

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

American Humanist Association et al.,)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	Civil Action No. 8:14-cv-550-DKC
)	
Maryland-National Capital Park and Planning Commission,)	
)	
<i>Defendant,</i>)	
)	
The American Legion et al.,)	
)	
<i>Defendant-Intervenors.</i>)	
)	
)	

**DEFENDANT-INTERVENORS' MEMORANDUM IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

[ORAL ARGUMENT REQUESTED]

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INTRODUCTION

Nearly a century ago, private citizens led by the American Legion erected a memorial to the 49 soldiers, sailors, and Marines of Prince George's County who died serving the nation in World War I. Constructed on private land, the Bladensburg World War I Veterans Memorial 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." Ex. 23 at 17. Incorporating several additional secular, commemorative symbols, the Memorial was constructed on a traffic median at the terminus of the National Defense Highway—itsself dedicated to the memory of those lost in World War I—and since its completion has continuously served as a gathering point to honor those lost in the nation's conflicts.

In the years following the Memorial's dedication, however, the highway system's growth made it unsafe for the traffic median to remain under private control. As a result, the State took possession of the median and, incidentally, the Memorial as well. All throughout that time and to the present day, the Legion and other citizens have continued to use the Memorial for its original, commemorative purpose.

The Memorial stood without complaint for nine decades after it was built. Then, in 2012, Plaintiffs lodged the first and only known legal complaint against the Memorial. According to Plaintiffs, the State'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 Establishment Clause, however, does not mandate such hostility. "The goal of avoiding governmental endorsement [of religion] does not require eradication of all religious symbols in the public realm," *Salazar v. Buono*, 559 U.S. 700, 718 (2010) (plurality opinion), particularly where, as

here, the Memorial is on public land only because the government's highway expansion plans made it necessary. A reasonable objective observer, acquainted with the purpose, content, setting, and history of the Memorial, would understand that the State'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 sons, brothers, and fathers; that because of these grave markers, the cross-shape became an internationally recognized symbol uniquely associated with World War I; that the builders did not merely erect a cross, but instead included secular martial and commemorative symbols; that the Memorial has only ever been used for commemorative purposes; that the community has only ever regarded the Memorial as a World War I 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, Plaintiffs' arguments boil down to the claim that the mere fact that the Memorial employs 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 *per se* rules like the one asserted by Plaintiffs. And the Supreme Court has been clear that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden v. Perry*, 545 U.S. at 677, 690 (plurality opinion).

In short, Plaintiffs have neither the law nor the facts on their 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 FACTS

I. THE BLADENSBURG WORLD WAR I VETERANS MEMORIAL

A. Structure: A Celtic-styled cross incorporating commemorative symbols

Erected and dedicated by the American Legion as a World War I memorial on private land owned by the Legion, *see infra* Part II.C, the Bladensburg World War I Memorial’s main design element is a Celtic-styled cross sitting atop a stone pedestal “with an Art Deco surface provided by the use of polychrome exposed aggregate concrete.” National Park Service, *Historic American Building Survey: Peace Cross*, HABS No. MD14-15, 4 (2013), Ex. 3 (“Nat’l Park Service Report”).¹ A Celtic cross features arch-shaped brackets at the joints of the vertical and horizontal pillars, and is the “traditional memorial form,” *id.* at 6, used for crosses because it reflects “an ancient form marking a gravesite,” Winter Expert Report 8 (2015), Ex. 4 (“Winter Report”); *see also id.* at 15, 17 (figs. 6, 9, 10 showing temporary World War I crosses with Celtic-like stylings) and *infra* at 9.

The Memorial is not merely a bare cross, however; its builders “add[ed] a number of symbols to it to essentially make a distinctive symbol.” Piehler Expert Rebuttal 13, Ex. 6 (“Piehler Rebuttal”). At its center, front (facing west) and back (east), is a large depiction of the American Legion’s emblem, signifying the Memorial’s primary builder and original owner, and associating it with the Legion’s mission “[t]o preserve the memories and incidents of our associations in the Great War[s].” *See infra* at 17. (The Legion’s emblem also appears on the World War II Honor Scroll it later built in the same park. Nat’l Park Service Report 6.) Consistent with the Legion’s purpose, the Memorial’s large bronze plaque (facing west, nine feet wide and two-and-a-half feet tall, *see* Day Aff. to Comm’n Br.) declares the monument “DEDICATED TO THE HEROES / OF PRINCE GEORGE’S COUNTY, MARYLAND

¹ Photographs of the Memorial, its neighboring memorials, and Veterans Memorial Park are compiled as Exhibit 1.

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 the war, gives the dates of American involvement in the war, and concludes with a quote from President 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.” The plaque is mounted by star-shaped bolts to a large square pedestal that extends almost as far as the arms. Just above the pedestal, at the base of the cross itself, are mounted four large words in bronze, one on each side of the cross, reading “VALOR” (west), “ENDURANCE” (south), “COURAGE” (east), and “DEVOTION” (north). Each of these adaptations is proportionate and scaled to the overall size of the Memorial.

B. The Memorial stands on and among other memorials in Veterans Memorial Park²

The Memorial stands on a grassy median³ at the head of another World War I memorial, the old National Defense Highway linking Washington with the United States Naval Academy at Annapolis. As discussed *infra* at 13, the Memorial’s original backers decided to place it at the head of a new highway that would itself be dedicated to the those who fell in the Great War. *See* Undated Fundraising Letter from John R. Riggles, *reprinted in* Legion Post 3 Program, “Annual Dance,” (Nov. 9, 1974), Ex. 13 (seeking funds for memorial and for highway, both “[t]o honor your comrades lost in the War”). The two memorials were inaugurated together at the same ground-breaking in 1919, with a naval theme befitting the highway’s eastern terminus in Annapolis: the Secretary of the Navy gave the keynote, and the first shovel was turned by Mrs. Martin Redman, mother of the county’s first sailor to die in the war

² A map of Veterans Memorial Park and surrounding landmarks is attached as Exhibit 2.

³ In 1965, the Bladensburg Rotary Club, a private civic organization, installed electric lights on the median to illuminate the Memorial at night. Pls. Ex. 24. And although it sits on a traffic island, it is legal for visitors to cross the street to visit the Memorial. Waters Dep. 21, Ex. 14 (“[I]t’s public open space and so people can reach the memorial from different directions.”). Additionally, a wide shoulder on the road adjacent to the memorial enables free parking and easy access to the memorial, and people can reach the park from all directions. *Id.*; Md. Historical Trust Report 12 (marking Memorial’s accessibility as “unrestricted”).

(and author of the Memorial fundraising letter quoted *infra* at 12). Fittingly enough, the Memorial's plaque faces west, so that the traveler from Washington to Annapolis would be confronted with the names of the 49 fallen men at the outset of his or her journey on the highway dedicated to all who fought in the same war. *See also* Nat'l Park Service Report 2 ("Ultimately its dedication plaque would be placed on the west side of the monumental cross, further emphasizing its function as a gateway to the modern road."). And, sitting at the head of the highway, the Memorial also serves as a European-style wayside cross to mark the highway's intersection with Baltimore Avenue and Bladensburg Road. *See* Historic Preservation Commission, PG69-16, *Maryland Historical Trust Review Form 15-16* (1996), Ex. 5 ("Md. Historical Trust Report").

The paired memorials are flanked on either side by several more memorials constructed over the last century, each privately funded. *See* Richard A. Wilson, "The Bladensburg War Memorials," *Prince George's Magazine*, (Fall 1983), at 8, Ex. 7 ("War Memorials Article").

- A large ***World War II Honor Scroll*** made of colored aggregate meant to complement the Memorial's construction, featuring a bronze American Legion seal and plaque dedicated "IN MEMORY OF THE MEN AND WOMEN OF PRINCE GEORGE'S COUNTY WHO MADE THE SUPREME SACRIFICE THAT FREEDOM MIGHT LIVE." Nat'l Park Service Report 6. Like the Memorial, this memorial named the county's fallen, but, unlike the Memorial, the names are no longer readable. Richard A. Wilson, *The War Memorials of Bladensburg* 6 (July 1983), Ex. 8 ("War Memorials History").
- A modest ***Pearl Harbor Memorial***, consisting of a simple plaque on a post before a solitary tree.
- A ***Korea-Vietnam Veterans Memorial***, made of blue granite by a local business owned by an American Legion member who served in Korea. War Memorials History 6. The memorial is inscribed with the words "DUTY," "HONOR," and "COUNTRY," and gives the dates of both wars.
- A ***September 11 Memorial Garden***, consisting of an arcing stone walkway, bordered by trees (each individually lit), with benches for reflection upon a line of stones with this epitaph: "PRINCE GEORGE'S COUNTY HONORS THOSE WHO LOST THEIR LIVES ON SEPTEMBER 11, 2001 / WE WILL ALWAYS REMEMBER THEM."

