

No. 15-2597

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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AMERICAN HUMANIST ASSOCIATION, ET AL.,  
*Plaintiffs-Appellants,*

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,  
*Defendant-Appellee,*

&

THE AMERICAN LEGION, ET AL.,  
*Intervenors/ Defendants-Appellees,*

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On Appeal from the United States District Court for the District of Maryland,  
Greenbelt Division, Deborah K. Chasanow, District Judge

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**BRIEF OF APPELLEES**

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Adrian R. Gardner  
William C. Dickerson  
Tracey A. Harvin  
Elizabeth L. Adams  
6611 Kenilworth Ave., Suite 200  
Riverdale, MD 20737  
Telephone: (301) 454-1670  
Facsimile: (301) 454-1674

*Counsel for Maryland-National Capital  
Park and Planning Commission*

Noel J. Francisco  
Christopher DiPompeo  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, DC 20001  
Telephone: (202) 879-3939  
Facsimile: (202) 626-1700

Roger L. Byron  
Kenneth A. Klukowski  
FIRST LIBERTY  
2001 Plano Parkway  
Suite 1600  
Plano, TX 75075  
Telephone: (972) 941-4444  
Facsimile: (972) 941-4457

*Counsel for The American Legion, The  
American Legion Department of Maryland, and  
The American Legion Colmar Manor Post 131*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 15-2597 Caption: Am. Humanist Assoc. et al., v. Md-Nat'l Capital Park & Planning Comm'n

Pursuant to FRAP 26.1 and Local Rule 26.1,

Maryland-National Capital Park and Planning Commission  
(name of party/amicus)

who is Appellee, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
  
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:
  
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?  YES  NO  
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ William C. Dickerson

Date: January 11, 2016

Counsel for: M-NCPPC

**CERTIFICATE OF SERVICE**

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I certify that on January 11, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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January 11, 2016  
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 15-2597 Caption: American Humanist Association et al. v. Maryland-National Capi...

Pursuant to FRAP 26.1 and Local Rule 26.1,

THE AMERICAN LEGION

(name of party/amicus)

---

who is appellee, makes the following disclosure:  
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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Christopher DiPompeo

Date: January 8, 2016

Counsel for: The American Legion

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No. 15-2597 Caption: American Humanist Association et al. v. Maryland-National Capi...

Pursuant to FRAP 26.1 and Local Rule 26.1,

THE AMERICAN LEGION DEPARTMENT OF MARYLAND

(name of party/amicus)

who is appellee, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Christopher DiPompeo

Date: January 8, 2016

Counsel for: The American Legion Dep't of Md.

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No. 15-2597 Caption: American Humanist Association et al. v. Maryland-National Capi...

Pursuant to FRAP 26.1 and Local Rule 26.1,

THE AMERICAN LEGION COLMAR MANOR POST 131  
(name of party/amicus)

who is appellee, makes the following disclosure:  
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Signature: /s/ Christopher DiPompeo

Date: January 8, 2016

Counsel for: Am. Legion Colmar Manor Post 131

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## INTRODUCTION

Nearly a century ago, private citizens led by the American Legion erected a memorial to the 49 men of Prince George's County who died serving the nation in World War I ("WWI"). The Bladensburg World War I Veterans Memorial (the "Memorial") lists the names of these men, and was built in a cross shape to recall the crosses marking the countless American graves on the Western Front of that war. As one of the original sponsors, Mrs. Martin Redman, put it in 1920, "the chief reason I feel so deeply in this matter, my son, Wm. F. Redman, lost his life in France and because of that I feel that our memorial cross is, in a way, his grave stone." JA2300. Incorporating several additional secular, commemorative symbols, the Memorial was constructed on private land at the terminus of the National Defense Highway—itsself dedicated to the memory of those lost in WWI. Eventually, the highway system's growth made it unsafe for the traffic median to remain under private control, and, as a result, the Commission took possession of the median and, incidentally, the Memorial as well. But from the first days of the Memorial to the present, the Memorial has continuously served as a gathering point to honor those lost in the nation's conflicts.

In 2012, the American Humanist Association and three of its members (collectively, the "AHA") lodged the first and only known legal complaint against the Memorial. According to the AHA, the Commission's ownership of the Memorial amounts to an unconstitutional establishment of religion in violation of the First Amendment, and the Memorial must therefore be torn down.

The District Court, however, properly held that the Establishment Clause does not mandate such hostility. A reasonable objective observer, acquainted with the purpose, content, setting, and history of the Memorial, would understand that the Commission's highway expansion purpose was mundanely secular; that the original builders chose the cross-shape for the Memorial not out of religious motivations, but specifically to recall the foreign grave markers of their fallen loved ones; that because of these grave markers, the cross-shape became an internationally recognized symbol uniquely associated with WWI; that the builders did not merely erect a cross, but also included secular, commemorative symbols; that the Memorial has only ever been used for commemorative purposes; that the community has only ever regarded the Memorial as a WWI memorial; and that the Memorial stood for 90 years without complaint before Plaintiffs initiated this litigation. Once acquainted with these facts, the reasonable objective observer would easily conclude that the Memorial's purpose and effect is commemorative, not religious.

At bottom, the AHA's arguments boil down to a claim that the Memorial's employment of a cross-shape should inevitably lead to its unconstitutionality. This is simply not the law. The Establishment Clause requires a fact-intensive inquiry that cannot be reduced to broad, categorical rules like the one asserted by the AHA. The AHA relies on a laundry list of distinguishable cases from other courts, involving other displays, erected in other circumstances, but this belies the fact that the AHA has no comprehensive counternarrative of the facts *in this case*. This is not the type of

detailed, fact-specific analysis that the Establishment Clause requires, and that the District Court conducted.

In short, the AHA has neither the law nor the facts on its side. The Memorial was built as a memorial, it has only ever been used as a memorial, and it has always been regarded by the community as a memorial. The Establishment Clause does not require the Court to reach into this community and tear out a cherished landmark.

### **STATEMENT OF THE ISSUE**

This appeal presents the question whether the District Court properly concluded that a memorial built in 1925 to honor the 49 men from Prince George's County who died in WWI does not violate the Establishment Clause of the First Amendment, U.S. CONST., amend. I, cl.1, merely because it is shaped like a cross.

### **STATEMENT OF THE CASE**

#### **I. THE BLADENSBURG WWI VETERANS MEMORIAL**

##### **A. The Memorial Consists Of A Cross Incorporating Commemorative Symbols On A Large Pedestal**

The Memorial consists of a cross sitting atop a large stone pedestal.<sup>1</sup> Rather than a bare cross, however, the Memorial includes many secular, commemorative symbols. For example, on both the front and back sides of the Memorial, the designers placed a large image of the American Legion's emblem at the intersection of the cross' arms to reflect the Memorial's original builders. JA1856. In addition,

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<sup>1</sup> Photographs of the Memorial, its neighboring memorials, and Veterans Memorial Park are compiled at JA1855-70.

Celtic-styled arches were added above and beneath the arms to reflect “an ancient form marking a gravesite,” JA1890; *see also* JA1897-99. At the base of the cross are four large words, mounted in bronze, one on each side, reading “VALOR”, “ENDURANCE”, “COURAGE”, and “DEVOTION.” JA1963.

On its pedestal, the Memorial contains a large bronze plaque—measuring nine feet wide and two-and-a-half feet tall, JA3092—which declares the monument was “DEDICATED TO THE HEROES / OF PRINCE GEORGE’S COUNTY, MARYLAND WHO LOST THEIR LIVES IN / THE GREAT WAR FOR THE LIBERTY OF THE WORLD.” The plaque lists each of the names of the 49 local men who died in WWI, gives the dates of American involvement in the war, and concludes with a quote from President Woodrow Wilson’s address to Congress requesting a declaration of war: “The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives.” JA1963.

Each of these adaptations is proportionate and scaled to the overall size of the Memorial, and all can be easily seen by passersby, whether traveling by foot, vehicle, or other means. *See* JA1855-58 (photographs of Memorial).

## **B. The Memorial Stands On And Among Other Memorials In Veterans Memorial Park<sup>2</sup>**

The Memorial stands on a grassy median at the head of another WWI memorial, the old National Defense Highway linking Washington with the United States Naval Academy at Annapolis. The two memorials were inaugurated together at the same ground-breaking in 1919, and the paired memorials are now flanked on either side by several more memorials constructed over the last century, each privately funded. *See* JA3092-93; JA1961-65; 1859-70 (pictures). These memorials include (1) a World War II (“WWII”) Honor Scroll dedicated by the American Legion in 1944; (2) a Pearl Harbor Memorial; (3) a Korea-Vietnam Veterans Memorial dedicated in 1983; (4) a September 11 Memorial Garden; and (4) a Battle of Bladensburg Memorial. *See* JA3092-93; JA1961-65. In addition, private citizens are currently funding the installation of two 38-foot-tall soldier statues, one British and one American, on opposite sides of the bridge just to the west. JA3093.

To the south of these memorials is the Battle of Bladensburg Visitor Center, part of the Star-Spangled Banner National Historic Trail, reflecting the fact that the entire area is on the grounds of the infamous Battle of Bladensburg from the War of 1812. *See* JA 1961-62. The park’s many memorials and historic character have

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<sup>2</sup> A map of Veterans Memorial Park and surrounding landmarks was included as Exhibit 2 to the Legion’s motion for summary judgment. *See* Dkt. No. 83, Ex. 2. An apparent printing error in the Joint Appendix, however, made the labels incorrect and the map unusable. *See* JA1872. A copy of the map as it appeared in the brief submitted to the District Court is included in a supplemental appendix, at SA2.

spurred the “recognition of Bladensburg as the focus of the County’s remembrance of its veterans and war dead.” JA1961. The entire area is commonly called “Veterans Memorial Park,” *id.*, or simply “Peace Cross.” *See id.*; JA2235.

Visitors have unrestricted access to all of the memorials in Veterans Memorial Park, including the Memorial at issue in this case. *See* JA2200-01. Additionally, a wide shoulder on the road adjacent to the Memorial enables free parking and easy access to the Memorial. *Id.*; *see also* JA1920 (historical trust report identifying the Memorial’s accessibility as “[a]ccessible” and “unrestricted”).

