at 376-377. In 1922, the private group ran out of funds and the land was officially transferred to the American Legion—a congressionally chartered veterans service organization—to finish construction. *Id.* at 377.

Like other war monuments, the Memorial is a Celtic cross. 891 F.3d 117, 123 (Mem) (4th Cir. 2018) (Niemeyer,

J., dissenting from denial of petition to rehear en banc). A large 9-ft wide plaque dedicates the Memorial to “the heroes of Prince George’s County Maryland,” and lists their names. 147 F. Supp. 3d at 376. Also inscribed is a quote from President Woodrow Wilson at the start of the War: “The right is more precious than peace.” 874 F.3d 195, 219 (4th Cir. 2017). Four civic principles are emblazoned around the base: “DEVOTION,” “ENDURANCE,” “COURAGE,” and “VALOR.” 147 F. Supp. 3d at 376. The American Legion’s seal—a star engraved with “U.S.”—is placed prominently at the center of the cross on both faces. Directly beside the Memorial flies the American flag. *Ibid.*

The Memorial sits in Veterans’ Memorial Park amongst the World War II monument; the Korean and Vietnam Wars memorial; the War of 1812 monument; the memorial for Pearl Harbor victims; the garden commemorating 9/11; the flags honoring Prince George’s County, Maryland, and America; and two 38-ft statutes commemorating fallen soldiers in the Battle of Bladensburg. *Id.* at 378-379. The

Park is listed on the National Register of Historic Places, *id.* at 380 n.6, and on the Star-Bangled Banner National Historic Trail as a “crossroads * * * for communities to commemorate their residents in service and in death.” 874 F.3d at 201.

In 1961, the Maryland-National Capital Park and Planning Commission (“Commission”) obtained title to the Memorial and highway median for traffic safety and historic preservation purposes. *Ibid.* The Commission has spent \$122,000 maintaining the Memorial over a span of more than fifty years. *Id.* at 222 (Gregory, C.J., dissenting). Three isolated religious services—all in August 1931—precede a consistent, exclusive history of secular memorial services honoring fallen soldiers. *Id.* at 217.

For almost a century, the Memorial has rested without legal challenge. In 2014, the American Humanist Association and three residents brought a 42 U.S.C. § 1983 action, claiming the Commission’s possession and maintenance of the Memorial violated the Establishment Clause of the First Amendment. 147 F. Supp. 3d at 380.

B. Prior Proceedings

1. The district court granted summary judgment to the defendants, finding the Memorial “predominantly secular” under both *Lemon* and *Van Orden*. *Id.* at 384. The court found the Commission’s secular purpose “uncontroverted,” *id.* at 385; the Memorial’s cross-shape communicated “a central symbol of the American overseas cemetery” and did not endorse religion, *id.* at 386; and maintenance of the Memorial “[did] not implicate any of the evils against which *Lemon*[] * * * protects.” *Id.* at 389. Rather, “the record amply demonstrate[d]” that the Memorial “simply [] honor[ed] our Nation’s fallen soldiers.” *Id.* at 385 (internal quotation marks omitted).

2. The divided Fourth Circuit panel reversed on the basis that the “Latin cross is the core symbol of Christianity.” 874 F.3d at 200. Although conceding the Commission’s “legitimate secular purposes,” the court discarded the “history of the particular Cross before [them] [as] not clearly support[ing] one party” and therefore not “aid[ing] * * * the

analysis.” *Id.* at 206, 208. Instead, the court rested on the “meaning of the Latin cross” in isolation and “its affiliation with the crucifixion of Jesus Christ.” *Id.* at 207. Chief Justice Gregory, dissenting from the holding on the merits, criticized the majority for “misappl[ying] *Lemon* and *Van Orden*”; “subordinat[ing] the Memorials’ secular history and elements”; constructing a reasonable observer that “ignores certain elements * * * and reaches unreasonable conclusions”; and “confus[ing] maintenance of a highway median and monument in a state park with excessive religious entanglement.” *Id.* at 217-218 (Gregory, C.J., dissenting).

3. Three justices dissented from the Fourth Circuit’s denial of the petition to rehear en banc, each noting the Fourth Circuit’s holding put other longstanding crosses in jeopardy, such as those in nearby Arlington National Cemetery. 891 F.3d at 122 (Gregory, C.J., dissenting); *id.* at 123 (Wilkinson, J., dissenting); *id.* at 124 (Niemeyer, J., dissenting).