- Most recently, local citizens added a large *Battle of Bladensburg/War of 1812 Memorial*, which commemorates Commodore Joshua Barney's resistance against the advancing British troops in the tragic engagement at Bladensburg. Consisting of a large block of stone with a bronze relief depicting American troops facing south towards the World War I Memorial, the Battle of Bladensburg Memorial's edifice, plus walkways, benches, and parking lot, occupies a traffic median much larger than the site of the Memorial at issue here. (This memorial is still in progress. Private citizens are also funding the installation of two soldier statues, one British and one American, facing each other on opposite sides of the bridge just to the west. Day Aff. to Comm'n Br. When completed, the statues will stand approximately 40 feet tall. *Id.*)

Just to the south of these memorials is the Battle of Bladensburg Visitor Center, part of the Star-Spangled Banner National Historic Trail, featuring “[h]istorical and archaeological artifacts” from the British encampments there and numerous outdoor historical displays throughout its grounds. Prince George's County Department of Parks and Recreation, “Battle of Bladensburg Visitor Center,” <http://bit.ly/1AVd67x>. Indeed, the site of the new Bladensburg memorial, dedicated on the battle's bicentennial, harkens back to the fact that the Memorial at issue here was deliberately built on the grounds of that tragic battle, “roughly where the advancing British troops in 1814 first drew American fire from across the river. In the general vicinity is ground where American blood flowed for a cause so like the causes that other Americans fought and died for elsewhere.” War Memorials History 7. Other historic sites in the area include the George Washington House/Indian Queen Tavern, just north of the newest memorial, and the Old Port of Bladensburg, Nat'l Park Service Report 2, just north of that in turn. In fact, the Memorial “was placed on what was, in the eighteenth century, the Public Landing for the busy port of Bladensburg.” Md. Historical Trust Report 6.

The park's many memorials and historic character have spurred the “recognition of Bladensburg as the focus of the County's remembrance of its veterans and war dead.” War Memorials Article 8. Perhaps unsurprisingly, the entire area is commonly called “Veterans Memorial Park,” *id.*, or simply “Peace Cross.” *See Peace Cross Flooding Seen Getting Worse*, Wash. Post, Oct. 19, 1955, Ex. 15.

II. THE MEMORIAL WAS BUILT BY THE AMERICAN LEGION ON PRIVATE GROUND IN THE IMMEDIATE AFTERMATH OF WWI TO HONOR THE FALLEN SOLDIERS, SAILORS, AND MARINES OF PRINCE GEORGE’S COUNTY

The Memorial traces its origins to the immediate aftermath of World War I, 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 fallen’s graves overseas—an image that became inextricably intertwined with public consciousness of the War’s solemn toll. The initial private drive in 1919 to build the Memorial faltered, but was revived by the returned veterans of the American Legion. Having taken ownership of the project and the underlying property, the Legion finally 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, row on row”: Remembering fallen heroes of the Great War

1. Marking the fallen: Crosses during the War

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. Winter Report 10–11. 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. *Id.*

Around half of America’s fallen were buried in temporary cemeteries overseas, Winter Report 11, almost all under temporary wooden crosses, *see* Frederick W. Van Duyne, “Erection of permanent headstones in the American Cemeteries in Europe,” *Quartermaster Rev.*, Jan.-Feb. 1930, at 25, Ex. 21. 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. Winter Report 15. 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,” Winter Report 13–14:

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* (G.P. Putnam Sons ed., 1919).



Original wooden crosses at Flanders Field American cemetery. Winter Report 16.

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.” Winter Report 13–14. Indeed, as Plaintiffs’ expert Kurt Piehler has observed, “the Cross became *the* principal grave marker” in overseas World War I cemeteries. G. Kurt Piehler, “The Military, War, and Memory,” in *Encyclopedia of War & American Society*, at 994 (2005), Ex. 16 (emphasis added).



Provisional World War I cemetery with wooden crosses. Winter Report 15. More pictures at *id.*, pp. 16–17.



Wooden cross marking the grave of Quentin Roosevelt, son of President Teddy Roosevelt, who fell on July 14, 1918. Winter Report 17.

2. Remembering the fallen: Crosses after the War

Worldwide. After the war, Dr. Piehler writes, “cross gravestones replaced the widely used wooden crosses that served as temporary grave markers and quickly emerged as a cultural image of the battlefield.” G. Kurt Piehler, “The American Memory of War,” in *The American Experience of War*, at 232 (2010), Ex. 17; *see also* Winter Report 15 (wooden crosses served as “markers for those who built more permanent cemeteries in the years immediately following the Armistice”). In the war’s wake, the cross came to symbolize “vast armies of the dead, forever resting on foreign soil,” *id.* at 13, and “signified the dreadful nature of war on the Western Front,” Piehler, “The American Memory of War,” at 232.

To remember and honor the men who did not come home, many families and communities across the world used an “adapted, modulated, secularized cross.” Winter Report 1–2. 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.” *Id.* at 14. Across the British Empire, for example, the government erected more than one thousand Crosses of Sacrifice in imperial cemeteries after the war. “Men and Affairs—War Graves,” *The Age*, Oct. 16, 1937, Ex. 18. The Cross of Sacrifice was “an adapted Celtic cross, which served to encompass a chivalric metal sword at its core.” Winter Report 21. Even today, communities in the former British Empire use the Cross of Sacrifice to commemorate the fallen of World War I: On the war’s centennial in 2014, a joint Irish and British delegation dedicated a new Cross of Sacrifice in Dublin, to honor those Irish who fell in Britain’s service in the war. “Irish President Michael D Higgins honours WWI soldiers,” BBC News, July 31, 2014, Ex. 19.

The home front. Consistent with that global trend, “[t]he cross,” Dr. Piehler writes, “developed into a central symbol of the American overseas cemetery.” G. Kurt Piehler, *Remembering War the American Way* 101 (2004), Ex. 20. And, for this reason, communities throughout America also began erecting cross-shaped memorials to commemorate those lost in World War I. For example, the Memorial at issue in this case is within 40 miles of four other cross-shaped World War I 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 generally* Md. Historical Trust, *Wayside Cross Monument*, Feb. 26, 1997, Ex. 62; “Peace Cross at the Cathedral of the Incarnation,” Monument City Blog, May 18, 2009, <http://bit.ly/1KPMAPZ>; “Argonne Cross (WWI),” Arlington National Cemetery,

<http://bit.ly/1afBwN3>; “Canadian Cross of Sacrifice (WW I/WW II/Korea),” Arlington National Cemetery, <http://bit.ly/1M9tYrs>.

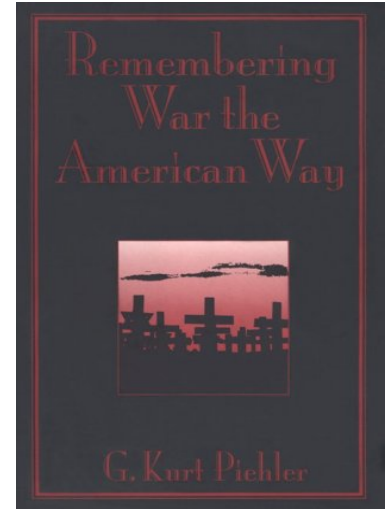
The cross’s resonance as a powerful commemorative symbol of the war was confirmed in the national debate over how to replace the wooden crosses overseas. The War Department initially decided to replace the wooden crosses with slab marble headstones akin to those in domestic cemeteries like Arlington, but reversed course after patriotic groups voiced their opposition. Frederick W. Van Duyne, “Erection of permanent headstones in the American Cemeteries in Europe,” *Quartermaster Rev.*, Jan.-Feb. 1930, at 25, Ex. 21. 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 crosses and the Star of David would be more appropriate.” *Id.*

Discussing the temporary crosses in hearings, Congress recognized that the markers had become “wooden symbols . . . emblematic of the great sacrifices which [the] war entailed.” H.R. Res. 15, 68th Cong. at 1 (1924), Ex. 22. 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.” *Id.* at 18. The Jewish Welfare Board also supported the crosses-and-stars scheme proposed for permanent grave markers at World War I cemeteries: 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.* at 19 (emphasis added).