## II. THE ORIGINS OF THE MEMORIAL

The Memorial traces its origins to the immediate aftermath of WWI, when survivors of the War and the mothers of deceased servicemembers wanted to create a memorial to their fallen comrades and sons. Their use and adaptation of a cross-shape was intended to recall the wooden crosses that first marked the graves of the fallen overseas—an image that became inextricably intertwined with public consciousness of the losses of WWI. The initial private drive in 1919 to build the Memorial faltered, but was revived by the returned veterans of the American Legion, who unveiled the completed Memorial in 1925 as a fitting tribute to the 49 men of Prince George’s County lost to the War.

**A. Crosses Became An Internationally Recognized Symbol Of The Losses Of WWI**

**1. Wooden Crosses Were The Principal Gravemarker In Overseas Cemeteries During WWI**

World War I was a brutal, industrialized war unlike any before it. Artillery fire, chemical weapons, and trench warfare dominated the fighting, killing millions of soldiers. JA1892-93. Despite America's late entrance into the war, approximately 87,900 American soldiers were killed in five months of heavy fighting—more than died in both Korea and Vietnam. JA1893.

Around half of America's fallen were buried in temporary cemeteries overseas, *id.*, most under temporary wooden crosses, JA2272. For servicemembers on the Western Front, the “countless groups of wooden crosses gathered together to mark the site where soldiers died” were a constant presence. JA1897. The sight of those crosses was immortalized by soldier and poet John McCrae, who, before he died in the war, wrote “In Flanders Fields,” a poem “celebrated all over the world,” JA1895:

In Flanders fields the poppies blow  
Between the crosses, row on row,  
That mark our place; and in the sky  
The larks, still bravely singing, fly  
Scarce heard amid the guns below.

We are the Dead. Short days ago  
We lived, felt dawn, saw sunset glow,  
Loved and were loved, and now we lie  
In Flanders fields.

Take up our quarrel with the foe:  
To you from failing hands we throw



The torch; be yours to hold it high.  
If ye break faith with us who die  
We shall not sleep, though poppies grow  
In Flanders fields.

John McCrae, *In Flanders Fields and Other Poems* (New York: G.P. Putnam Sons ed., 1919).



Original wooden crosses at Flanders Field American cemetery. JA1898.

The poem “conjured up a unique image with a distinct association with World War I—an endless sea of crosses and a unique moment in American and world history.” JA1895-96. Indeed, as the AHA’s expert Dr. Kurt Piehler observed in a 2005 publication, “the Cross became *the* principal grave marker” in overseas WWI cemeteries. JA2239 (Piehler, *The Military, War, and Memory*) (emphasis added).



Provisional WWI cemetery with wooden crosses. JA1897. More pictures at JA1898-99.



Wooden cross marking the grave of Quentin Roosevelt, son of President Teddy Roosevelt. JA1899.

## 2. After WWI, Crosses Became An Internationally Recognized Symbol Of The Losses Of The War

After the war, AHA expert Dr. Piehler wrote in a 2010 publication, “cross gravestones replaced the widely used wooden crosses that served as temporary grave markers and quickly emerged as a cultural image of the battlefield.” JA2256 (Piehler, *The American Memory of War*); see also JA1897. The cross came to symbolize “vast armies of the dead, forever resting on foreign soil,” JA1895, and “signified the dreadful nature of war on the Western Front,” JA2256.

To remember and honor the men who did not come home, many families and communities across the world used an “adapted, modulated, secularized cross” as a memorial. JA1883-84. They used these cross shapes “to symbolize not a specific religious belief but precisely to remind people at home of the archipelago of crosses found in cemeteries all over the Western front of what they called the Great War.”

JA1896. Across the British Empire, for example, the government erected more than one thousand Crosses of Sacrifice in imperial cemeteries after the war. JA2260-62.

Consistent with that global trend, Dr. Piehler observed in his 2004 book *Remembering War the American Way* that “[t]he cross” “developed into a central symbol of the American overseas cemetery.” JA2270. For this reason, communities throughout America also began erecting cross-shaped memorials to commemorate those lost in WWI. For example, the Bladensburg Memorial is within 40 miles of four other cross-shaped WWI memorials: the Wayside Cross in Towson, the Victory Cross in Baltimore, and the Argonne Cross and Canadian Cross of Sacrifice in Arlington National Cemetery. *See* JA923; JA1905-06; JA2660, JA2675.

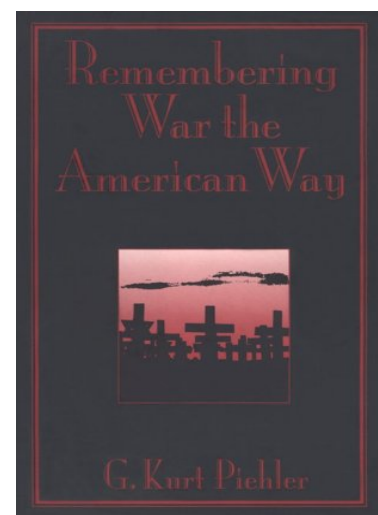
The cross’s resonance as a powerful commemorative symbol of the war was confirmed in the national debate over how to replace the wooden crosses overseas. The War Department initially decided to replace the wooden crosses with slab marble headstones akin to those in domestic cemeteries like Arlington, but reversed course after patriotic groups voiced their opposition. JA2272. Observing that “[t]he cross and the Star of David had already marked American graves in Europe for more than five years,” organizations such as “the American Legion and the American War Mothers[ ] felt that designs of headstones similar to the wooden cross and the Star of David would be more appropriate.” *Id.*

During hearings, Congress recognized that the markers had become “wooden symbols . . . emblematic of the great sacrifices which [the] war entailed.” JA2280

(H.R. Res. 15, 68th Cong. at 1 (1924)). Among surviving relatives and comrades, the crosses had become “peculiarly and inseparably associated” with the dead soldiers as a result of widespread imagery in art and poetry. *Id.* “The crosses on the graves,” one witness testified, “symbolize the American sacrifices in France during the World War, and our war literature has impressed this fact very forcibly on the minds of the people.” JA2289. The Jewish Welfare Board also supported the crosses-and-stars scheme proposed for permanent grave markers: its executive director stated at the hearing that, “if there is a sentiment to preserve these cemeteries as they are, and if by so doing the American people will more vividly remember the great sacrifices that were made during the war, then let us by all means conserve this sentiment.” *Id.*

AHA expert Dr. Piehler has written that the national support for retaining cross-shaped headstones overseas:

suggests a great deal about how [Americans] viewed the war. Although the cross signified the promise of resurrection in the Christian tradition, it also stood for suffering and sacrifice; by adopting it, Americans declared symbolically that the war dead had offered their lives in order to redeem the nation. Their loss remained extraordinary and far removed from the profane.



JA2270 (Piehler, *Remembering War the American Way*). These words are taken from Dr. Piehler’s book, whose first-edition cover (shown above and at JA3359) uses an image of an overseas cemetery’s crosses and stars to symbolize “remembering war the American way.” *See* JA2582-83; JA2606-08.

## **B. The Memorial Was Designed To Mirror The Foreign Gravemarkers Of Those Who Died In WWI**

In Prince George's County in 1919, a Memorial Committee that included ten mothers of men lost in the war resolved to erect a memorial to the county's fallen heroes. JA1962. Channeling the national sentiment for memorials recalling the "crosses, row on row" overseas, *see* JA1877, the Committee chose to adapt a cross symbol. Committee treasurer Mrs. Martin Redman explained the sentiment animating this choice in a 1920 letter to U.S. Senator John Walter Smith: "[I]he chief reason I feel so deeply in this matter, my son, Wm. F. Redman, lost his life in France and because of that I feel that our memorial cross is, in a way, his grave stone." JA2300. The Committee circulated a flyer in 1919 explaining its purposes for building the Memorial as "commemoration of their sons who thus died for the cause of democracy" and "that future generations may look upon it and remember" these men who died in the war. JA2303. The Committee also partnered with the county Good Roads League, whose fundraising letter stressed the project's commemorative focus—and its ecumenical character:

*To honor your comrades lost in the War, we are going to dedicate the National Defense Highway, which runs from Bladensburg to Annapolis, to them, and build a massive sacrifice cross at the beginning of the Highway . . . . You are to get the names of every person in your community regardless of wealth, nationality, religion, or politics. These names will be wrapped in an American Flag, placed in a bronze chest, and buried in the foundation of the monument by the school girls' committee.*

JA2178 (emphases added).

This was a “strictly voluntary undertaking[ ] of private citizens,” JA1961, and pledge sheets were circulated “throughout the county with a call for everyone to participate, regardless of how small or large the donation,” JA1980. Recalling the traditional patriotic rhetoric of the day, those sheets read:

WE, THE CITIZENS OF MARYLAND, TRUSTING IN GOD, THE SUPREME RULER OF THE UNIVERSE, PLEDGE FAITH IN OUR BROTHERS WHO GAVE THEIR ALL IN THE WORLD WAR TO MAKE THE WORLD SAFE FOR DEMOCRACY. THEIR MORTAL BODIES HAVE TURNED TO DUST, BUT 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 COMMEMORATING THE MEMORY OF THOSE WHO HAVE NOT DIED IN VAIN.

JA2305.

On September 28, 1919, the builders broke ground on the Memorial and the National Defense Highway together at the same ceremony. JA1970. Mrs. William Farmer, mother of the county’s first soldier to fall in the War, broke ground on the Memorial’s foundation, while Mrs. Redman, the mother of the county’s first sailor to fall, turned the first shovel on the memorial highway to Annapolis. *Id.*

The principal speaker at the ceremony was Josephus Daniels, wartime Secretary of the Navy, who spoke of both memorials in his address:

A concrete highway that will be a boon to the traveler from far and near, that will never fail in rain or sun, that every day in the year will present an unalterable face to every duty expected of it, as did the men in whose honor it was named; and a cross that will stand for time and eternity, *like the principles they defended.*

JA1970 (emphasis added); *see also* JA1991.