SUMMARY OF ARGUMENT

The Fourth Circuit is alone among the courts of appeals to hold that a longstanding war memorial—originally created as a war memorial, used exclusively as a war memorial for 88 years, and existing in the community for almost a century without legal challenge—violates the Establishment Clause solely because the Memorial is shaped as a cross. The Fourth Circuit’s holding cannot be upheld under this Court’s Establishment Clause jurisprudence.

I. In contravention of this Court’s longstanding Establishment Clause jurisprudence, the Fourth Circuit relies on a *per se* rule striking a religious symbol from the public sphere. Yet this Court has never held that the Establishment Clause requires the government to purge religious symbols from the public realm. Rather, this Court has repeatedly acknowledged the deep traditions of religion stretching back to the Framers. Establishment Clause review is necessarily a fact-sensitive inquiry and prohibits the broad sweep of the Fourth Circuit’s absolutist rule. A *per se* rule against large

crosses does not communicate neutrality, but rather, hostility and will tend to spark the very social conflict the Establishment Clause seeks to avoid. Indeed, the Fourth Circuit's holding is likely to lead to increased litigation over the many historical war monuments with religious symbols scattered across the nation. Finally, the Fourth Circuit's *per se* rule against crosses cannot be upheld under this Court's Establishment Clause jurisprudence.

II. *Van Orden v. Perry*, 545 U.S. 677 (2005), is materially indistinguishable and controls the outcome in this case. As in *Van Orden*, the private-party origins are indicated prominently on the Memorial, thereby distancing the State from any religious significance of the cross-shape. Additionally, the Bladensburg Memorial communicates a *more* secular message than even the Ten Commandments monument in *Van Orden*. First, the *Van Orden* monument is adorned with several religious symbols, whereas the Bladensburg Memorial is decorated with only secular symbols. Second, the text of the Ten Commandments is an

affirmative command with sectarian significance, whereas the Bladensburg Cross is a passive display with sectarian ambiguity. Additionally, the Bladensburg Memorial's physical setting in Veterans Memorial Park among other war memorials of a common theme reinforces the Memorial's secular message. The placement of the Memorial on a traffic median reinforces that the Memorial was not intended for religious meditation. Finally, the fact that the Memorial has reposed without legal challenge for almost a century reflects the community's perception of the Memorial as a secular, non-divisive fixture in the community. The Bladensburg Memorial is clearly constitutional under this Court's precedent in *Van Orden*.

III. Although the Court may rest its decision on *Van Orden*, the Bladensburg Memorial easily passes the *Lemon* test as well. The Commission's secular purpose is not in dispute, as both lower courts found traffic safety and preservation of a historic monument are legitimate, secular purposes. The Memorial does not endorse religion because of

the overwhelming evidence of secular intent and effect, including: (1) the civic content adorning the Memorial; (2) its placement on a highway median in a State park surrounded by other war memorials; (3) its long, nearly exclusive history of civic events; and (4) the national context of the cross as an honor in the military with deep historic roots. Although the reasonable observer recognizes the cross has religious significance, it is heavily outweighed by the Memorial's secular intent, history, and context.

ARGUMENT

I. The Fourth Circuit's Holding Cannot Stand Because The Establishment Clause Prohibits A Per Se Rule Against Crosses

A. A Categorical Rule Against Crosses Is Unconstitutional Because It Communicates Hostility, Not Neutrality, to Religion

The Establishment Clause recognizes “total separation of [church and State] is not possible in an absolute sense.” *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); see also U.S.

Const. amend. I (“Congress shall make no law respecting an establishment of religion . . .”). The government is not required “to avoid any public acknowledgement of religion’s role in society,” *Salazar v. Buono*, 559 U.S. 700, 719 (2010), nor “to hide works of art or historic memorabilia from public view just because they also have religious significance.” *Van Orden v. Perry*, 545 U.S. 677, 711 (2005) (Breyer, J., concurring). Such a rule would not communicate neutrality, but “active[] hostility to the religious.” *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 306 (1963). For this reason, the Fourth Circuit’s per se rule that large crosses violate the Establishment Clause cannot be upheld.