Dr. Piehler writes 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.

Piehler, *Remembering War the American Way*, at 101. These words are taken from Dr. Piehler's book, whose first-edition cover (shown to the right) uses an image of an overseas cemetery's crosses and stars to symbolize "remembering war the American way."



B. Remembering the fallen of Prince George's County: A memorial cross at the head of a memorial highway

The first push. In Prince George's County in 1919, a Memorial Committee that included ten mothers of men who died in the war resolved to erect a memorial to all the county's fallen heroes. War Memorials Article 9; *cf.* Nat'l Park Service Report 4 ("The cross form was popular for war memorials as well as grave monuments in this period."). Channeling the national sentiment for memorials recalling the "crosses, row on row" overseas, the Memorial Committee chose to adapt a cross symbol. As committee treasurer Mrs. Martin Redman put it, "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." Letter from Mrs. Martin Redman to John Walter Smith, U.S. Senator (Aug. 26, 1920), *reprinted in* Legion Post 3 Program, "Annual Dance," Nov. 9, 1974, at 17, Ex. 23 (in response to August 20, 1920 letter from Sen. Smith enclosing \$50 donation towards "memorial cross to be erected in Bladensburg in honor of the soldiers, sailors, and marines from Prince George's County who participated in the war with Germany and gave their lives in the cause"). That same Committee

circulated a flyer explaining in detail its purposes in building the Memorial in the wake of World War I:

In commemoration of their sons who thus died for the cause of democracy, the people of Prince George's County, Maryland, are erecting a great cross of snow-white cement that future generations may look upon it and remember the fifty-four boys who went from this county to help stop this stream of destruction, and who now sleep in France. This Memorial Cross will stand in a strategic position at the point where the Washington-Baltimore Boulevard joins the Defense Highway leading from Washington to Annapolis. Here, those who come to the Nation's Capital to view the wonders of its architecture and the sacred places where their laws are made and administered may, before this Cross, rededicated [sic] themselves to the principles of their fathers and renew the fires of patriotism and loyalty to the nation which prompted these young men to rally to the defense of the right. And here the friends and loved ones of those who were in the great conflict will pass daily over a highway memorializing their boys who made the supreme sacrifice.

1919 Fundraising Flyer, "Memorial Cross To The Heroes of Prince George's County, Maryland Who Lost Their Lives in the World War, and the Dedication of the National Defense Highway," Ex. 24 (emphases added). 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.

Undated Fundraising Letter from John R. Riggles, *reprinted in* Legion Post 3 Program, "Annual Dance," Nov. 9, 1974, at 13, Ex. 13 (emphases added).

The initial push was a "strictly voluntary undertaking[] of private citizens," War Memorials Article 8, and pledge sheets were circulated "throughout the county with a call for everyone to participate, regardless of how small or large the donation," History Division, Md.-Nat'l Capital Park & Planning Comm'n, *The Peace Cross* 1 (undated), Ex. 9 ("History Division Report"). 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.

Undated Pledge Sheet, *reprinted in* Legion Post 3 Program, "Annual Dance," Nov. 9, 1974, at 15,

Ex. 25. Befitting a local economy recovering from the world's first industrialized, total war, "the most common pledges were 25 cents, 50 cents, or a dollar, the latter often made in the name of a couple or family." History Division Report 1–2.

Reporting and commentary. The *Washington Post* repeatedly publicized the Memorial project its first year, giving the fundraising initiative valuable publicity. One article that year publicized a lawn party "[t]o raise funds for the memorial cross to 54 men of Prince Georges county, Md., who gave their lives during the war." "Lawn Fete for Memorial—Bladensburg Citizens Will Raise Fund for War Cross," *Wash. Post*, Aug. 7, 1919, at 7, Ex. 26; *see also* "Gift from Miss Wilson—To Be Sold at Bladensburg Lawn Party for War Memorial," *Wash. Post*, Aug. 9, 1919, at 8, Ex. 27 (describing party "to raise funds for the memorial to be erected in honor of the soldiers of Prince Georges county who lost their lives in the war"). Another *Post* article recounted plans for a seaplane flight to carry messages "regarding the erection of the big sacrifice cross at Bladensburg in honor of the 52 Prince Georges county Yanks who lost their lives in the war." "Sacrifice Cross for Soldier—Prince Georges Countians Plan Seaplane Flight to Aid Fund," *Wash. Post*, July 11, 1919, at 5, Ex. 28. Another piece explained that "[w]ounded Yanks at Walter Reed Hospital have sent numerous donations and letters of sympathy for the mothers and other bereaved relatives of the Prince Georges county soldiers," as part of the drive

to fund “the memorial cross at Bladensburg to honor Prince Georges county men who died in the war.” “Wounded Yanks Subscribe—Walter Reed Patients Help Prince Georges Memorial Fund,” *Wash. Post*, Aug. 18, 1919, at 12, Ex. 29 (adding that “[m]any of the wounded Yanks have subscribed all their funds”). Yet another *Post* piece explained the purpose uniting the Memorial and the highway it would mark: “The National Defense Highway, between Bladensburg and Annapolis, will be dedicated by the citizens of Prince Georges county, Md., to the memory of their dead soldiers, sailors, and marines. A calvary cross, 20 feet high, will be erected at Bladensburg and the names of the county heroes will be inscribed on a bronze tablet.” “Highway to be Memorial,” *Wash. Post*, June 8, 1919, at A11, Ex. 30.

Historians looking back at the Memorial’s genesis describe the builders’ purposes in accord with the *Post*’s coverage. In a recent report, a National Park Service historian explained that the builders erected the cross “as a memorial to the Prince George's County, Maryland residents who lost their lives in World War I . . . [and] as the starting point of the new National Defense Highway between Bladensburg and Annapolis.” Nat’l Park Service Report 1. Likewise, in 1996 the Maryland Historical Trust concluded that the Memorial was built “as a monument to Prince George’s County residents who lost their lives serving in the United States Armed Forces in World War I,” and that it was significant “as an expression of the post war era’s shared perception of the noble character and valor of the veterans and their cause.” Md. Historical Trust Report 1. And another historian of the war memorials of Bladensburg stated simply in 1983 that the Memorial’s builders constructed it “to honor the men of the County who lost their lives in World War I,” War Memorials History 3, placing the Memorial’s builders among those “private citizens [whose] dedication and drive have resulted in the recognition of Bladensburg as the focus of the County’s remembrance of its veterans and war dead,” War Memorials Article 8.

Groundbreaking. On September 28, 1919, the builders broke ground on the Memorial and the National Defense Highway together at the same ceremony. War Memorials History 3. Mrs. William Farmer, mother of the first county soldier to fall in the War, broke ground on the Memorial’s foundation, while Mrs. Redman turned the first shovel on the memorial highway to Annapolis, in honor of her son William,⁴ the first county sailor to fall. *Id.*

The principal speaker at the ceremonies was Josephus Daniels, wartime Secretary of the Navy (presumably invited because of the National Defense Highway’s ties to the Naval Academy), 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.*

War Memorials History 3 (emphasis added). (Daniels also praised the crowd for “being the first to actually erect a memorial.” History Division Report 9.) Finally, “[t]he Marine Band provided music, several speeches were given by local officials and the exercises were concluded by the singing of The Star Spangled Banner.” *Id.* at 9 (internal quotation marks omitted).

C. The American Legion takes up the torch

Despite its auspicious beginnings, however, the initial drive came up short. It fell to the newly returned veterans of the American Legion to take over the project (and property) and build the Memorial to honor their fallen comrades.

1. The American Legion and its Snyder-Farmer Post 3

Nationally. The American Legion was founded on March 16, 1919 by veterans of the American Expeditionary Forces, *see* History, *The American Legion*, <http://www.legion.org/history>, for the

⁴ William Redman is incorrectly listed as “WILLIAM REDMOND” on the finished Memorial plaque.