### **C. The American Legion Completed The Memorial To Honor Fallen Comrades**

The initial drive, however, came up short. It fell to the American Legion to take over the project (and property) and build the Memorial to honor their fallen comrades.

#### **1. The American Legion Is A Federally Chartered Patriotic Veterans Organization**

The American Legion was founded on March 16, 1919 by veterans of the American Expeditionary Forces for the purposes listed in its constitution's preamble:

For God and Country, we associate ourselves together for the following purposes:  
To uphold and defend the Constitution of the United States of America;  
[T]o maintain law and order;  
[T]o foster and perpetuate a one hundred percent Americanism;  
[T]o preserve the memories and incidents of our associations in the Great Wars;  
[T]o inculcate a sense of individual obligation to the community, state and nation;  
[T]o combat the autocracy of both the classes and the masses;  
[T]o make right the master of might;  
[T]o promote peace and good will on earth;  
[T]o safeguard and transmit to posterity the principles of justice, freedom and democracy;  
[T]o consecrate and sanctify our comradeship by our devotion to mutual helpfulness.

JA2321; *see also* JA2319 (federal charter of American Legion).

From its beginning, the Legion has been an inclusive, non-sectarian organization. *See* JA2059 (no religious requirements for membership or leadership);

JA2370, JA2373 (no religious requirements for membership or service as chaplain); JA2429 (no religious requirements for membership). The AHA's expert Dr. Piehler has remarked that it is "difficult to characterize the American Legion as a nativist organization," as it was in fact a "remarkably diverse and ecumenical organization" that successfully recruited large numbers of Catholics and Jews after WWI during "an era of substantial nativism." JA2468 (Piehler, *The Jewish Veterans Organizations and the Shaping of the American National Identity in the Twentieth Century*). Several Catholic priests and one rabbi served as national chaplain of the Legion in that period, despite the prominence of anti-Catholicism and anti-Semitism in the early twentieth century. *Id.* Additionally, the Legion "emphasized the unity of all Americans and it did not exclude any American WWI veterans from membership based on their ethnicity or national origin." *Id.*

## **2. The American Legion Took Ownership Of The Memorial Project And Property**

By 1922, little progress had been made on the Memorial for lack of funds. *See* JA1876; JA2482. "[B]eing on the Washington-Baltimore boulevard," the unfinished Memorial "became an eye-sore to those who passed it every day." JA1992.

The local American Legion post ("Post 3") volunteered to take over responsibility for building the Memorial and take ownership of the land on which it sits. JA2091-92. The Memorial Committee signed over the unfinished Memorial and the Committee's liabilities and assets, *id.*, while the Town of Bladensburg conveyed to



Post 3 the underlying and surrounding land, *id.*, that the Memorial “might be a finished and fitting tribute to those of our boys who gave their lives in the World War.” JA2504 (Town of Bladensburg Commissioners’ 1922 conveyance to American Legion).<sup>3</sup>

### **3. The Completed Memorial Was Dedicated By The American Legion In 1925**

After four years of fundraising the Legion erected “a monument to the county’s heroic dead who made the supreme sacrifice in the World War,” JA2506, dedicating the Memorial in a patriotic ceremony on July 12, 1925. As the *Washington Post* put it, “future generations passing through Bladensburg, Md., may be reminded of the 49 young men of Prince Georges County who made the supreme sacrifice in the world war.” JA2508. Representative Stephen Gambrill delivered the keynote:

Where we of the past generation have failed to prevent war, perhaps you young men of the American Legion or the mothers who gave their sons to the conflict may succeed. . . . You men of Prince Georges [sic] 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.

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<sup>3</sup> The AHA contends that this conveyance did not actually transfer the land to the Legion, and that the Memorial was built on land still owned by the Town of Bladensburg. In their briefs to the District Court, however, the parties both agreed that this fact was not material to the outcome, *see* Dkt. No. 93-1, at 4 n.3; Dkt. No. 90 at 11, for reasons explained more fully therein.

*Id.* Clergy from local Hyattsville churches gave an invocation and benediction. *Id.* The Army Music School band provided music, and representatives from the War Mothers and the Legion also spoke. *Id.*

### **III. THE COMMISSION'S OWNERSHIP OF THE MEMORIAL**

In the years following, the National Defense Highway and other adjoining roads grew busier. Recognizing potential traffic hazards from private ownership of the median, in 1935 the state legislature authorized the state Roads Commission to acquire property rights around the Memorial. *See* JA2510-11 (1935 Maryland Laws 937, Ch. 432) (citing “traffic hazard situation”); JA2513.

Two decades later, the Roads Commission condemned a parcel adjacent to the Memorial as part of a highway modernization plan. *See* JA2516-17. However, the Memorial itself was apparently not affected by the condemnation order, nor was Post 3 made a party to the order. *See id.* Instead, in 1960, at the Legion’s request, the Roads Commission deeded that parcel to the Maryland-National Capital Park and Planning Commission (the “Commission”). *See* JA2519 (Md. Rd. Comm’n Mins., Oct. 25, 1960); JA2521-24 (Md. Rd. Comm’n Deed); JA2118-21. Then, after negotiation, Post 3 conveyed all its property interests in the Memorial to the Commission, but reserved an easement or similar legal right to conduct veterans’ commemorative events on the property, and a reversionary right to intervene in the care of the memorial should the Commission ever not be able to do so. JA2526-30 (1961 conveyance from Post 3 to the Commission).

Today, the Commission still owns and controls the property, subject to the Legion's interests reserved in holding commemorative events there. JA1874; JA2381. The Commission provides routine groundskeeping, power for the lighting, and occasional repairs every few decades. *See* JA2129-30; JA2132-34.

#### **IV. PUBLIC USE AND RECEPTION OF THE MEMORIAL**

##### **A. The Memorial's Only Consistent Use Has Been As A Venue For Commemorative Veterans' Events**

From its beginning in 1919 to the present day, the Memorial's only consistent use has been commemorative. *See* JA1876; JA1971; JA2532; JA2059. Continuing that tradition, the Legion holds a commemorative event at the Memorial every Veterans Day, and a Memorial Day event across the street between the WWII Honor Scroll and the Korea-Vietnam Veterans' Memorial. JA2027-28; JA2534.<sup>4</sup> As explained in the 2014 program, JA2956-57; *see also* JA2027-30, those events include the following: presentation of the colors; the national anthem; a nonsectarian invocation by a Legion representative; an introduction from the local Legion post and recognition of guests; a welcome message from invited public officials; a commemorative speech from a regional Legion official; laying of floral wreaths; taps; a nonsectarian benediction by a local Legion representative; an invitation to lunch at the local Legion hall; and

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<sup>4</sup> The Legion's Memorial Day programs state that they are held at "Peace Cross," consistent with the local practice of referring to the area by that name. Officials from the American Legion confirmed in deposition testimony that the Memorial Day events are held across the street from the Memorial, between the WWII Honor Scroll and the Korea-Vietnam Memorial. JA2027-28; JA2534 (errata sheet correcting mistaken reference to "WWI" memorial).

retirement of the colors.<sup>5</sup>

**B. Public Accounts Of The Memorial Throughout Its History Consistently Recognize It As A WWI Memorial**

The public has consistently viewed the Memorial as honoring the fallen. Indeed, newspaper articles from every decade of the Memorial's existence uniformly refer to the Memorial in commemorative terms. *See, e.g.*, JA2542 (1927 *Washington Post* article describing Memorial Day event); JA2544 (1929 *Washington Post* article noting use of Memorial by "Prince Georges County [to] honor[] its hero dead"); JA2546 (1940 *Washington Post* article detailing "nonsectarian memorial services" at Memorial, with its grounds "made to resemble an American cemetery in France with wooden crosses and poppies"); JA1972 (noting 1953 ceremony involving placement of "[w]hite crosses, each with an American flag and a poppy," at Memorial and WWII scroll); JA1980 (1957/58 report describing Memorial as a "monument honoring the county's war dead"); JA1258 (1965 article noting locals' recollection that "[t]he cross was erected many years ago as a memorial to World War I dead"); JA2548 (1975 article referring to Memorial as "historic marker [that commemorated] the county's war dead"); JA2558-59 (1984 article describing Memorial as built "to honor county men who died in World War I"); JA1922 (1996 Maryland Historic Trust report

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<sup>5</sup> The local Legion post typically uses nonsectarian invocations and benedictions appropriate for veterans' commemorative events, published by the national Legion. For examples, *see* JA2537, JA2538-39, JA2540 (American Legion Officer's Guide and Manual of Ceremonies). These invocations and benedictions typically include themes such as respect for those who fell in the nation's conflicts and a call for remembrance of POWs and MIAs.

describing Memorial as “a monument to the Prince George’s County residents who lost their lives while serving in the United States Armed Forces in World War I”); JA2567-68 (2010 report to Commission noting that Memorial honors “the veterans of World War I to whom this monument was erected”). Moreover, in 2015, the Memorial was added to the National Register of Historic Places. *See* JA3416-17.

### **C. There Is No Documented Use Of The Memorial For Religious Purposes**

Although the Memorial has been the site of regular patriotic and commemorative events since its inception, *see* JA1876, the AHA’s expert could not identify any religious event at the Memorial in its nine-decade history, other than a 1931 event noted in the *Washington Post*. JA2636. That article mentions that an out-of-town preacher planned to hold a series of three Sunday services at the Memorial in August 1931. JA2570. Nothing in the record, however, confirms whether the services occurred.

## **V. THIS LAWSUIT AND THE DISTRICT COURT DECISION**

In 2014, the AHA and three individual plaintiffs filed a lawsuit contending the Memorial violates the Establishment Clause and requesting an injunction that it be torn down or its arms removed. *See* JA23. The District Court granted a motion to intervene as defendants filed by the Legion based on the property interest it retained in the Memorial. *See* JA115, JA128.