1. First, a categorical rule threatens “untutored devotion to the concept of neutrality,” thus depriving the courts of meaningful deliberation. *Schempp*, 374 U.S. at 306. This Court has repeated time and again that “[t]he Establishment Clause inquiry cannot be distilled into a fixed, *per se* rule.” *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995); see also *Van Orden*, 545 U.S. at 699 (Breyer, J.,

concurring) (“[N]o single mechanical formula [] can accurately draw the constitutional line in every case.”); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (“[N]o fixed, *per se* rule can be framed.”). Establishment Clause review is necessarily “delicate and fact-sensitive,” *Lee v. Weisman*, 505 U.S. 577, 597 (1992); yet the precedent the Fourth Circuit constructs in resting their ruling on the Memorial’s cross-shape—despite its wholly secular context and history—is that large crosses are *per se* violations, no matter the depth of secular evidence.

2. A *per se* rule against crosses threatens “eradication of all religious symbols in the public realm.” *Buono*, 559 U.S. at 718. Yet, the Establishment Clause “does not compel the government to purge from the public sphere all that in any way partakes of the religious.” *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring). Rather, the Constitution “affirmatively mandates accommodation * * * of all religions, and forbids hostility towards any.” *Lynch*, 465 U.S. at 673. To “disabl[e]” the Commission from preserving an

almost century-old war memorial that “recogniz[es] our religious heritage” simply because it is shaped as a cross “evinces [] hostility to religion.” *Van Orden*, 545 U.S. at 684 (Breyer, J., concurring).

3. The Fourth Circuit’s “absolutis[t]” rule “tend[s] to promote the kind of social conflict the Establishment Clause seeks to avoid.” *Id.* at 699. Depending on the history and context of the display, removal can spark more “religious divisiveness” than preservation. *Ibid.* City residents have grown up with the Bladensburg Memorial as a civic cornerstone of the community and the Memorial has enjoyed a century without legal challenge, thus “becom[ing] entwined in the public consciousness.” *Buono*, 559 U.S. at 716. Additionally, removal would be “viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor.” *Id.* at 726 (Alito, J., concurring).

4. Finally, the Fourth Circuit’s rule will inevitably elicit an avalanche of litigation for removal of other war memorials with religious symbols. Immediately threatened are the 24-

foot Canadian Cross of Sacrifice, the 13-foot Argonne Cross, the Victory Cross in Maryland, and the Wayside Cross in Connecticut. The removal of these memorials would present “an arresting symbol” to the public “of a government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country’s religious heritage.” *Id.* at 727. Such “callous indifference,” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), would ignite the precise “kind of social conflict the Establishment Clause seeks to avoid.” *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring).

The Fourth Circuit’s per se rule against crosses cannot be upheld cannot be upheld under this Court’s Establishment Clause jurisprudence.

**B. The Fourth Circuit’s Holding Contradicts
This Court’s Precedent That Recognition
Of A Religious Symbol Is Not Government
Endorsement**

Under the Fourth Circuit’s analysis, all religious symbols are in jeopardy because any government reference necessarily relies on original religious belief. Yet, this flies directly in the face of this Court’s jurisprudence, which has consistently concluded that displays with religious content—but also with a legitimate secular use—are permissible under the Establishment Clause. See, e.g., *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014) (upholding legislative prayer); *Van Orden*, 545 U.S. at 692 (upholding display of the Ten Commandments); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh*, 492 U.S. 573, 621 (1989) (upholding display of menorah); *Lynch*, 465 U.S. at 687 (upholding display of crèche).

Similarly, lower courts have found government displays of a Latin cross “need not be taken as a statement of governmental support for sectarian beliefs.” *Buono*, 559 U.S. at 719. See, e.g., *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1033 (10th Cir. 2008) (upholding three Calvary crosses in city seal because its “[h]istory is a critical aspect of the

context”); *Separation of Church & State Comm’n v. City of Eugene*, 93 F.3d 617, 626 n.12 (9th Cir. 1996) (O’Scannlain, J., concurring) (“While a crucifix is an unmistakable symbol of Christianity, an unadorned Latin cross need not be.”); *Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991) (upholding Latin cross in city seal because its history and “long and unchallenged use”).