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;
To maintain law and order;
To foster and perpetuate a one hundred percent Americanism;
To preserve the memories and incidents of our associations in the Great War[s];
To inculcate a sense of individual obligation to the community, state, and nation;
To combat the autocracy of both the classes and the masses;
To make right the master of might;
To promote peace and good will on earth;
To safeguard and transmit to posterity the principles of justice, freedom and democracy;
To consecrate and sanctify our comradeship by our devotion to mutual helpfulness.

National Constitution and By-laws, The American Legion, Const. art. III., <http://bit.ly/1BNeTqa>, Ex. 31.

From its beginning, the Legion has been an inclusive and non-sectarian organization. *See* Holdcraft Dep. 57:4–9, Ex. 10 (no religious requirements for membership or leadership); Myers Dep. 24:8–20, 27:7–10, Ex. 32 (no religious requirements for membership or service as chaplain); Onderdonk Dep. 34:6–22, Ex. 33 (no religious requirements for membership). Plaintiffs' expert Dr. Piehler finds it "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 World War I during "an era of substantial nativism." G. Kurt Piehler, "The Jewish Veterans Organizations and the Shaping of the American National Identity in the Twentieth Century," at 10, *presented at 2004 Convention, Society for Military History, May 22, 2004*, Ex. 34. 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, "[i]n promoting a vision of Americanism, [the Legion] emphasized the unity of all Americans and it did not exclude any American World War I veterans from membership based on their ethnicity or national origin." *Id.*

In Prince George's County. In the summer of 1919, a large number of veterans joined together

in Hyattsville to form the third Maryland post of the American Legion. The post was named after Maurice B. Snyder and William Farmer (whose mother broke ground on the Memorial), “the first two Hyattsville boys to make the supreme sacrifice for God and for Country in the World War.” George T. Hunter, *History – Snyder-Farmer Post No. 3*, 12 (1922), Ex. 11 (“Post 3 History”).

2. The American Legion takes ownership of the Memorial project and property

By 1922, little progress had been made on the Memorial for lack of funds. *See* Nat’l Park Service Report 3 (contractor had “prepared the foundations for the memorial cross” but “Memorial Committee did not have the funds to continue and construction was halted”); Davis Buckley Architects & Planners, *Crack Survey of the Memorial Peace Cross in Bladensburg Maryland* 3 (2015), Ex. 35 (initial construction limited to “excavation and perhaps the casting of concrete footings”). “[B]eing on the Washington-Baltimore boulevard,” the unfinished Memorial “became an eye-sore to those who passed it every day.” History Division Report 10.

To remedy this situation, Snyder-Farmer Post 3 volunteered to take over responsibility for completing the Memorial and to take ownership of the land on which it sits. Post 3 History 18. The old Memorial Committee signed over the unfinished Memorial and the committee’s liabilities and assets, *id.*, while the Town of Bladensburg deeded the Legion 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.” Bladensburg Comm’rs 1922 Deed to Am. Legion, Ex. 36 at 1 (recorded at Prince George’s County. Cir. Ct. (Land Records) 421, p. 0381, MSA_CE64_507).

Having taken responsibility for the Memorial, the Legion embarked on “four years of intense fundraising activities,” War Memorials History 4, featuring a county-wide effort to raise, dollar by dollar, the funds needed to complete “a monument to the county’s heroic dead who made the supreme

sacrifice in the World War, still of recent memory.” John H. Hiser, “The Story of the Memorial Cross,” *Prince George’s Enquirer*, May 2, 1924, Ex. 37 (requesting minimum donations of one dollar).

3. The completed Memorial was dedicated by the American Legion in 1925 on private property

The Legion achieved its goal, dedicating the Memorial in a patriotic ceremony on July 12, 1925, so that, as the *Washington Post* put it, “future generations passing through Bladensburg, Md., may be reminded of the 49 young men of Prince George’s county who made the supreme sacrifice in the world war.” “Legion Dedicates Bladensburg War Memorial Cross,” *Wash. Post*, July 13, 1925, at 14, Ex. 38.

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 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.

Id. Mrs. Bradley Snyder, mother of Post 3’s other namesake, was invited to unveil the Memorial itself, assisted by Post Commander John Hiser, and an American flag at the base of the monument was removed to reveal the large bronze plaque with the words of dedication to the 49 fallen men. *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 spoke as well. *Id.*

III. THE COMMISSION TOOK OWNERSHIP OF THE LAND ON WHICH THE MEMORIAL SITS BECAUSE OF HIGHWAY EXPANSION

In the years following the Memorial’s completion, the National Defense Highway and the other adjoining roads grew busier as more Americans took to driving. Recognizing potential traffic hazards from private ownership of the median of a busy highway, in 1935 the state legislature authorized the State Roads Commission to acquire property rights around the Memorial. *See* 1935 Maryland Laws

937, Ch. 432 (citing “traffic hazard situation”), Ex. 39; *see also* “Planners Study Bypass Around Peace Cross,” *Wash. Post*, Sept. 8, 1939, at 31, Ex. 40 (“Traffic congestion . . . [caused the] Maryland highway planners to consider three bypass routes into the city from [the] Defense highway.”).

Two decades later, the roads commission finally condemned a parcel adjacent to the Memorial as part of a highway modernization plan. *See* Prince George’s Cnty. Land Record, Liber 2821-1, Ex. 41 (regarding *Bonnell v. Casey*). However, the Memorial itself was apparently not affected by the condemnation order, nor was Legion 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 Defendant, the Maryland-National Capital Park and Planning Commission. *See* Md. Rd. Comm’n Mins., Oct. 25, 1960, Ex. 42; Md. Rd. Comm’n Deed, Ex. 43; Stachura Dep. 11–14, Ex. 12. Then, after negotiation, Post 3 conveyed all its property interests in the Memorial to the Commission, but reserved an easement (or irrevocable license or similar interest) in the form of a legal right to conduct veterans’ commemorative events on the property, and a reversionary right to intervene in the care and maintenance of the memorial should the Commission ever not be in a position to do so. Conveyance from Snyder-Farmer Post 3 to Md.-Nat’l Capital Park & Planning Comm’n, February 15, 1961, *attached to* Letter from Waldo Burnside to Comm’, Mar. 1, 1961, Ex. 44.

The Commission accepted the transfer from the Legion and substantially agreed to its terms. *See* March 8, 1961 endorsement on *id.* Today, the Commission still owns and controls the property, subject to the Legion’s right to hold commemorative events at the property. Nat’l Park Service Report 1; Myers Dep. 35, Ex. 32. The Commission provides routine groundskeeping, power for the lighting, and occasional repairs every few decades. *See* Stachura Dep. 22–23, 25–27, Ex. 12.

IV. PUBLIC USE AND RECEPTION OF THE MEMORIAL SINCE ITS CREATION

Over the past 90 years, the Legion has consistently and continuously held patriotic veterans' events at the Memorial. In that time, the public has consistently perceived the Memorial as commemorating the 49 fallen men named on its plaque, and lodged no complaints about the Memorial over the nine decades prior to the 2012 demand letter preceding this action.

A. The Legion's nine-decade history of patriotic, commemorative programming at the Memorial

From its beginning in 1919 to the present day, the Memorial's only consistent use has been commemorative. *See* War Memorials History 4 (Memorial "is the site of numerous commemorative services"); *see also* "Renewed Peace Cross Dedication," *Prince Georges J.*, Nov. 12, 1985, Ex. 45 (86-year-old World War I veteran has attended commemorative events at Memorial for many years; attending gives him "a shot of adrenalin"). And from at least 1925 onward, the Legion has continuously held events there to remember the fallen and honor veterans more generally. Nat'l Park Service Report 3 ("From the first years following its dedication, the Peace Cross has served as a site for American Legion Memorial Day ceremonies and other veterans' events."); *see also* Holdcraft Dep. 57, Ex. 10.