After briefing and without argument, the District Court granted summary judgment to the Commission and the Legion. Applying the test articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the District Court held the Memorial had neither the purpose nor effect of endorsing religion, and did not excessively entangle government with religion. In addition, although the District Court concluded that “[t]he facts, history, and context of the Monument do not present a particularly difficult ‘borderline’ *Lemon* analysis,” the Court also discussed the impact of the Supreme Court’s decision in *Van Orden v. Perry*, 545 U.S. 677 (2005), reaching the same result. JA3455 n.11. The AHA and individual plaintiffs timely appealed.

## SUMMARY OF ARGUMENT

I. The Supreme Court’s decision in *Van Orden* dictates the outcome of this case. As in *Van Orden*, the Memorial contains several secular symbols that communicate its message of commemoration, including the Legion’s emblem, martial-themed words, arches, and a plaque explaining its purpose. Similarly, the Memorial’s setting in a traffic median in Veterans Memorial Park with other monuments to those lost in the nation’s conflicts “suggests little or nothing of the sacred,” but instead “provide[s] a context of history” and commemoration. *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment). Finally, the Memorial’s history and reception—namely, that it was constructed by private persons to reflect the gravemarkers of Americans killed in WWI; that the Commission owns it only as a result of highway

safety concerns; that it has only ever been used as a site for commemorative events; and that it stood for 90 years before the first and only complaint was lodged against it—suggests “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 . . . a government effort” to endorse religion. *Id.*

**II.** The District Court also properly concluded that the Memorial passes muster under the *Lemon* test.

**A.** First, as the District Court recognized, *Lemon*’s purpose prong is simply not at issue in this case, given the mundanely secular reasons (highway expansion, commemoration of veterans, and historical preservation) for which the Commission owns and maintains the Memorial.

**B.** Nor do the AHA’s arguments fare any better under *Lemon*’s effect prong. When applying *Lemon*’s effect prong, the question is not whether a display contains imagery that could be regarded as religious. Rather, the question is “whether a particular display, with religious content, would cause a reasonable observer to fairly understand it in its particular setting as impermissibly advancing or endorsing religion.” *Lambeth v. Bd. of Commr’s*, 407 F.3d 266, 270 (4th Cir. 2005). Here again, the Memorial’s content, setting, and history make clear to a reasonable objective observer that its primary effect is commemoration, not religious endorsement.

The AHA’s contrary arguments are not persuasive. First, although the AHA argues that the use of a cross-shape “to honor all veterans sends a strong message of

endorsement and exclusion,” AHA Br. 26 (internal quotation marks omitted), the AHA misunderstands the nature of the Memorial, which was not built to honor “all veterans” with a generic symbol of death, but to honor 49 specific individuals with a symbol that was intimately associated with the war in which they died. Second, the use of traditional non-sectarian military prayers at veterans’ events does not transform those events into religious services, and the undisputed fact that the Memorial’s only consistent use has been for veterans’ events powerfully shows that the community has regarded it as a commemorative symbol. Likewise, although the AHA points to religious themes in statements from the time of the Memorial’s construction, these sound-bites are more reflective of the times than the builders’ purposes and, in any event, say nothing about why the Commission owns the Memorial today. And third, although underlying all the AHA’s arguments is the flawed premise that the Memorial must fail *Lemon*’s effect test because its “overtly Christian design sends an intrinsically religious message,” AHA Br. 27, 48, courts have been clear both that a display’s inclusion of symbols that can have religious meaning does not inevitably lead to the display’s invalidation, and that the Establishment Clause does not mandate the eradication of all references to religion from the public realm.

C. Finally, the Commission’s lawnmowing, lighting, and occasional repairs of the Memorial do not present the type of “comprehensive, discriminating, and continuing surveillance’ of religious exercise,” that would trigger *Lemon*’s entanglement prong. *Lambeth*, 407 F.3d at 273 (quoting *Lemon*, 403 U.S. at 619).



**III.** Although the AHA argues that courts have been “virtually unanimous in holding that a government cross display, *in any context*, is unconstitutional,” AHA Br., 23, that claim is both wrong and irrelevant. Several courts of appeals have upheld displays containing a cross, and, in any event, courts have recognized that the intensely fact-specific nature of Establishment Clause cases renders other cases of little use in evaluating a challenged display. Unsurprisingly, as the District Court correctly held, *see* JA3499, the AHA’s cases are all distinguishable.

## **ARGUMENT**

### **I. VAN ORDEN CONTROLS THE RESULT IN THIS CASE**

In granting summary judgment, the District Court analyzed the Memorial under both the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as well as under the Supreme Court’s more recent decision in *Van Orden v. Perry*, 545 U.S. 677 (2005). Ultimately, the District Court concluded that “the Monument does not violate the Establishment Clause under *Van Orden*’s legal judgment test.” JA3455. The District Court was correct. The facts of *Van Orden* are not materially distinguishable from this case, and the AHA’s argument that *Van Orden* can be disregarded is not consistent with precedent from either this Court or the Supreme Court. As a controlling opinion of the Supreme Court on facts that are materially indistinguishable, *Van Orden* dictates the outcome here.

#### **A. Van Orden Cannot Be Meaningfully Distinguished**

In *Van Orden*, the Supreme Court considered whether a Ten Commandments

monument on the Texas State Capitol grounds violated the Establishment Clause. In that case, the 22 acres surrounding the Texas State Capitol contained 17 monuments and 21 historical markers. *Van Orden*, 545 U.S. at 681 (plurality opinion). One of these was a 6-foot high, 3.5-foot wide stone monolith whose central element was the text of the Ten Commandments framed both by religious and secular symbols. *Id.* The bottom of the monument contained an inscription reading, “PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961.” *Id.* at 681-82. The Eagles, a private organization, paid for the monument, the State selected the site for it, and its dedication was presided over by two state legislators. *Id.* at 682.

The Supreme Court affirmed the Fifth Circuit’s decision that the monument did not violate the Constitution, with Justice Breyer providing the controlling opinion. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (recognizing Justice Breyer’s opinion as controlling); *Myers v. Loudon Cnty. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005) (applying the reasoning of Justice Breyer’s opinion to a challenge to the Pledge of Allegiance).

Acknowledging that the Ten Commandments “undeniably ha[d] a religious message,” *Van Orden*, 545 U.S. at 700 (Breyer, J.), Justice Breyer nonetheless concluded that “the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well,” *id.* at 701. Key was the fact that “[t]he circumstances surrounding the display’s placement on the capitol grounds

and its physical setting suggest[ed] that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate.” *Id.* Moreover, Justice Breyer continued, “the monument’s 40-year history on the Texas state grounds indicates that that has also been its effect.” *Id.*

Justice Breyer emphasized that the Fraternal Order of Eagles was “a private civic (and primarily secular) organization” which “sought to highlight the Commandments’ role in shaping civic morality as part of that organization’s efforts to combat juvenile delinquency.” *Id.* And Justice Breyer made clear that the “prominent[ ] acknowledge[ment]” of the Eagles as donor “further distances the State itself from the religious aspects of the Commandments’ message.” *Id.* at 701–02.

Justice Breyer next observed that “the physical setting of the monument, moreover, suggests little or nothing of the sacred,” because it sat in a park containing many other monuments, “all designed to illustrate the ‘ideals’ of those who settled in Texas and of those who have lived there since that time.” *Id.* at 702. This setting “d[id] not readily lend itself to meditation or any other religious activity. But it d[id] provide a context of history and moral ideals.” *Id.* “That is to say,” Justice Breyer explained, “the context suggests that the State intended the display’s moral message . . . to predominate.” *Id.*

Next, Justice Breyer explained that “[i]f these factors provide a strong, but not conclusive, indication that the Commandments’ text on this monument conveys a predominantly secular message, a further factor is determinative here.” *Id.* In

particular, that 40 years had passed since the monument was erected without any legal challenges “suggest[ed] 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 amounting, in any significantly detrimental way, to a government effort to promote religion over nonreligion.” *Id.* This 40 years of repose evidenced that the monument conveyed “a broader moral and historical message reflective of a cultural heritage,” *id.* at 703.

Finally, Justice Breyer observed that “to reach a contrary conclusion here, based primarily on the religious nature of the tablets’ text would . . . lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.” *Id.* at 704. For these reasons, Justice Breyer concluded that the Ten Commandments monument did not violate the Establishment Clause.

*Van Orden* easily resolves this case. First, as in *Van Orden*, “[t]he *circumstances surrounding* the [Commission’s ownership of the Memorial] . . . suggest[s] that the State itself intended the . . . nonreligious aspects of the [Memorial’s] message to predominate.” *Id.* at 701 (emphasis added). As the District Court recognized, the Commission’s involvement with the Memorial is due only to highway expansion plans and concerns of highway safety. *See supra* at 17-18. In addition, as in *Van Orden*, here the seal of the Memorial’s original builder—the American Legion—is prominently displayed in the center of the Memorial. *See supra* at 3-4.

Moreover, the Memorial’s “*context* suggests that the State intended the display’s

[commemorative] message . . . to predominate.” *Van Orden*, 545 U.S. at 702 (Breyer, J.). As in *Van Orden*, the Memorial is located in an area with other monuments based on a similar theme—commemorating those who died in the country’s military conflicts. *See supra* at 5–6. Even the specific location of the Memorial is significant, since it lies on the site of the Battle of Bladensburg and is at the terminus of (and was dedicated with) another WWI memorial—the National Defense Highway—specifically because of their mutual commemorative purpose. The Memorial’s location in the median of a busy highway intersection “suggests little or nothing of the sacred,” and thus the Memorial “does not readily lend itself to meditation or any other religious activity.” *Van Orden*, 545 U.S. at 702 (Breyer, J.). The setting does, however, “provide a context of history” and commemoration of those who have fallen in the nation’s conflicts. *Id.*

In addition, “a further factor is determinative here.” *Id.* While 40 years passed in which the *Van Orden* monument went unchallenged, almost 90 years passed before the AHA lodged the first complaint against the Memorial. “[I]hose [90] years suggest more strongly than can any set of formulaic tests that few individuals, whatever their belief systems, are likely to have understood the [Memorial] as . . . a government effort” to endorse religion. *Id.* Finally, as in *Van Orden*, “to reach a contrary conclusion here, based primarily on the religious nature of the [Memorial’s cross-shape] would . . . lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.” *Id.* at 704. Removing a “longstanding” WWI

memorial from the public land on which it happens to sit would “create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.” *Id.*

*Van Orden*, therefore, compels the conclusion that the Memorial does not run afoul of the Establishment Clause, as the District Court concluded.