The Fourth Circuit’s per se rule is not supported by precedent and should not be upheld.

II. *Van Orden* Is Materially Indistinguishable And Controls The Outcome In This Case

In *Van Orden*, a majority of this Court refused to apply *Lemon* in holding a large monolith of the Ten Commandments on state capitol grounds did not violate the Establishment Clause. 545 U.S. at 677. The 6-foot monolith was one of several historical markers surrounding the capitol, each intended to celebrate the “people, ideals, and events that compose Texan identity.” *Id.* at 681. The predominant element of the monolith was the inscription of the Ten

Commandments. *Ibid.* Bordering the text were five religious symbols—Greek letters signifying Christ, the eye inside the pyramid, two tablets representing the Ten Commandments, and two Stars of David—and one secular symbol—an eagle holding the American flag. *Ibid.* A dedication indicated the Texas Fraternal Order of Eagles (“Eagles”) donated the display. *Id.* at 681-682.

The plurality rejected *Lemon* as “not useful in dealing with the sort of passive monument” at issue; instead, their “analysis [was] driven both by the nature of the monument and by our Nation’s history.” *Id.* at 686. The plurality emphasized the “unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.” *Ibid.* (quoting *Lynch*, 465 U.S. at 674); see also *Town of Greece*, 572 U.S. at 577 (“Any test the Court adopts must acknowledge a practice that * * * has withstood the critical scrutiny of time.”).

Justice Breyer, in his controlling opinion, also dismissed *Lemon*'s "mechanical formula" in favor of "legal judgment" that "reflect[s] and remain[s] faithful to the underlying purposes of the [Establishment] Clause[], and * * * take[s] account of context and consequences measured in light of those purposes." 545 U.S. at 699-700 (Breyer, J., concurring); The Ten Commandments "undeniably has a religious message," but religious symbolism "alone cannot conclusively resolve this case." *Id.* at 700-701. Rather, the Ten Commandments in certain contexts "convey not simply a religious message but also a secular moral message * * * [and] a historical message." *Id.* at 701. Taking into consideration (1) the "circumstances surrounding the display," (2) its "physical setting," and (3) its "unchallenged" 40-year history, Justice Breyer concluded the "Commandments' text on th[e] monument conveys a predominantly secular," "moral and historical message reflective of a cultural heritage." *Id.* at 701-703.

First, in analyzing the “circumstances” of the monolith, Justice Breyer stressed the Eagles—a “private civic (and primarily secular) organization”—had “donated” the monument, which “further distance[d] the State itself from the religious aspect of the Commandments’ message.” *Id.* at 701-702.

Second, Justice Breyer found the “physical setting” supported “that the State intended the display’s [secular] message * * * to predominate.” *Id.* at 702. The monolith’s placement in a “large park” with other historical markers “illustrat[ing] the ‘ideals’” of Texas “suggest[ed] little or nothing of the sacred.” *Ibid.* Rather than “lend itself to meditation or any other religious activity,” the setting provided a “context of history and moral ideals,” which reinforced a secular message. *Ibid.*

Finally, Justice Breyer found the monolith’s “unchallenged” display for forty years “determinative” of a “predominantly secular message.” *Ibid.* This third factor is “critical in a borderline case” because one “basic purpose[.]”

of the Establishment Clause is to avoid “religiously based divisiveness.” *Id.* at 704. The monolith’s longevity “suggest[s] more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as * * * a government effort to favor a particular religio[n].” *Id.* at 702. Indeed, “a contrary conclusion * * * [would] exhibit a hostility toward religion * * * [that] might well encourage disputes.” *Ibid.*

1. *Van Orden* controls the result in this case. First, as in *Van Orden*, the Memorial’s “circumstances” suggest the Commission “intended the * * * nonreligious aspects of the [Memorial’s] message to predominate.” *Id.* at 701. Both courts below agree the Commission’s purposes are plainly secular: historical preservation and traffic safety. Like *Van Orden*, notice of the original builders is “prominently acknowledge[d]” by the seal of the American Legion in the center of both sides of the Memorial. *Ibid.* This dedication

“further distance[s] the State itself from the religious aspect of the [Memorial’s] message.” *Id.* at 701-702.