The Legion's events today. Continuing that tradition, the Legion holds a commemorative event on the Memorial median every Veterans Day. *Id.* at 30.⁵ As explained in the 2014 program, Legion Post 131, "Veterans Day Program 2014," Nov. 11, 2014, Ex. 67; *see also* Holdcraft Dep. 25–28, those events include the following: presentation of the colors (here by a JROTC unit); the national anthem;

⁵ While the Legion's Memorial Day programs state they are held at "Peace Cross," they are actually held across the street, between the WWII Honor Scroll and the Korea-Vietnam Memorial. Holdcraft Dep. 25–26, Ex. 10; *see also* Holdcraft Dep. Errata, Ex. 46 (reference to World War I memorial should be reference to World War II memorial).

an invocation by a Post 131 representative⁶; an introduction from the Post and recognition of guests, including visitors from other Posts and veterans' organizations; a welcome message from invited public officials, *id.* at 29 (public officials are "invitees"); a commemorative speech from a regional Legion official; laying of floral wreaths; taps; a benediction by a Post 131 representative;⁷ an invitation to lunch at the Post 131 hall; and retirement of the colors.

⁶ Post 131 typically uses a nonsectarian invocation published by the national Legion, such as the below:

O God of Hosts, we bow our heads in thankfulness for the victories Thou hast granted us—to us and to those peoples who have united with us to stamp out the evils of aggression, intolerance and greed.

We beseech Thee to bring the blessings of understanding to the families and friends, in this and other lands, of those who have given their lives that men may be free. Grant, O God, that those closest to the fallen may mingle the pain of their losses with the ennobling light of sacrifice for civilization—sacrifice for a better world for this and other generations yet unborn.

Grant us too, O God, the courage to so live with the family of nations around the world that the end of strife will be the beginning of enduring peace. Grant us patience in planning with our fellow men and women a world in which nations may resolve their differences by peaceful means.

Touch Thou the souls of people in every land with the enduring light of wisdom so they may form a brotherhood which will strive to further the arts of peace under laws and ethics blessed by Thy love.

Grant us now Thy continued blessing upon unity and strength, that makes victories possible in war, that we may win greater victories of peace.

Amen.

Or:

Almighty God, Father of all mankind and Judge over nations, we pray Thee to guide our work in this meeting and in all our days. Send Thy peace to our nation and to all nations. Hasten the fulfillment of Thy promise of peace that shall have no end.

We pray for those who serve the people and guard the public welfare that by Thy blessing they may be enabled to discharge their duties honestly and well. We pray for our comrades that by Thy help they may observe the strictest Justice, keep alight the fires of Freedom, strive earnestly for the spirit of Democracy; and preserve untarnished our loyalty to our Country and to Thee. Finally, O God of mercy, we ask Thy blessing and comfort for those comrades who are suffering mental and physical disability. Cheer them and bring them the blessings of health and happiness. Amen.

The American Legion, Officer's Guide and Manual of Ceremonies, 64, 106, Ex. 47.

⁷ Post 131 typically uses a nonsectarian benediction published by the national Legion, such as the below:

Our Heavenly Father, we deem this a fitting time to pay our respects to our departed comrades. As we stand with bowed heads in reverence to them, let us remember the good deeds they accomplished. Let us revere them, as good soldiers who fought the good fight in a just cause, let us silently pray for peace, the peace that passes all understanding. And let us in mind and soul consecrate our hearts and lives to the real America, the land of the free and the home of the brave, the America worth fighting for. As we stand in silence to our departed comrades, may we sincerely say, 'May their souls rest in peace.' Let us also remember the POWs and the MIAs still unaccounted for from the Wars and Conflicts. Amen.

The American Legion, Officer's Guide and Manual of Ceremonies, 67–68, Ex. 47.

B. Public accounts of the Memorial throughout its history consistently recognize it as a World War I memorial

For as long as the Legion has held events there, the public has consistently viewed the Memorial as honoring the fallen, year after year:

- A 1927 *Washington Post* article described the Legion’s convening of local citizens at the Memorial to commemorate the fallen on Memorial Day. “Prince Georges Dead Honored by Citizens,” *Wash. Post*, May 31, 1927, at 2, Ex. 48.
- A 1929 article explained that the Memorial was used by “Prince Georges County [to] honor[] its hero dead.” “War Dead Honored,” *Wash. Post*, May 31, 1929, Ex. 49.
- For Memorial Day 1940, the *Post* detailed “nonsectarian memorial services” being held at the Memorial, with its grounds “made to resemble an American cemetery in France with wooden crosses and poppies.” “Peace Cross to Be Scene of Rites,” *Wash. Post*, May 30, 1940, Ex. 50.
- On Memorial Day 1945, the Legion held a parade from the Hyattsville Armory to the Memorial, in a ceremony “involv[ing] no speeches but rather a roll call of the dead at the Cross and then the [World War II Honor] Scroll. The rites ended with a firing squad sounding volleys and the blowing of taps.” War Memorials History 5.
- On Memorial Day 1953, the Legion dedicated the Honor Scroll’s commemorative plaque, after which locals placed “[w]hite crosses, each with an American flag and a poppy,” at the Memorial and at the Scroll. War Memorials History 5.
- In 1957/58, the Commission’s History Division published an article describing the Memorial as a “monument honoring the county’s war dead” and a “Prince George’s County landmark.” History Division Report at 1. The article, like many other works, recognized the significance of the World War I memorial within the context of Veterans Memorial Park and its location on the grounds of the Battle of Bladensburg. *Id.* at 2; *see also* War Memorials Article.
- An article on the Memorial’s 1965 lighting recounted locals’ recollection that “[t]he cross was erected many years ago as a memorial to World War I dead.” Ps.’ Ex. 24 at 3.
- A 1975 *Prince George’s Post* article discussing the Memorial’s refurbishment referred to it as a “historic marker [that commemorated] the county’s war dead.” “New Look for Bladensburg,” *Prince George’s Post*, July 24, 1975, Ex. 51. At the 50th anniversary of the Memorial’s dedication that year, the event included a reading of “White Crosses.” Program, 50th Anniversary of the Dedication of the Memorial Cross, July 12, 1975, Ex. 52.

- A 1977 monograph described the Memorial as erected by the Legion “to recall the 49 men of the County who died in World War I.” Catherine Wright, *A Brief History of a 1742 Town* 59 (1977), Ex. 53.
- A 1984 article on one veteran’s campaign to restore the Memorial described it as built “to honor county men who died in World War I.” “Veteran fights to save memorial,” *Prince Georges J.*, Nov. 9, 1984, at A8, Ex. 54. A photo taken during the Memorial’s subsequent restoration features a sign posted by the Commission, identifying the Memorial as “COMPLETED BY THE SNYDER-FARMER-BUTLER AMERICAN LEGION POST IN 1925 TO HONOR THE HEROIC PRINCE GEORGES COUNTY CITIZENS WHO DIED FOR THEIR COUNTRY IN WORLD WAR I.” Undated Photograph, “Peace Cross Being Renovated,” Ex.55.
- A 1985 article on the Memorial’s restoration and rededication featured an 86-year-old World War I veteran who had attended commemorative events there “for many years,” for whom each ceremony was “a shot of adrenalin.” “Renewed Peace Cross Dedication,” *Prince Georges J.*, Nov. 12, 1985, Ex. 45.
- The Maryland Historic Trust in a 1996 report recognized the Memorial “as a monument to Prince George’s County residents who lost their lives serving in the United States Armed Forces in World War I.” Md. Historical Trust Report 1.
- In 2001, a Bladensburg councilmember told the *Prince George’s Gazette* that the Memorial “was built in memory of the World War I veterans,” and that it now “stands for the hope and peace and the sacrifices made from all wars.” “Peace Cross Used to Celebrate Veterans,” *Prince George’s Gazette*, July 5, 2001, at A-5, Ex. 56.
- In a 2010 report to the Commission, a historic preservation consultant described the Memorial as honoring “the veterans of World War I to whom this monument was erected” and “the memory of the Maryland veterans who lost their lives in World War I.” Daniel C. Filippelli, “Peace Cross”—An Evaluation of Condition and Recommendations for Restoration 4, 5 (Apr. 2010), Ex. 57.