**B. The AHA’s Attempt To Convince The Court To Disregard *Van Orden* Is Not Legally Supportable**

Nonetheless, the AHA argues that this Court should ignore *Van Orden* on the ground that “*Van Orden* is not binding on any court because a majority could not be reached on the applicable standard.” AHA Br. 65. The AHA, however, is wrong.

It is black letter law that “[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .’” *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted). Courts have thus repeatedly held that “the controlling opinion in *Van Orden* is, of course, that of Justice Breyer.” *Card v. City of Everett*, 520 F.3d 1009, 1017 n.10 (9th Cir. 2008); *see also, e.g., Green v. Haskell Cnty. Bd. of Comm’rs*, 568 F.3d 784, 807 (10th Cir. 2009); *Staley v. Harris Cnty.*, 485 F.3d 305, 308 (5th Cir. 2007).

Unsurprisingly, the cases cited by the AHA do not suggest that *Van Orden* can be disregarded. They simply recognize that Justice Breyer’s opinion does not establish a new test—often called the “legal judgment” test—to replace *Lemon*. *See, e.g., ACLU*

of *Ky. v. Mercer Cnty.*, 432 F.3d 624, 636 & n.11 (6th Cir. 2005) (concluding that *Lemon* test governs Ten Commandments displays in courthouse after *Van Orden*). None of these cases suggests that *Van Orden*'s holding on the facts is not binding on lower courts. See, e.g., *Trunk*, 629 F.3d at 1105-07 (analyzing cross-shaped monument under both *Lemon* and the "legal judgment" test of *Van Orden*). Indeed, in the only post-*Van Orden* case decided by this Court involving expressive religious content, this Court applied Justice Breyer's "legal judgment" test rather than *Lemon*. See *Myers*, 418 F.3d at 402. The AHA fails even to cite *Myers*, let alone attempt to reconcile with this Court's precedent its position that *Van Orden* does not apply.

As the District Court recognized, regardless of whether *Van Orden* establishes some new "test" to apply instead of *Lemon*, it controls the result here because it cannot be meaningfully distinguished on the facts.<sup>6</sup>

## II. THE MEMORIAL ALSO SATISFIES THE *LEMON* TEST

For the reasons above, *Van Orden* easily resolves this case and the Court need go no further. If, however, the Court determines that *Van Orden* does not control the result here, it will be necessary to consider the analysis required by the *Lemon* test. Government action challenged under *Lemon* "(1) must be driven in part by a *secular purpose*; (2) must have a *primary effect* that neither advances nor inhibits religion; and (3)

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<sup>6</sup> In fact, the ideal rule for this case is the history-and-coercion test announced by the Supreme Court in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). However, because *Van Orden* is directly on point, it continues to control facts such as these until the Supreme Court explicitly declares otherwise. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

must not *excessively entangle* church and State.” *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 608 (4th Cir. 2012). The rule does not require “‘a regime of total separation’ between church and State,” *id.* (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973)), but instead sets “a policy of ‘benevolent neutrality’ that recognizes a wide range of ‘permissible state accommodation’ for religion,” *id.* (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669, 673 (1970)). As the District Court correctly held, the Memorial does not run afoul of the Establishment Clause under the *Lemon* test.

**A. *Lemon’s* Purpose Prong Is Not At Issue In This Case**

*Lemon’s* secular-purpose requirement presents “a fairly low hurdle,” *Glassman v. Arlington Cnty.*, 628 F.3d 140, 146 (4th Cir. 2010). A government action fails *Lemon’s* “purpose” prong only when the government action is “‘entirely motivated by a purpose to advance religion,’” *Lambeth*, 407 F.3d at 270 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)). Applying this standard, courts have found governments to have a legitimate secular purpose in such things as “preserv[ation of] a historically significant war memorial,” *Trunk*, 629 F.3d at 1108 (internal quotation marks omitted), “honor[ing] fallen troopers and . . . promot[ing] safety on the State’s highways,” *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1157 (10th Cir. 2010), *amended and superseded by* 637 F.3d 1095 (10th Cir. 2010), and depiction of the national motto, *Lambeth*, 407 F.3d at 270.



Although in the District Court, the AHA devoted much of its brief to the argument that the Memorial failed *Lemon*'s purpose prong because it is shaped like a cross, it has essentially abandoned that argument on appeal, making it only in a passing footnote. *See* AHA Br. 26 n.4. And for good reason—it is undisputed that the Commission owns the Memorial only because highway expansion and traffic safety concerns made it a necessity. *See supra* at 17-18. And the Commission continues to display the Memorial because it is a historically significant war memorial and because the Commission is required to maintain the Memorial as it stood on private land by virtue of the Memorial's designation as a historic site. None of these purposes is religious. Simply put, *Lemon*'s purpose prong is not at issue in this case.

**B. The Primary Effect Of The Memorial Is Not Endorsement of Religion**

*Lemon*'s second prong requires the court to determine whether a “display’s principal or primary effect is to advance or inhibit religion, or whether the display has the effect of ‘endorsing’ religion.” *Lambeth*, 407 F.3d at 270. The question is not whether a display contains imagery that could be regarded as religious. Rather, the question is “whether a particular display, with religious content, would cause a reasonable observer to fairly understand it in its particular setting as impermissibly advancing or endorsing religion.” *Id.* at 271.

“That test requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its

placement.” *Salazar v. Buono*, 559 U.S. 700, 720–21 (2010) (plurality opinion). The reasonable observer is “informed as well as reasonable,” *Alvarado v. City of San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996), and thus is not “limited to the information gleaned simply from viewing the challenged display,” *Capitol Square Review & Adv. Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in judgment). This information includes the “purpose, context, and history of the symbol” at issue. *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008).

Indeed, the reasonable observer is “presumed to know far more than most actual members of a given community.” *Id.* at n.16; *see also Lambeth*, 407 F.3d at 271-72. Thus, when evaluating the primary effect of a display on the reasonable observer, 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 person *might* think [the Commission] endorses religion.” *Pinette*, 515 U.S. at 780 (O’Connor, J.); *see also Mercer Cnty.*, 432 F.3d at 636 (same). The inquiry, rather, is “whether *the* reasonable person *would* conclude that [the] display has the effect of endorsing religion.” *Mercer Cnty.*, 432 F.3d at 636.

A challenged display must be “assessed in the context of all relevant factors.” *Salazar*, 559 U.S. at 721 (plurality opinion). Courts evaluating governmental displays that include religious elements have found significant (a) the content of the display—that is, whether the religious aspects of the display are placed in context by the inclusion of secular elements that reinforce its secular meaning, *see, e.g., Lynch v.*

*Donnelly*, 465 U.S. 668, 692 (1984); (b) the setting of the display—that is, the display’s location and whether there are other, non-religious things around the display that communicate a secular message, *see, e.g., Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227, 243 (2d Cir. 2014); and (c) the history of the display—that is, the circumstances surrounding the creation of the display, *see, e.g., City of Las Cruces*, 541 F.3d at 1033–34, and how the community has perceived and used the display over time, *see, e.g., Lambeth*, 407 F.3d at 271-72; *Trunk*, 629 F.3d at 1102, 1120.

**1. The Memorial’s Content, Setting, And History Demonstrate That Its Primary Effect Is Commemoration, Not Religious Endorsement**

When observing the Memorial, the reasonable objective observer would first notice that the main design element in the Memorial is its cross-shape, and, as an “informed” observer, she would know that a cross can have religious significance. But the reasonable objective observer would not stop there, because to focus “exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.” *Lynch*, 465 U.S. at 680. Instead, the reasonable observer would understand that her task is to evaluate “whether a particular display, *with religious content*, would cause [her] to fairly understand it in its particular setting as impermissibly advancing or endorsing religion.” *Lambeth*, 407 F.3d at 271 (emphasis added); *see also Salazar*, 559 U.S. at 721 (plurality opinion) (criticizing district court for “concentrat[ing] solely on the religious aspects of the cross”).

**Content.** Beyond its mere shape, the reasonable observer would notice that the Memorial is not simply a bare cross, but that the builders also added many secular elements to communicate its commemorative purpose. She would notice that the Memorial is styled like a Celtic cross, the traditional form of a cross used for gravesites rather than worship. *See* JA1890. She would also observe the symbol of the American Legion displayed on both sides of the Memorial in the center of its crossbars, “prominently acknowledg[ing] that the [Legion] donated the display . . . [and] further distanc[ing] the State itself from the religious aspect of the [Memorial’s] message.” *Van Orden*, 545 U.S. at 701–02 (Breyer, J.).

Moving around the Memorial, the objective observer would notice the four words affixed in large letters to each side of the base of the cross—“VALOR,” “ENDURANCE,” “COURAGE,” and “DEVOTION,” each of which communicates the Memorial’s martial theme. The objective observer, whether walking or driving, would also notice that the Memorial contains a large plaque on its base. Then, walking up to the Memorial, she would read the words inscribed on the plaque, which explain in detail the message the Memorial is meant to convey—namely, that it is “DEDICATED TO THE HEROES / OF PRINCE GEORGE’S COUNTY, MARYLAND WHO LOST THEIR LIVES IN / THE GREAT WAR FOR THE LIBERTY OF THE WORLD.” *See* JA1857, JA1943. The objective observer would also see the list of the 49 local men who died in WWI, the dates of

American involvement in the war, and the quote from President Wilson's address to Congress requesting a declaration of war. JA1963.