Moreover, the Bladensburg Memorial’s “circumstances” are *more* secular than the *Van Orden* display. Whereas the latter was decorated with religious symbols—Greek lettering representing Christ, the eye inside the pyramid, tablets representing the Ten Commandments, Stars of David—the Bladensburg Memorial is adorned with only secular symbols—President Woodrow Wilson’s patriotic quote; the words “VALOR,” “ENDURANCE,” “COURAGE,” and “DEVOTION”; the dedication to 49 local soldiers; and finally, the American flag flying directly beside the Memorial. See *Buono*, 559 U.S. at 747 n.7 (Stevens, J., dissenting) (noting a “more elaborate monument” can convey “a primarily nonreligious message”). In contrast to the *Van Orden* monolith, the *only* religious element of the Memorial is its shape.

The Bladensburg Memorial’s “circumstances” are also more strongly secular because the Ten Commandments are

affirmative commands authored by God, including several not adopted into our secular legal code: (1) “Though shalt have no other gods before me”; (2) “Thou shalt not make to thyself any graven images”; and (3) “Thou shalt not take the name of the Lord thy God in vain.” 545 U.S. at 717 (Stevens, J., dissenting). In contrast, the Bladensburg Memorial is a passive cross that neither commands nor invites worship. Additionally, the *Van Orden* display chose between “many distinctive versions of the Decalogue” to display specifically the King James version. *Ibid.* In contrast, the Bladensburg Memorial was identified as both a Latin cross and a Celtic cross in the Fourth Circuit below, demonstrating the religious ambiguity of the Memorial.

2. Turning to the second factor, the Memorial’s “physical setting,” in the “large [Veterans Memorial] [P]ark” among other monuments unified by a central theme of commemorating fallen soldiers, “suggests little or nothing of the sacred.” *Id.* at 702 (Breyer, J., concurring). As in *Van Orden*, the Park provides a collective, uniform “context of

history,” similar to an outdoor museum. *Ibid.* At a national level, the Memorial is part of the Star-Spangled Banner National Historic Trail, connecting it to over 100 other historic sites, see *Star-Spangled Banner National Historic Trail*, Nat’l Park Serv., https://www.visitmaryland.org/sites/default/files/Star_Spangled_NPS_Map.pdf, and is listed in the National Register of Historic Places, among other “important touchstones of our shared heritage” across the country. See *National Register of Historic Places*, U.S. Gen. Servs. Admin. (2018), <https://www.gsa.gov/nationalregister>. Finally, the Memorial’s placement on the median of a busy highway intersection “does not readily lend itself to meditation or any other religious activity,” but reinforces that “the State intended the display’s [secular] message * * * to predominate.” 545 U.S. at 702.

3. Regarding longevity, the fact that nearly 90 years have passed—more than twice as long as the *Van Orden* monument—without a single legal challenge to the

Bladensburg Memorial is a “determinative” indication of the Memorial’s secular message. *Ibid.* The Memorial’s ninety-year history of peace is “critical” because it demonstrates “more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the [Memorial] as amounting * * * to a government effort to favor a particular religio[n].” *Id.* at 702-704. In contrast to the “short (and stormy) history of the courthouse Commandments’ display[]” in *McCreary Cty. v. American Civil Liberties Union Ky.*, 545 U.S. 844 (2005), the uncontested tranquility of the Memorial for almost a century “demonstrates the substantially [secular] objectives of [the Commission] * * * and the effect of this readily apparent objective upon those who view it.” 545 U.S. at 703 (Breyer, J., concurring). Whereas a decision to leave in place the *McCreary* monument with its history of controversy would have tended to cause religious divisiveness, a decision to remove the *Van Orden* monument after years without legal challenge would “tend to promote * * * social conflict.” *Id.*

at 699. Similarly, here, the Fourth Circuit’s holding to remove the Memorial after almost a century of peace would tend to “encourage disputes * * * [and] thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.” *Id.* at 704.

The *Van Orden* monument is materially indistinguishable from the Bladensburg Memorial. Thus, the Court may rest its decision on *Van Orden* and go no further. If the Court wishes to consider *Lemon*, the Memorial also clearly survives.