C. There is no documented use of the Memorial for religious purposes

In 1931, the *Post* reported that a preacher would conduct a series of three services that August at the Memorial. “Head of Church Army Will Be Preacher Here,” *Wash. Post*, July 25, 1931, at 4, Ex. 58. Nothing in the record, however, confirms whether the services actually occurred. And, although the Memorial was the site of regular patriotic and commemorative events, including Memorial Day, Fourth of July, and Veterans Day services, *see* Nat’l Park Service Report 3, Plaintiffs’ expert could not identify

any religious event at the Memorial in its nine-decade history, other than the 1931 event mentioned by the *Post*, Piehler Dep. 65, Ex. 59.

D. No complaints were made about the Memorial for more than 90 years after construction began

There is no evidence of any complaints about the Memorial predating the American Humanist Association's demand letter in 2012, 93 years after the Memorial was started and 87 years after it was completed. *See* Letter from William Burgess, Am. Humanist Ass'n, to Patricia Barney, Md.-Nat'l Capital Park & Planning Comm'n (Aug. 22, 2012), Ex. 60.

ARGUMENT

The American Legion built the Memorial nine decades ago on private property, and the Memorial only came into government hands when the State's highway expansion concerns required it. The Establishment Clause's neutrality mandate is best satisfied, therefore, by simply leaving the Memorial be. Under controlling precedent, *see Van Orden v. Perry*, 545 U.S. 677 (2005), the Memorial's secular, commemorative purpose, history, and context all point toward that result—especially the nine decades that went by without a single legal complaint having been lodged. And even if the Court applies the *Lemon* test as Plaintiffs urge, the outcome is the same—a reasonable objective observer acquainted with the Memorial's content, setting, and history would easily conclude that the Memorial's purpose and effect is commemoration of local soldiers, sailors, and Marines lost in World War I, not endorsement of religion. Nor does Plaintiffs' asserted rule that governmental use of a cross-shape is *per se* unconstitutional change the result. The Establishment Clause demands a fact-intensive inquiry that cannot be reduced to *per se* rules, and the Supreme Court and Fourth Circuit have been clear that the mere fact that a symbol has religious content does not automatically lead to its invalidation

under the Establishment Clause. For these reasons, the Court should grant the American Legion's motion for summary judgment and deny Plaintiffs motion for summary judgment.

I. VAN ORDEN CONTROLS THE RESULT IN THIS CASE

In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Supreme Court considered whether a Ten Commandments monument on the grounds of the Texas State Capitol violated the Establishment Clause of the First Amendment. See U.S. Const. amend. I. In that case, the 22 acres surrounding the Texas State Capitol contained 17 monuments and 21 historical markers commemorating the ““people, ideals, and events that compose Texan identity.”” *Id.* at 681 (quoting Tex. H. Con. Res. 38, 77th Leg., Reg. Sess. (2001)). One of the monuments on the capitol grounds consisted of a 6-foot high, 3.5-foot wide stone monolith whose central element was the text of the Ten Commandments. *Id.* An eagle holding an American flag, an eye inside of a pyramid, and two small tablets with ancient script were carved above the Ten Commandments. *Id.* Below the text were two Stars of David and the Greek letters Chi and Rho, superimposed on one another—a symbol representing Christ. *Id.* The bottom of the monument contained an inscription which read, “PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961.” *Id.* at 681-82. Although the monument was paid for by the Eagles, a private organization, the State selected the site for the monument based on the recommendation of the state organization responsible for maintaining the Capitol grounds, and the dedication was presided over by two state legislators. *Id.* at 682.

Applying the Establishment Clause test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), both the District Court and the Fifth Circuit held that the monument did not violate the Constitution. These courts reasoned that the State had a valid secular purpose in recognizing and commemorating the

Fraternal Order of Eagles for their efforts to reduce juvenile delinquency and that a reasonable objective observer would not conclude that the monument was meant to endorse religion. *Id.*

The Supreme Court affirmed the Fifth Circuit’s decision. Chief Justice Rehnquist, however, writing for a four-Justice plurality of the Court, first explained that the *Lemon* test was “not useful in dealing with the sort of passive monument that Texas ha[d] erected on its Capitol grounds.” *Id.* at 686. Instead, the plurality’s “analysis [was] driven both by the nature of the monument and by our Nation’s history.” *Id.* Finding “an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789,” *id.* at 686 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)), the plurality noted that “religion has been closely identified with our history and government,” *Van Orden*, 545 U.S. at 683 (quoting *School Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203, 212 (1963)). Moreover, while “the Ten Commandments are religious [and] [t]he monument, therefore, has religious significance,” “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” *Van Orden*, 545 U.S. at 690. Thus, because the Ten Commandments had a “dual significance”—including an “undeniable historical meaning” as well as “religious significance”—the plurality concluded that the display did not violate the Establishment Clause. *Id.* at 691–92.

Justice Breyer concurred in the plurality’s result and, in fact, provided the controlling opinion in the case. *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. Schls.*, 418 F.3d 395, 402 (4th Cir. 2005) (applying Justice Breyer’s “legal judgment” test). Like the plurality, Justice Breyer also held that the traditional *Lemon* analysis was not appropriate. Explaining that “the Court has found no single mechanical formula that can accurately draw the constitutional line in every case,” *Van Orden*, 545 U.S.

at 699, Justice Breyer held that none of the Court’s prior tests could substitute for “the exercise of legal judgment.” *Id.* at 700. According to Justice Breyer, “[w]hile the Court’s prior tests provide useful guideposts . . . no exact formula can dictate resolution to such fact-intensive cases.” *Id.* at 701.

In making this “legal judgment,” Justice Breyer paid particular attention to the context in which the Ten Commandments were used because “to determine the message that the text here conveys, [a court] must examine how the text is *used*.” *Id.* at 701 (emphasis in original). Acknowledging, like the plurality, that the Ten Commandments “undeniably ha[d] a religious message,” *id.* at 699, 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 to this conclusion 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.*

As for the circumstances surrounding the monument’s display on public ground, Justice Breyer emphasized that the Fraternal Order of Eagles was “a private civic (and primarily secular) organization” who “while interested in the religious aspects of the Ten Commandments,” also “sought to highlight the Commandments’ role in shaping civic morality as part of that organization’s efforts to combat juvenile delinquency.” *Id.* at 701. And Justice Breyer made clear that “[t]he tablets . . . prominently acknowledge that the Eagles donated the display, a factor which, though not sufficient, thereby further distances the State itself from the religious aspects of the Commandments’ message.” *Id.* at 701–02.

Turning to the setting of the monument, Justice Breyer 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, that “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.* at 702. In particular, the fact that 40 years had passed since the monument was erected without any legal challenges being brought against it “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.* In contrast with the displays at issue in *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 856 (2005), which was decided on the same day and “where the short (and stormy) history of the courthouse Commandments’ displays demonstrate[d] the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them,” the 40 years of repose in *Van Orden* “suggest that the public visiting the capitol grounds has considered the religious aspects of the tablets’ message as part of what is a broader moral and historical message reflective of a cultural heritage,” *Van Orden*, 545 U.S. 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 [State’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). It is undisputed that the only reason the State has any involvement with the Memorial is due to the fact that its highway expansion plans and concerns of highway safety made this a necessity. *See supra* at 19–20. Indeed, unlike in *Van Orden*, where the state was directly involved with the approval, location, and dedication of the monument, here the State had no role whatsoever with the Memorial until highway expansion concerns led it to acquire the land, more than 30 years after it was constructed. In addition, as in *Van Orden*, where a notation at the bottom of the monument made clear that the monument had been erected by the Fraternal Order of Eagles, 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.