Finally, considering again the Memorial's cross-shape, the objective observer would recall that, in addition to its religious connotations, the cross-shape is also an internationally recognized symbol for the human toll of WWI. She would know that, as the Supreme Court has stated, "a Latin cross is not merely a reaffirmation of Christian beliefs," but also "evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles . . . ." *Salazar*, 559 U.S. at 721 (plurality opinion).<sup>7</sup> And she would understand that by using the shape of a "central symbol of the American overseas cemetery," JA2270, the Memorial "reflects a series of secular events" that had touched the lives of its builders—specifically, the deaths of their 49 loved ones in WWI. *See, e.g., City of Las Cruces*, 541 F.3d at 1035 (cross in city seal did not endorse religion where it reflected "City's unique history" involving burial of victims of Apache attacks under wooden crosses at location of city); *Ellis v. La Mesa*, 990 F.2d 1518, 1526 (9th Cir. 1993) ("Even a purely religious symbol may acquire independent historical significance by virtue of its being associated with significant non-religious events.").

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<sup>7</sup> The AHA argues that the District Court "erroneously relied on [this] *dicta* from *Salazar*." AHA Br. 41. However, as this Court has recognized, "[s]uch observations by the Court, interpreting the First Amendment and clarifying the application of its Establishment Clause jurisprudence, constitute the sort of *dicta* that has considerable persuasive value in the inferior courts." *Lambeth*, 407 F.3d at 271.

**Setting.** Turning to the Memorial’s setting, the reasonable observer would most immediately note that “[t]he physical setting of the [Memorial] . . . suggests little or nothing of the sacred.” *Van Orden*, 545 U.S. at 702 (Breyer, J.). Situated on a traffic median at the intersection of several highways, the “setting does not readily lend itself to meditation or any other religious activity.” *Id.* Second, she would see that the Memorial “sits in a large park containing [several] monuments . . . all designed to illustrate” the same theme (here, commemoration). *Id.* She would recall that the Memorial is part of the National Defense Highway, and that other monuments grew up around the Memorial in the decades after it was built. *See supra* at 5–6. In contrast, she would note that the community has not erected a single *religious* monument, symbol, or relic in the area surrounding the Memorial. These facts would further suggest to the reasonable observer that the community has regarded the message of the Memorial to be one of commemoration for those lost in America’s conflicts.<sup>8</sup>

**History.** Finally, the reasonable observer would not be limited merely to the information gathered from observing the Memorial. *See Pinette*, 515 U.S. at 780 (O’Connor, J.). She would also be aware of the Memorial’s unique history. *See Lambeth*, 407 F.3d at 271-72; *City of Las Cruces*, 541 F.3d at 1031. This history would

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<sup>8</sup> The AHA’s claim that the Memorial is not part of an “array” of monuments because it is located alone on the median is not supported by the facts. As shown on the map, *see* SA2, the Memorial is located midway between the large Battle of Bladensburg memorial to the north and the group of monuments on the south. Any pedestrian or driver on one of the roads crisscrossing the region would pass at least two of these memorials, and usually more.

include the facts that (a) wooden crosses were “the principal grave marker” in overseas WWI cemeteries, JA2239; (b) these crosses became so “peculiarly and inseparably associated” with the war and the lives it took, that Congress was forced to abandon a plan to replace them with more traditional American grave markers, *supra* at 10-11; (c) the Memorial was conceived of, designed by, and erected by private groups—namely, the mothers of soldiers killed in WWI and the American Legion, *supra* at 12–17; (d) these groups chose the cross design to mirror the grave markers in the foreign cemeteries where their loved ones had been buried, JA2300 (letter from Mrs. Redman); (e) the only reason the Commission owns the Memorial is its location in the median of a busy intersection, *supra* at 17-18; (f) the Memorial’s only consistent use has been for patriotic and commemorative events—namely, the Legion’s regular Veterans Day events, *see supra* at 18-20; (g) conversely, it has *never* been the site of regular religious events, with the record referencing only one religious event ever even planned to occur at the Memorial, *see supra* at 20; (h) the Memorial stood for almost 90 years before the first complaint against it; and (i) during this entire time, the record is devoid of a single public comment referring to the Memorial in exclusively religious terms.

In short, the Memorial’s content, setting, and history show that the Memorial’s message is one of commemoration for the men of Prince George’s County lost in WWI, not endorsement of religion.

## 2. The AHA's Contrary Arguments Are Not Persuasive

Notwithstanding the above, the AHA contends that the Memorial fails *Lemon's* effect test for essentially three reasons: (a) the use of a cross-shape “to honor all veterans sends a strong message of endorsement and exclusion,” AHA Br. 26 (internal quotation marks omitted); (b) the use of traditional non-sectarian military prayers at veterans' events, the mention of a single religious event in 1931, and the private sponsors' use of patriotic-religious imagery to describe the Memorial gives the Memorial “a long history of religious use and symbolism,” AHA Br. 62; and (c) the Memorial's cross-shape communicates an “intrinsically religious message,” AHA Br. 48. Each of these arguments fails.

### (a) The AHA Misunderstands The Nature Of The Memorial

The AHA's central argument under *Lemon's* effect prong is that the Memorial “fails the effect test because the government, 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 and adherents that they are insiders.” *Id.* (internal quotation marks and alteration omitted). Contending that “[t]he cross does not serve as a secular symbol for war dead,” *id.* at 37, the AHA argues that a veterans' memorial shaped like a cross “exalts Christians while sending a stigmatic message to non-Christians that they are unworthy of remembrance.” *Id.* at 30.



The AHA, however, misunderstands the nature of the Memorial. As the District Court recognized, the Memorial was not built to honor “all veterans” with a generic symbol of death, but rather to honor the 49 particular men from Prince George’s County who died in WWI with a symbol that was “peculiarly and inseparably associated” with the war in which they died. JA2280. This fact is critical to a proper evaluation of the primary effect of the Memorial. Unlike the cases cited by the AHA in which courts have held that cross-shaped memorials to “all veterans” failed the *Lemon* test because a cross is not a generic symbol of war dead, the shape of the Memorial in this case is the product of a particular history and association with WWI. Indeed, the fact that the families of many of the servicemembers honored on the Memorial were involved in its design and construction makes this case far more like the “cemetery crosses” the AHA goes to great lengths to distinguish, *see* AHA Br. 37-38, and communicates that the shape of the Memorial was the product of their private choice rather than government endorsement. In fact, for sponsors whose loved ones had been buried in overseas cemeteries, the “memorial cross [*was*], in a way, [their sons’] grave stone.” JA2300.

**(b) The Memorial’s Consistent Use For Commemorative Events Confirms The District Court’s Conclusion**

Next, the AHA contends that the Memorial fails the effect prong of the *Lemon* test because it “has a long history of religious use and symbolism.” AHA Br. 62 (internal quotation marks omitted). Its evidence for this claim is threefold: (1)

veterans' events held at the Memorial have contained nonsectarian prayers; (2) the record contains a reference to a single religious event planned to be held at the Memorial in 1931; and (3) the use of patriotic-religious imagery to describe the Memorial at its dedication and in pledge sheets. The District Court correctly rejected this argument.

As an initial matter, despite claiming “a long history of religious use and symbolism,” *id.*, the AHA does not even attempt to address the most important historical facts of the case—namely, that the private sponsors chose a symbol particularly associated with the deaths of those it honored and that the Commission came to own the Memorial only due to highway safety concerns—or to provide the type of comprehensive counternarrative of the facts that is critical in Establishment Clause cases. *See Duncan*, 616 F.3d at 1157.

In any event, the AHA is simply wrong to claim that the Memorial “has been consistently used in a sectarian manner” because “[v]irtually every documented event held at the Cross has included religious activity (such as prayers) and has involved the participation of Christian clergy.” AHA Br. 60-61 (internal quotation marks omitted). As the District Court correctly recognized, JA3451 n.9, the fact that the Legion includes non-sectarian prayers at its annual Veterans' Day and Memorial Day events—consistent with “long-standing military tradition,” JA3407 (U.S. Army Command Policy on Public Prayers at Official Functions)—does not transform these patriotic events into religious services. *See Town of Greece*, 134 S. Ct. at 1815.

Likewise, the fact that in the 90-year history of the Memorial, the record mentions only a single religious event ever planned for the Memorial vividly shows that the community does not perceive the Memorial as sending a religious message. It also distinguishes this case from cases like *Trunk*, where the monument allegedly “functioned as a holy object, a symbol of Christianity, and a place of religious observance” for most of its history, with only a “few scattered [veterans] memorial services before the 1990s.” *Trunk*, 629 F.3d at 1102; *see also id.* at 1119-20 & n.19. Indeed, the fact that the only continuous use of the Memorial throughout its history has been for events *honoring veterans* persuasively shows that its message is one of commemoration, not endorsement of religion.

Finally, the AHA’s isolated sound-bites of religious phrases and imagery used to describe the Memorial around the time it was built cannot outweigh the detailed factual account above. *See, e.g., id.* at 1102 (rejecting “the sound bites proffered by both sides” and looking instead to the “extensive factual background”). The comments cited by the AHA are more reflective of the times than of any desire for the Memorial to send a religious message, and the full context of the AHA’s sound-bites show that the religious imagery was used to reinforce the Memorial’s commemorative purpose, not to endorse religion.<sup>9</sup> As the District Court made clear,

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<sup>9</sup> Indeed, even if the original private sponsors had intended to build a religious memorial, their religious motivations cannot be imputed to the Commission, whose purposes were mundanely secular. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 476–77 (2009).

“[e]ven if these statements or events carry some religious meaning, . . . there is overwhelming evidence in the record showing that the predominant purpose of the Monument was for secular commemoration.” JA3446.<sup>10</sup>

**(c) The AHA’s Claim That “Intrinsically Religious”  
Symbols Cannot Survive Establishment Clause  
Scrutiny Has No Basis**

Finally, underlying all of the AHA’s arguments is the premise that the Memorial must fail *Lemon*’s effect test because its “overtly Christian design sends an intrinsically religious message.” AHA Br. 27, 48. Indeed, the AHA dedicates large portions of its brief to proving that a “cross is the preeminent symbol of Christianity,” *id.* (quotation marks omitted), hoping to prevail by simple syllogism: (1) government displays of an “intrinsically religious” symbol are always unconstitutional; (2) a cross is an “intrinsically religious” symbol; (3) therefore, the Memorial, which is shaped like a cross, must be unconstitutional. The AHA, however, is wrong, for several reasons.