III. The Memorial Easily Satisfies The *Lemon-Plus-Endorsement* Test

In *Lemon*, this Court articulated a three-prong test: the government action “[1] must have a secular legislative purpose, [2] its principal or primary effect must be one that neither advances nor inhibits religion, [and] finally, the statute must not foster an excessive government entanglement with religion.” 403 U.S. at 612-613 (considering laws in Pennsylvania and Rhode Island providing state aid to parochial schools). The Fourth Circuit

employed a modified version of *Lemon* that integrates the “endorsement” test. See *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring) (articulating the endorsement test). The endorsement test modifies the first and second *Lemon* prongs to ask, “whether government’s actual purpose is to endorse or disapprove of religion,” and whether the display “in fact conveys a message of endorsement or disapproval.” *Id.* at 690.

Even applying the *Lemon*-plus-“Endorsement” test, the Memorial is constitutional because the Commission’s purposes of historic preservation and traffic safety are plainly secular; the Memorial’s context and history sends a predominantly secular message; and the intermittent maintenance of the memorial does not constitute *excessive* entanglement. To remove the Bladensburg Memorial from where it has stood for nearly a century would send a far stronger message of religious disapproval than to let it rest as a historic site.

A. The Commission's Secular Purpose Is Not Disputed

The Commission violates the first prong of *Lemon* if their action is “entirely motivated by a purpose to advance religion.” *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). Both the Fourth Circuit and the district court below correctly recognized the Commission had two secular purposes in maintaining the Bladensburg cross: (1) traffic safety near a busy highway intersection and (2) preservation of a “historically significant war memorial” that has commemorated fallen soldiers for almost a century. See, e.g., *Trunk v. San Diego*, 629 F.3d 1099, 1108 (9th Cir. 2011) (holding “preserv[ation] [of] a historically significant war memorial” is a legitimate secular purpose). The Commission’s purposes for displaying and maintaining the Memorial are plainly secular.

B. The Memorial Does Not Endorse Religion Because Its Content, Physical Setting And History Are Overwhelmingly Secular

The second prong of *Lemon* inquires whether the government's "principal or primary effect," *Lemon*, 403 U.S. at 612, is to "endorse" religion. *Lynch*, 465 U.S. at 690. Endorsement occurs when a display communicates that the government has affirmatively "take[n] a position on [a] question[] of religious belief or [] 'ma[de] adherence to a religion relevant in any way to a person's standing in the political community.'" *Allegheny*, 492 U.S. at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)). In contrast, government endorsement does *not* occur simply when a religious symbol appears in the public sphere. Therefore, the inquiry is not "whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable [observer] *might* think [the Commission] endorses religion." *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring). The reasonable observer's "knowledge" is not "limited to the information gleaned simply from viewing the challenged display," but rather, is "more informed than the

casual passerby” with an understanding of “the history and context of the community and forum.” *Id.* at 779-780. Here, the content, history, and physical setting of the Memorial send a secular, commemorative message.

1. First, although the Memorial’s “religious * * * significance * * * is not neutralized by the setting, the overall [Park] setting changes what viewers may fairly understand to be the purpose of the display.” *Lynch* 465 U.S. at 692.

In *County of Allegheny*, for example, this Court upheld the public holiday display of an 18-foot menorah. 492 U.S. at 621. Justice O’Connor’s controlling opinion acknowledged the menorah is a “central religious symbol” but found that, when placed in a holiday display, the menorah “d[id] not convey a message of endorsement.” *Id.* at 635 (O’Connor, J., concurring). Similar to a museum, where the religious content of an individual painting is negated by the surrounding artwork, the holiday display conveyed an overall message of religious pluralism, even though some elements were sectarian. *Ibid.* In contrast, the *Allegheny* Court found

that a crèche “stand[ing] alone” in the county courthouse sent a message of government endorsement where it lacked secular context. *Id.* at 598 (majority opinion). Accordingly, in *Lynch*, this Court upheld a different crèche that was part of a “larger display.” 465 U.S. at 691 (O’Connor, J., concurring). Therefore, the inquiry is not whether a symbol is sectarian but whether a symbol’s religious significance is negated by secular context.