Moreover, the Memorial’s “*context* suggests that the State intended the display’s [commemorative] message . . . to predominate.” *Van Orden*, 545 U.S. at 702. As in *Van Orden*, the Memorial is located in an area that includes other monuments based on a similar theme as the Memorial—commemorating those who lost their lives in the country’s military conflicts, including the Battle of Bladensburg, World War I, World War II, the Korean and Vietnam Wars, Pearl Harbor, and the September 11, 2001 attacks. *See supra* at 5–6. In fact, even the location of the Memorial is significant, since it lies on the site of the Battle of Bladensburg and was erected at the terminus of (and dedicated with) another World War I memorial—the National Defense Highway—specifically because of their mutual commemorative purpose. In addition, “the physical setting of the monument . . . suggests little or nothing of the sacred.” *Van Orden*, 545 U.S. at 702. Being located in the median of a busy highway intersection, the Memorial “does not readily lend itself to meditation or any other

religious activity.” *Id.* The setting does, however, “provide a context of history” and commemoration of those who have fallen in the nation’s conflicts. *Id.*

In addition, “[i]f these factors provide a strong, but not conclusive, indication that the [Memorial] conveys a predominantly secular message, a further factor is determinative here.” *Id.* at 702. While in *Van Orden*, 40 years passed in which the monument went unchallenged, here almost 90 years passed before Plaintiffs lodged the first complaint against the Memorial. *See supra* at 25. “[T]hose [90] years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the [Memorial] as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to ‘engage in’ any ‘religious practice[e],’ to ‘compel’ any ‘religious practice[e],’ or to ‘work deterrence’ of any ‘religious belief.’” *Van Orden*, 545 U.S. at 702 (quoting *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring)). “Those [90] years suggest that the public visiting [Veterans Memorial Park] has considered the religious aspects of the [Memorial’s] message as part of what is a broader [commemorative] and historical message reflective of a cultural heritage.” *Van Orden*, 545 U.S. at 702–03.

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.* The Plaintiffs’ effort to remove a “longstanding” World War I 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.* at 704.

Van Orden, therefore, compels the conclusion that the Memorial does not run afoul of the Establishment Clause.

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 more extensive 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) 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)).

Even under the *Lemon* test, therefore, the Memorial does not run afoul of the Establishment Clause. The State’s only purpose for owning the Memorial—as an incident to highway expansion—could not be more mundane or secular. And the purposes of the Memorial’s original private builders (although irrelevant to the *State’s* purpose) were plainly commemorative in nature. Moreover, in light of the Memorial’s secular, commemorative content, setting, and history, the Memorial satisfies *Lemon’s* effect prong as well. Nor do lawnmowing or occasional concrete repair constitute excessive entanglement. Indeed, removing the Memorial from its historic location merely because, for reasons unrelated to religion, the Memorial fell into government hands would far more readily raise concerns of entanglement than simply letting it be.

A. Highway expansion and historic preservation are legitimate secular purposes for the State’s ownership and maintenance of the Memorial

Lemon’s secular-purpose requirement presents “a fairly low hurdle,” *Glassman v. Arlington*

Cnty., 628 F.3d 140, 146 (4th Cir. 2010). In the Fourth Circuit, a government action fails *Lemon*'s "purpose" prong only when the government action is "entirely motivated by a purpose to advance religion," *Lambeth v. Bd. Of Comm'rs*, 407 F.3d 266, 270 (4th Cir. 2005) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)); see also, e.g., *Koenick v. Felton*, 190 F.3d 259, 266 (4th Cir. 1999) (same); *Hewett v. City of King*, 29 F. Supp. 3d 584 (M.D.N.C. 2014) (applying the "entirely motivated" test).⁸ Consistent with this, "[t]he [Supreme] Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680 (citing *Stone v. Graham*, 449 U.S. 39, 41 (1980); *Epperson v. Arkansas*, 393 U.S. 97, 107–09 (1968); *Schempp*, 374 U.S. at 223–24; *Engel v. Vitale*, 370 U.S. 421, 424–25 (1962)). "Even where the benefits to religion were substantial, as in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); *Walz*, [1397 U.S. at 664]; and *Tilton [v. Richardson]*, 403 U.S. 672 (1971)], [the Court] saw a secular purpose and no conflict with the Establishment Clause." *Id.*

Applying this standard, courts have found the government 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), and depiction of the national motto, *Lambeth*, 407 F.3d at 270. Naturally, the proffered secular purpose must be "sincere and not a sham." *Glassman*, 628 F.3d at 146–47 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987)).⁹

⁸ Relying on an unpublished decision from the Central District of California, Plaintiffs claim that the government must "articulate a *predominantly* secular purpose for using [religious] symbols under *Lemon*." Pls. Br. at 16–17 (citing *Am. Humanist Ass'n v. City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *21 (C.D. Cal. Feb. 25, 2014)). Even if this is the standard in the Ninth Circuit, it is clearly not the standard in the Fourth.

⁹ *Trunk* and *Duncan*—two of the cases most often cited by Plaintiffs—flatly refute Plaintiffs argument that the government can never articulate a secular purpose for tolerance of a cross-shaped symbol. See Pls. Br. 17.

1. The State owns and maintains the Memorial for secular purposes only

In this case, it is undisputed that the State owns the Memorial because highway expansion and traffic safety concerns made it necessary for the State to assume ownership of the traffic median on which it sits. *See supra* at 19–20 (authorizing State Roads Commission to take ownership of adjoining land because “use of said land for commercial purposes will create a serious menace to traffic at this point”). And the state continues to display the Memorial because the deed conveying the land to the State from the Legion in 1961 requires the State to do so, because the Memorial is a historically significant war memorial, and because the State is required to maintain the Memorial as it stood on private land by virtue of the Memorial’s designation as a historic site. *See supra* at 20; Comm’n Br.

None of these purposes—highway expansion, traffic safety, protection of the Legion’s residual property interests, or historic preservation—is religious. Nor do Plaintiffs argue that these purposes are a sham. Instead, Plaintiffs argue that the Memorial fails the purpose prong of *Lemon* because “the religious motivations of the Cross’s sponsors, including the American Legion, can be imputed on [sic] Defendant,” citing *Gonzales v. N. Twp. of Lake Cnty.*, 4 F.3d 1412, 1418 (7th Cir. 1995), and *Cooper v. USPS*, 577 F.3d 479, 493–95 (2d Cir. 2009). Pls. Br. at 20. There is simply no basis for this assertion, as shown by a Supreme Court case the Plaintiffs ignore. In *Pleasant Grove City, Utah v. Summum*, the Court expressly rejected the argument that a private party’s motivations for erecting a monument could be mechanically imputed to the government, holding that “[b]y accepting . . . a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument.” 555 U.S. 460, 476–77 (2009); *see also Trunk*, 629 F.3d at 1107–08 (evaluating only the purpose of Congress in acquiring ownership of a cross-shaped memorial, not the religious motivations of the memorial’s builders or supporters). And Plaintiffs have provided no reason to

believe, as a factual matter, that the State meant to endorse the builders' motivations when it acquired the land to meet its own highway-expansion needs.

Moreover, *Gonzales* and *Cooper* both predate *Summum*, and, in any event, do not stand for Plaintiffs' proposition. In *Gonzales*, for example, the Knights of Columbus constructed a crucifix in a public park for an expressly religious purpose and deeded the crucifix to the township during the dedication ceremony. 4 F.3d at 1412. Rather than analyzing whether it was proper to impute the motivations of a private group to a government body asserting a legitimate purpose, the court instead concluded that the government's asserted purpose was merely a sham. *Id.* at 1421. And in *Cooper*, the religious display was set up by a mail processing location that the court first found to be a state actor because it was operating a contract with the U.S. Postal Service, before analyzing whether the display violated the Establishment Clause. 577 F.3d at 492–93. In this case, it is undisputed that the government had no involvement with the Memorial until it became necessary to take ownership due to the state's highway expansion plans, decades after the Memorial was built.¹⁰

As in *Summum*, there is no basis for imputing the original builders' motivations to the State. Thus, because the only purpose that matters for the Establishment Clause analysis is the *government's* purpose, *Lemon's* purpose prong is simply not in dispute in this case.

2. Even if somehow relevant, the Memorial's builders' purposes were commemorative rather than religious

As explained above, the motivations of the Memorial's private sponsors at the time of its creation are irrelevant to the question before the Court. But in any event, even if the private sponsors' motivations *were* relevant, the record evidence uniformly shows that the purpose of the Memorial was—

¹⁰ Under *Summum*, it is especially inappropriate to attribute private donors' motives to the government where, as here, "a privately donated memorial is funded by many small donations," as "the donors themselves may differ in their interpretation of the monument's significance." 555 U.S. at 476. *Summum's* holding is especially apt here, where all donations were towards a memorial intended to be *privately* owned.

and has always been—commemoration of those lost in World War I, not the endorsement of religion. This secular, commemorative purpose is evident in the builders’ own statements, in reporting and commentary on the construction, in the content of the Memorial’s groundbreaking and dedication ceremonies, and in the physical choices made in designing and choosing the site for the Memorial. By contrast, Plaintiffs have produced no evidence that the Memorial’s builders had a religious purpose; the various religious references scattered throughout the record show only that the builders were aware of the religious content of a symbol they were deploying for a non-religious purpose.