First, because Establishment Clause cases are “very case-specific” and “ask th[e] court to examine carefully the particular context and history of the[ ] displays before concluding what effect they would likely have on [a] reasonable observer,”

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<sup>10</sup> Similarly, the AHA’s quotation of anonymous online postings by individuals regarding this litigation is unconvincing. *See* AHA Br. 56-57. The District Court rightly disregarded these hearsay statements, which say nothing about what the reasonable objective observer would understand the Memorial to represent. *See Mercer Cnty.*, 432 F.3d at 638 (“Were [a court] to focus on the perceptions of individuals, every religious display would be necessarily precluded so long as some passersby would perceive a governmental endorsement thereof.”) (quotation marks omitted). The notion that these anonymous postings could outweigh the decades of consistent commemorative use of, and reporting on, the Memorial borders on the absurd.

*Duncan*, 616 F.3d at 1157, courts have repeatedly held that broad, categorical rules are not appropriate. *See, e.g., Lynch*, 465 U.S. at 678 (“[N]o fixed, *per se* rule can be framed.”); *Myers*, 418 F.3d at 402 (“There is no single mechanical formula that can accurately draw the constitutional line in every case.”).

Second, this Court has been clear that the mere fact that a symbol can have religious meaning does not automatically lead to its invalidation. *See Lambeth*, 407 F.3d at 271. And the Supreme Court “has consistently concluded that displays with religious content—but also with a legitimate secular use—may be permissible under the Establishment Clause.” *Id.* Here, no reasonable person would dispute that a cross can have religious significance; but that fact “merely begs the question whether *this display* is religious; it does not answer it.” *Mercer Cnty.*, 432 F.3d at 639 (emphasis added); *see also Lynch*, 465 U.S. 680 (“Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.”). Indeed, *every* Establishment Clause display case involves a symbol with religious content. While that is a necessary predicate for an Establishment Clause claim, it is far from a sufficient ground for resolving it.

Finally, courts have repeatedly held that “the Establishment Clause is not properly construed to command that government accounts of history be devoid of religious references.” *Port Auth.*, 760 F.3d at 239. “The Constitution does not oblige government to avoid any public acknowledgment of religion’s role in society,” nor does it “require eradication of all religious symbols in the public realm.” *Salazar*, 559

U.S. at 719 (plurality opinion); *see also Van Orden*, 545 U.S. at 687 (plurality opinion) (“[R]eligion has been closely identified with our history and government, and [t]he history of man is inseparable from the history of religion.”) (internal citations and quotation marks omitted); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 631 (1989) (O’Connor, J., concurring in part) (“[T]he government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement.”). Here, the people of Bladensburg in 1919—like many others throughout the world—chose to memorialize their loved ones with a cross because of its unique historical association with the war in which they died. Acknowledging the role of memorial crosses in the remembrance of WWI is not endorsement of religion; it is simply good history. Tearing down a 90-year old Memorial merely because its shape can have religious significance, on the other hand, not only distorts history, it “exhibit[s] a hostility toward religion that has no place in our Establishment Clause traditions.” *Van Orden*, 545 U.S. at 704 (Breyer, J.).

**C. Lawnmowing And Infrequent Concrete Repair Do Not Excessively Entangle Government With Religion**

Lastly, there is no excessive entanglement in this case. As this Court has explained, “[t]he kind of excessive entanglement of government and religion precluded by *Lemon* is characterized by ‘comprehensive, discriminating, and continuing state surveillance’ of religious exercise.” *Lambeth*, 407 F.3d at 273 (quoting

*Lemon*, 403 U.S. at 619).<sup>11</sup> Here, however, the only regular state action on record concerns routine upkeep of the Memorial—groundskeeping and lighting, JA2129-30—and occasional repairs, carried out every few decades, *see* JA2132-34. And there is no evidence of any religious exercise whatsoever at the Memorial since the Commission took ownership in 1961. As the District Court correctly held, this is not the stuff of entanglement. The Memorial “does not require pervasive monitoring or other maintenance by public authorities. Nor does the display require any other sort of continued and repeated government involvement with religion.” *Lambeth*, 407 F.3d at 273 (citations omitted).<sup>12</sup>

### **III. THE CASES CITED BY THE AHA DO NOT CONTROL THE RESULT HERE AND ARE DISTINGUISHABLE**

Notwithstanding the District Court’s detailed analysis of the facts of this case, the AHA repeatedly criticizes it for declining simply to follow cases from other courts, actually suggesting that this “underscore[d] the notion that it was ‘simply reaching for any way to keep a religious [display] on [government property].’” AHA Br. 35 (quoting *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 873 (2005)). The AHA’s

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<sup>11</sup> Potential for “divisiveness” is not a factor in the Fourth Circuit’s analysis of whether a passive display creates excessive entanglement. *See Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 291 (4th Cir. 2000); *Lambeth*, 407 F.3d at 273.

<sup>12</sup> The Court could also affirm due to a lack of standing, because none of the Appellants has foregone any legal rights (e.g., the right to drive on the public highways running through Veterans Memorial Park) to avoid contact with the Memorial. *See* JA2763-65; JA2830-31; JA2912-13. Although controlling Fourth Circuit precedent currently forecloses this argument, *see Subre v. Haywood Cnty.*, 131 F.3d 1083, 1088-89 (4th Cir. 1997), the Appellees make it to preserve it for appeal.

unsupported accusation cannot be squared with the District Court's opinion. As the District Court correctly held, the AHA's cases are all distinguishable.

**A. The District Did Not "Ignore" The AHA's Cases**

First, the AHA is simply wrong to claim that the District Court "ignored" the cases the AHA cited. AHA Br. at 34. To the contrary, the District Court observed that although the AHA "cite[d] multiple cases addressing a cross memorial on public land to support the proposition that 'courts have been virtually unanimous in concluding that the government's display of a cross on public property unconstitutionally endorses and advances Christianity,'" "[t]his assertion ignores the key factual distinctions between the cases Plaintiffs cite and the Monument." JA3449. The AHA's excessive focus on other cases from other jurisdictions analyzing other uses of a cross-shape in other factual contexts is not justified. As one of the cases cited by the AHA itself recognizes, because Establishment Clause cases "present a fact intensive inquiry, the Court must address the facts before it in this case, and not merely accept the conclusions of other courts, even in cases involving similar displays, as they may have had materially different evidence before them." *Hewett v. City of King*, 29 F. Supp. 3d 584, 618 (M.D.N.C. 2014).<sup>13</sup>

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<sup>13</sup> The District Court also did not "ignore" Dr. Piehler's testimony, AHA Br. 40, but instead explicitly relied on and quoted his research in its opinion. See JA3451 (noting that the "'cross developed into a central symbol of the American overseas cemetery' during and following World War I") (quoting JA2270). As detailed above, Dr. Piehler's prior research is remarkably consistent with the District Court's decision. Rather than disregarding Dr. Piehler, the District Court simply gave more weight to the views he expressed in neutral publications about the significance of the cross-



In any event, the AHA's claim that "[t]he courts have been virtually unanimous in holding that a government cross display, *in any context*, is unconstitutional" is an overstatement. AHA Br. 23. In fact, several federal courts of appeal have confronted challenges to government displays of crosses and held that they did not violate the Establishment Clause. For example, in *City of Las Cruces*, 541 F.3d at 1033-34, the Tenth Circuit held that the use of a cross in a city's seal did not have the primary effect of endorsing religion where it was reflective of the "City's unique history," namely, the fact that victims of Apache attacks had been buried under wooden crosses at the location of the city. Similarly, in *Port Authority*, 760 F.3d at 244, the Second Circuit held that the display in a public museum of cross-shaped wreckage from the remains of the World Trade Center did not have the purpose or effect of endorsing religion because, "while having religious significance to many, [the cross] was also an inclusive symbol for any persons seeking hope and comfort in the aftermath of the September 11 attacks." *See also Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991) (upholding use of a cross on city's seal derived from Stephen Austin's coat of arms); *Briggs v. Mississippi*, 331 F.3d 499, 506-07 (5th Cir. 2003) (upholding use

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(continued...)

shape to WWI than to his contrary statements in expert reports prepared for this litigation. Indeed, the District Court was justified in doing so, given that Dr. Piehler's neutral statements were consistent with the evidence presented by the American Legion's expert, Dr. Jay Winter—a Yale University professor with forty-five years of scholarship in the field of twentieth century warfare and its aftermath, who has devoted his career to the history of WWI, and whose credentials dwarf those of Dr. Piehler. *See* JA1885-87.

of St. Andrew's cross on Mississippi state flag); *Demmon v. Loudon Cnty. Pub. Schs.*, 279 F. Supp. 2d 689, 697–98 (E.D. Va. 2003) (cross symbols on bricks used for school fundraising); *Paul v. Dade Cnty.*, 202 So. 2d 833 (Fla. 3d DCA 1967) (string of lights in form of cross displayed during holiday season outside county courthouse); *Meyer v. Oklahoma City*, 496 P.2d 789 (Okla. 1972) (display of 50-foot tall Latin cross on publicly owned fairgrounds). In fact, the Ninth Circuit recently rejected an Establishment Clause challenge to a veterans' memorial statue of Jesus, a symbol whose religious significance is far more "intrinsic" than the historically based cross shape here. See *Freedom from Religion Found., Inc. v. Weber*, 628 F. App'x 952 (9th Cir. 2015) (per curiam).<sup>14</sup>

## **B. The Cases Cited By The AHA Are Distinguishable**

Given that Establishment Clause cases turn on the particular facts before the court, it is not surprising that the AHA's cases are all distinguishable.