Like the crèche and the menorah, the Bladensburg Cross has religious significance, but the reasonable observer’s focus is not “solely on the religious aspect of the cross, divorced from its background and context.” *Buono*, 559 U.S. at 721. Rather, the reasonable observer notices the overwhelming secular content on the Memorial. In the center of the cross on both sides, the seal of the American Legion—a star with the letters “U.S.”—prominently acknowledges the original private builders. On the base, a large plaque dedicates the Memorial to “the heroes of Prince George’s County Maryland,” and lists all 49 names. The reasonable

observer also takes note of the quote from President Woodrow Wilson's speech leading America into the "fight" for democratic ideals—"more precious than peace"—to which the fallen soldiers "dedicate[d] their lives." Emblazoned on each side of the base are civic words of duty: "VALOR," "ENDURANCE," "COURAGE," and "DEVOTION." The reasonable observer also notes the Memorial's placement beside the American flag.

Zooming out, the reasonable observer notices the Memorial is on a highway median, which tends to negate any religious significance, since the area is difficult to access and does not "readily lend itself to meditation or any other religious activity." *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring). Rather, as a nearby formal marker indicates: "This crossroads has become a place for communities to commemorate their residents in service and in death." Additionally, the reasonable observer notes the Memorial's placement inside Veterans Memorial Park at the base of the National Defense Highway, provides an "overall [] setting

[which] changes what viewers may fairly understand to be the purpose of the display.” *Lynch*, 465 U.S. at 692. The reasonable observer is also aware that a common civic theme of honoring fallen soldiers unites the Park’s memorials, including the World War II monument, the Korean and Vietnam Wars monument; the War of 1812 monument; the memorial to Pearl Harbor victims; the memorial to 9/11 victims; the flag display honoring America, Maryland, and Prince George’s County; and two 38-foot statues commemorating the soldiers who died in the Battle of Bladensburg. Finally, the reasonable observer knows the Memorial is part of a national network of historic monuments: both the National Register of Historic Places and the Star-Spangled Banner National Historic Trail. In sum, the Memorial does not “stand[] alone” like the crèche in *Allegheny*, 492 U.S. at 598, but is part of a “larger display” that presents a predominantly secular message. 465 U.S. at 691 (O’Connor, J., concurring).

2. The reasonable observer is not “limited to the information gleaned simply from viewing the challenged display,” but also understands the secular history. *Pinette*, 515 U.S. at 779-780. First, the builders’ original goal to “renew the fires of patriotism and loyalty to the nation which prompted these young men to rally to the defense of the right.” Second, the Memorial was privately designed and funded, which “further distances the State itself from the religious aspect of the [Memorial’s] message.” *Van Orden*, 545 U.S. at 701-702 (Breyer, J., concurring). Third, the Commission obtained title over the median and Memorial solely to address traffic safety and historic landmark preservation concerns.

In addition, the reasonable observer is aware of a long history of almost completely secular events. At the groundbreaking ceremony, the primary speaker, then-Secretary of the Navy, said the National Defense Highway “present[ed] an unalterable face to every duty expected of it, as did the men in whose honor it was named” and the

Bladensburg Memorial “st[ood] for time and eternity, like the principles they defended.” The Memorial has been the site of countless patriotic services honoring fallen soldiers. Typically, a keynote speaker from the military, local government, American Legion, or a local veteran leads the service. Only three religious events ever occurred at the Memorial, all three were in August 1931—almost ninety years ago—and the record demonstrates exclusively secular memorial services, ongoing to this day, have since been held. Finally, the reasonable observer is aware that the Memorial has sat in repose, legally “unchallenged” for almost a century, “until the single legal objection raised by [respondent].” *Id.* at 702.

3. The reasonable observer also understands the history of the cross in light of both the Memorial’s local context and the larger national context. Thus, the reasonable observer knows the “cross is not merely a reaffirmation of Christian beliefs,” but had a significant, historical presence in

American wars, specifically World War I. *Buono*, 559 U.S. at 721.