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<sup>14</sup> The AHA's selective editing of quotations from case law and the facts is also misleading. To cite but one example, the AHA quotes Justice Kennedy's concurrence in *County of Allegheny* as stating: "I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a *large* Latin cross." AHA Br. 43. But Justice Kennedy actually wrote: "I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross *on the roof of city hall*." *Cnty. of Allegheny*, 492 U.S. at 661 (Kennedy, J.). The location of the cross in Justice Kennedy's example is *precisely* the kind of factual distinction that is relevant to the fact-specific Establishment Clause inquiry. Nor are the facts immune from the AHA's pattern of selective quotation. See, e.g., AHA Br. 10 (omitting "and Country" from end of quote stating that Post 3 "was named 'in memorial to their [Snyder and Farmer's] supreme sacrifice for God[.]'" (alterations in AHA Brief)). Space does not permit a complete rebuttal of all factual and legal misstatements, but the AHA's use of ellipses and alterations should be viewed with skepticism.

## 1. The Reasoning Of *Trunk* Does Not Support Appellants

As the District Court observed, *Trunk* is very different from this case. *See* JA3449-50. Noting that “[s]imply because there is a cross or a religious symbol on public land does not mean that there is a constitutional violation,” *Trunk*, 629 F.3d at 1102, the *Trunk* court explained the process of its analysis: “We do not look to the sound bites proffered by both sides but instead to the extensive factual background provided in the hundreds of pages of historical documents, declarations, expert testimony, and public records. Here, a fact-intensive evaluation drives the legal judgment.” *Id.*

The Court ultimately concluded that the cross did not survive Establishment Clause scrutiny, explaining:

We are not faced with a decision about what to do with a historical, longstanding veterans memorial that happens to include a cross. Nor does this case implicate military cemeteries in the United States that include headstones with crosses and other religious symbols particular to the deceased. Instead we consider a site with a free-standing cross originally erected in 1913 that was replaced with an even larger cross in 1954, a site that did not have any physical indication that it was a memorial nor take on the patina of a veterans memorial until the 1990s, in response to the litigation.

*Id.* at 1102.

Clearly, the Memorial in this case would have survived the test applied in *Trunk*. First, the *Trunk* court specifically rejected the argument that “[s]imply because there is a cross or a religious symbol on public land does not mean that there is a

constitutional violation.” *Id.* Similarly, it rejected reliance on “sound bites” like those proffered by the AHA here, in favor of the kind of “fact-intensive evaluation” of “the extensive factual background” proffered by the Appellees. *Id.* Moreover, while the *Trunk* court emphasized that it was “not faced with a decision about what to do with a historical, longstanding veterans memorial that happens to include a cross,” *id.*, there is no question that the Memorial is just that. Similarly, although the court found that the *Trunk* cross “did not have any physical indication that it was a memorial nor take on the patina of a veterans memorial until the 1990s, in response to the litigation,” *id.*, the record is clear that the Memorial has always and only been a WWI memorial, with the Legion’s symbol, the plaque, and the martial-themed words on its base. The AHA’s isolated quotations from *Trunk* cannot change the fact that the reasoning applied by the court in that case would, if anything, require *rejection* of its challenge here.

## 2. *Duncan* Is Distinguishable From This Case

*Duncan* is also easily distinguished. In *Duncan*, the State of Utah erected twelve-foot tall crosses on the sides of roads near where state troopers died in the line of duty. The *Duncan* crosses included the emblem of the Utah Highway Patrol, which, the court found, created an impermissible risk that observers would “link[ ] the State to that religious sign.” 616 F.3d at 1160. Although biographical data was printed on each cross, the court recognized that motorists “driving by one of the memorial

crosses at 55-plus miles per hour may not notice, and certainly would not focus on, the biographical information.” *Id.*

Unlike *Duncan*, the Memorial at issue in this case does not “bear[ ] the imprimatur of a state entity” in any way. *Id.* Rather than a government seal, the Memorial’s crossbar contains the emblem of the American Legion, a private organization. This is a critical distinction because courts are far more likely to find an Establishment Clause violation where a symbol with religious significance is displayed in close association with a symbol representing the government. *See, e.g., Harris v. City of Zion*, 927 F.2d 1401, 1412 (7th Cir. 1991) (depiction of cross on city seal violates Establishment Clause because seal “acts as the City’s imprimatur for official correspondence, property and business”).

In addition, in contrast to the crosses on the side of highways in *Duncan*, the Bladensburg Memorial is located in a low speed zone directly next to a stoplight. At the light, stopped cars can easily see the American Legion symbol; the martial-themed words; and the fact that there is a plaque on the base of the Memorial explaining its purpose to pedestrians. JA3450-51. The content of that plaque would not be missed by the reasonable observer, given that the Memorial is accessible to pedestrians and, indeed, is regularly used as a site for commemorative veterans’ events. Moreover, all passersby would also be able to see on both sides of the road that the Memorial does not “stand[ ] alone,” but is “part of some sort of display involving other symbols”

commemorating military events. *Duncan*, 616 F.3d at 1160. As with *Trunk*, the facts of *Duncan* are distinguishable from this case.

### **3. Cases Involving City Seals, Holiday Displays, Generic Veterans Memorials, And Expressly Religious Purposes Are Also Distinguishable**

Finally, as the Appellees explained at length below, *see* Dkt. 83, at 57-60; Dkt. 93-1, at 20-25, and as the District Court recognized, all of the AHA's other cases involve very different factual circumstances, and are thus of limited use. Among these cases are several involving cross-shapes on city seals, in which courts often emphasize the significance of the city seal as the central symbol of the city's authority.<sup>15</sup> Others involve memorials to all veterans or crosses used in holiday displays, where courts have sustained challenges due to a lack of the type of close historical association with a cross present in this case.<sup>16</sup> And finally, many involve crosses erected by or with the

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<sup>15</sup> *See Harris*, 927 F.2d at 1412 (“The conspicuous depiction of the pre-eminent symbol of a particular faith on [city] seal conveys a message of approval that is simply inconsistent with the first amendment.”); *Friedman v. Bd. of Cnty. Com’rs*, 781 F.2d 777, 782 (10th Cir. 1985) (en banc) (city seal “pervades the daily lives of county residents [and] appears on all county paper work, on all county vehicles, even on county sheriff’s uniforms”); *Robinson v. City of Edmond*, 68 F.3d 1226, 1231 (10th Cir. 1995) (same); *ACLU v. City of Stow*, 29 F. Supp. 2d 845, 851-53 (N.D. Ohio 1998) (objective observer “would conclude from the seal that adherence to Christianity is somehow relevant to a citizen’s standing in the political community”).

<sup>16</sup> *See ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (cross not traditional symbol of Christmas); *Sep. of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (cross used to honor “all veterans”); *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988) (cross used to honor veterans of wars in Southeast Asia had no historical association with such wars); *ACLU v. Mississippi State Gen. Servs. Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987) (lighted cross on side of building for Christmas); *Libin v. Town of Greenwich*, 625 F. Supp. 393 (D. Conn. 1985)

consent of the government for explicitly religious purposes.<sup>17</sup> None of these cases involves facts like those at issue here, and, as a result, none are relevant to the issues at hand.

## CONCLUSION

For the reasons set forth above, the Commission and the Legion respectfully request that the Court affirm the District Court's order granting summary judgment.

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(continued...)

(Christmas display including cross); *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) (Christmas display cross promoted the “spiritual content” of Christmas).

<sup>17</sup> See *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (per curiam) (cross erected to serve as meeting place for Easter services); *Gonzales v. N. Twp. of Lake Cnty.*, 4 F.3d 1412 (7th Cir. 1993) (crucifix with figure of Jesus and plaque stating “Jesus of Nazareth, King of the Jews”); *Gilfillan v. City of Phila.*, 637 F.2d 924 (3d Cir. 1980) (cross erected by city as part of platform to be used by Pope John Paul II to celebrate mass); *Eckels*, 589 F. Supp. 222 (county commissioner erected three crosses at “meditation site” in public park, which served as site for religious and Easter services); *American Humanist Ass'n v. Lake Elsinore*, No. 5:13-cv-00989, 2014 WL 791800 (C.D. Cal. Feb. 25, 2014) (city council adopted memorial for explicitly religious reasons).

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Respectfully submitted,

/s/ Adrian R. Gardner

Adrian R. Gardner  
William C. Dickerson  
Tracey A. Harvin  
Elizabeth L. Adams  
6611 Kenilworth Ave., Suite 200  
Riverdale, MD 20737  
Telephone: (301) 454-1670  
Facsimile: (301) 454-1674  
adrian.gardner@mncppc.org  
william.dickerson@mncppc.org  
tracey.harvin@mncppc.org  
elizabeth.adams@mncppc.org

*Counsel for Defendant-Appellee Maryland-  
National Capital Park and Planning  
Commission*

/s/ Christopher DiPompeo

Noel J. Francisco  
Christopher DiPompeo  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, DC 20001  
Telephone: (202) 879-3939  
Facsimile: (202) 626-1700  
njfrancisco@jonesday.com  
cdipompeo@jonesday.com

Roger L. Byron  
Kenneth A. Klukowski  
FIRST LIBERTY  
2001 Plano Parkway  
Suite 1600  
Plano, TX 75075  
Telephone: (972) 941-4444  
Facsimile: (972) 941-4457  
rbyron@firstliberty.org  
kklukowski@firstliberty.org

*Counsel for Intervenors/Defendants-Appellees  
The American Legion, The American Legion  
Department of Maryland, and The American  
Legion Colmar Manor Post 131*



**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**No. 15-2597**      **Caption:**    *American Humanist Association, et al. v. Maryland-National Capital Park and Planning Commission, et al.*

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*/s/ Christopher DiPompeo*

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Christopher DiPompeo

*Counsel for Intervenors/ Defendants-Appellees  
The American Legion, The American Legion  
Department of Maryland, and The American  
Legion Colmar Manor Post 131*

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I certify that on April 4, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Christopher DiPompeo

*Counsel for Intervenors/ Defendants-Appellees  
The American Legion, The American Legion  
Department of Maryland, and The American  
Legion Colmar Manor Post 131*