First, the Latin cross “is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.” *Ibid.* One hundred and fourteen Civil War monuments display a cross; the fallen soldiers of World Wars I and II are commemorated by thousands of crosses in foreign cemeteries; Arlington Cemetery contains three war memorial crosses; and Gettysburg has two war memorial crosses. *Trunk*, 660 F.3d at 1100. In addition, military awards often use the symbol of a cross to honor service: the second-highest military decorations awarded for “extraordinary heroism” in the Army, Navy, and Air Force are all in the shape of a cross. See *Description of Medals*, U.S. Dep’t of Defense, <https://valor.defense.gov/description-of-awards/>. The cross is a resonant symbol of World War I because it “evokes the unforgettable image of the white crosses, row on row, that marked the final resting places of

so many American soldiers who fell in that conflict.” *Buono*, 559 U.S. at 725 (Alito, J., concurring); see also *Hewett v. City of King*, 29 F. Supp. 3d 584, 613-614 (M.D.N.C. July 8, 2014) (noting the American Battle Monument Commission designated the cross “the principal gravestone in * * * overseas cemeteries” after World War I). That the cross has been given “dual significance,” *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring), as a symbol of respect for veterans and fallen soldiers demonstrates “the cross and the cause it commemorated ha[ve] become entwined in the public consciousness” of our Nation. *Buono*, 559 U.S. at 716.

Finally, crosses as a symbol have been erected and maintained on public land for a long time and cross monuments are thus ubiquitous around the nation. Here are just a few examples: (1) the Irish Brigade Monument in Gettysburg National Military Park—a 19-foot Celtic cross erected in 1888—honors soldiers who fought and died at Gettysburg; (2) the Jeannette Monument at the Annapolis U.S. Naval Academy—a 22-foot Latin Cross erected in

1890—is dedicated to sailors who died exploring the Arctic; and (3) the Wayside Cross on New Canaan’s historic green—a large Celtic cross erected in 1923—honors fallen soldiers in World War II and the Vietnam War. The list goes on. This Court has recently re-affirmed the significance of such “historical practices” under the Establishment Clause. *Town of Greece*, 572 U.S. at 576. Although history alone cannot permit a practice that would otherwise amount to a constitutional violation, any “test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.” *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part). Thus, while a cross in isolation has religious significance, the reasonable observer is aware that the cross in the Bladensburg Memorial pulls on military, civic, and national traditions stretching back more than a century.

In sum, the reasonable observer recognizes the cross’s significance as a Christian symbol, but when weighed against

(1) the civic content of the Memorial, (2) the physical placement alongside other secular war memorials in a park uniformly dedicated to commemorating fallen soldiers, (3) the century-long history of nearly exclusive use of the Memorial for annual veterans events, (4) the cultural resonance of the cross as a symbol in both military and World War I history, and (5) the ninety-four years of time that have passed without legal challenge, the reasonable observer finds “few individuals, whatever their system of beliefs, are likely to have understood the [Memorial] as amounting * * * to a government effort * * * primarily to promote religion.” *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring).

**C. Maintenance Of A Memorial On A Busy
Highway Median Is Not Excessive
Entanglement**

The third prong of *Lemon* asks whether the challenged display is an “excessive government entanglement with religion.” *Lemon*, 403 U.S. at 613 (internal quotation marks

omitted). Although excessive entanglement “is a question of kind and degree,” *Lynch*, 465 U.S. at 684, “[e]ntanglement must be ‘excessive’ before it runs afoul of the Establishment Clause.” *Agostini v. Felton*, 521 U.S. 203, 233 (1997). The kind of excessive entanglement precluded by the Clause is characterized by “comprehensive, discriminating, and continuing state surveillance” of religious exercise. *Lemon*, 403 U.S. at 619.

The Commission’s display and maintenance of the Memorial is not an excessive entanglement with religion. First, the Memorial is part of an established government Park of other war memorials, all maintained by the Commission. Second, the Memorial is located on the median of a busy highway, requiring government upkeep for traffic safety. Third, since obtaining title over the Memorial in 1961, the Commission has spent about \$2,100 per year, an infinitesimally small percentage of the Park’s annual natural and historic resources budget of \$7.7 million. See *Adopted Annual Budget Fiscal Year 2019*, Md.-Nat’l Capital Park &

Planning Comm'n (2018),

<http://www.mncppc.org/ArchiveCenter/ViewFile/Item/427>.

Finally, maintenance of the Memorial cannot be unconstitutional entanglement simply because the Memorial itself is not an unconstitutional endorsement of religion.

The Commission's display and maintenance of the Memorial is not an excessive entanglement with religion.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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