The builders’ statements. The builders’ motivations are best summarized in the words of Mrs. Martin Redman, who wrote in 1920 that “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.” Ex. 23 at 17. Mrs. Redman’s memorial committee had previously circulated a flyer explaining that the Memorial would be built “[i]n commemoration of their sons who thus died for the cause of democracy.” Ex. 20. That Committee partnered with the county Good Roads League, whose fundraising letter to veterans stressed the project’s secular, commemorative purpose “[t]o honor your comrades lost in the War,” looking for donations from “every person in your community regardless of wealth, nationality, religion, or politics.” Ex. 13 at 13. The builders’ pledge sheet likewise stated that the Memorial’s purpose was for “COMMEMORATING THE MEMORY OF THOSE WHO HAVE NOT DIED IN VAIN,” Ex. 25 at 15, using patriotic and religious imagery no different from other, more famous American pledge sheets.¹¹ Finally, the Legion’s own fundraising drive consistently demonstrated the same secular, commemorative purpose, as it carried out a campaign to complete “a

¹¹ Compare *id.* (“WE, THE CITIZENS OF MARYLAND, TRUSTING IN GOD, THE SUPREME RULER OF THE UNIVERSE . . .”) with The Declaration of Independence (“We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions . . .”).

monument to the county's heroic dead who made the supreme sacrifice in the World War, still of recent memory.” Ex. 37.

Reporting and commentary. Newspaper reports from that era likewise describe the purpose of the Memorial in secular, commemorative terms. The *Washington Post*, for example, published several articles regarding the beginning of the fundraising drive in 1919. *See supra* at 14–15. And historians looking back at the events of 1919–25 have likewise come to the conclusion that the builders' purpose was to honor and commemorate the Prince George's County soldiers, sailors, and Marines lost in World War I. *See supra* at 15.

Groundbreaking and dedication. The Memorial's groundbreaking and dedication ceremonies also point to the builders' secular, commemorative purpose. For example, the groundbreaking and dedication were performed by the mothers of the first Hyattsville men to fall in the war, and the keynotes stressed a desire to commemorate the fallen and to keep alive the principles they died to uphold. *See supra* at 16, 19. Thus, Navy Secretary Daniels' groundbreaking address praised the Memorial as “stand[ing] for time and eternity, *like the principles they defended.*” *See* Ex. 8 at 4 (emphasis added). And Congressman Stephen Gambrill's dedication address urged that “by the token of this cross, symbolic of Calvary, let us keep fresh *the memory of our boys who died for a righteous cause.*” Ex. 38 at 14 (emphasis added).¹²

¹² Plaintiffs see in Rep. Gambrill's reference to “Calvary” an indication that the purpose of the Memorial was to endorse religion. However, as Professor Jay Winter explains, Gambrill's theme was the outlawing of war, which at the time was a matter of public debate leading to the Kellogg-Briand pact to abolish war. Ex. 4 at 9. Winter notes “the eclectic nature of his message, drawn from the contemporary movement to make war illegal in international law, from Christian rhetoric, and from an appeal to remember those who died in a just cause.” *Id.* And as is clear from the quotation (and as explained further *infra* at 55–57), Gambrill's reference to Calvary (recognizing religious connotations of a cross symbol) is secondary to his recognition of the Memorial's actual purpose, namely, “keep[ing] fresh the memory of our boys who died for a righteous cause.” *Id.*

Design choices. The builders’ choices about the Memorial’s design and location likewise point to their secular, commemorative purpose. For example, the record shows that the builders’ chose a cross shape for their new World War I memorial in order to mirror the cross-shaped gravestones that had become “a central symbol of the American overseas cemetery,” Ex. 20 at 101, and had “quickly emerged as a cultural image of the battlefield,” Ex. 17 at 232. *See, e.g.*, Ex. 23 at 17 (letter from Mrs. Redman). As a National Park Service historian explained in profiling the Memorial: “The cross form was popular for war memorials as well as grave monuments in this period. While clearly imbued with Christian significance, the cross was also used as a broader cultural symbol of sacrifice.” Ex. 3 at 4; *see also Salazar v. Buono*, 559 U.S. 700, 721 (2010) (plurality opinion) (noting that the Mojave Desert Cross erected after World War I “evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten”); *id.* at 715 (“Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message Rather, those who erected the cross intended simply to honor our Nation’s fallen soldiers.”).¹³

The builders, moreover, did not erect merely a bare Latin cross. Instead, they “add[ed] a number of symbols to it to essentially make a distinctive symbol.” Ex. 6 at 13. As Professor Winter explains,

[I]n this unique post-war setting, the symbol of the cross took on an ecumenical meaning informed by the preoccupations of a generation

¹³ The Plaintiffs’ “only response to [*Salazar*’s] extended discussion of [cross memorials] is to dismiss it as dicta. But as we and our sister circuits have frequently noted, with inferior [c]ourt[s], like ourselves, that argument carries no weight since carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.” *Wynne v. Town of Great Falls, S. Carolina*, 376 F.3d 292, 298 n.3 (4th Cir. 2004) (internal quotation marks omitted; collecting cases); *see also Myers*, 418 F.3d at 406 (“Although we are not bound by dicta or separate opinions of the Supreme Court, 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.”) (internal quotation marks omitted). The *Salazar* plurality included Justice Kennedy, Chief Justice Roberts, and Justice Alito. Justices Scalia and Thomas concurred in the judgment, having found the plaintiff to lack standing. While those two Justices did not reach the merits in *Salazar*, both have voted to uphold passive displays in every Establishment Clause case they have heard.

registering the shock of American loss of life in the world war. A composite cross, one with multiple symbols attached to it, referred not to a particular faith or denomination, but to the sea of crosses on the other side of the ocean marking the graves of men who had died in the war.

Id. Thus, the symbols added to the cross shape enhanced the Memorial's secular purpose. These design choices included:

- *Celtic stylings*, which the National Park Service recognized as “a traditional memorial form,” Ex. 3 at 6, reflecting “an ancient form marking a gravesite.” Ex. 4 at 8; *see also id.* at 15, 17 (figs. 6, 9, 10 showing temporary World War I crosses with Celtic-like stylings);
- *A large bronze dedication plaque*, which declares the Memorial “DEDICATED TO THE HEROES / OF PRINCE GEORGE’S COUNTY, MARYLAND WHO LOST THEIR LIVES IN / THE GREAT WAR FOR THE LIBERTY OF THE WORLD,” and gives the names of the 49 fallen, the dates of American involvement in the war, and President Wilson’s quotation;
- *The Legion’s emblems*, signifying the Memorial’s primary builder and original owner, “a private civic (and primarily secular) organization,” *Van Orden*, 545 U.S. at 701–02 (Breyer, J., concurring in the judgment), and associating the Memorial with the Legion’s founding mission “[t]o preserve the memories and incidents of our associations in the Great War.” *See Salazar*, 559 U.S. at 715 (plurality opinion) (taking Veterans of Foreign Wars decals on Mojave Desert Cross plaque as evidence of purpose “to commemorate American servicemen who had died in World War I”); and
- *Four large bronze words* at the base of the cross itself, each extolling virtues—none religious—central to the fallen men’s service, namely, “VALOR,” “ENDURANCE,” “COURAGE,” and “DEVOTION.”

The builders, moreover, chose to erect this “distinctive symbol,” Ex. 6 at 13, at a site that would reflect and enhance its commemorative significance. The Memorial was planned in conjunction with the National Defense Highway, a “living” memorial to those who served in the war, with the Memorial marking the highway’s terminus in the style of a European wayside cross that would have been a common sight to Americans serving in France and Belgium. Further underscoring the Memorial's message of remembrance for those lost in World War I, its builders placed it on the grounds of another

historic conflict, the Battle of Bladensburg, and just south of the historic Indian Queen Tavern, where George Washington was believed to have stayed.

Accordingly, even if the motivations of the Memorial's original private sponsors *were* relevant to the State's purpose today, the record shows that those motivations were secular and commemorative. As noted above, *Lemon's* purpose prong is not at issue in this case.

B. The Memorial's primary effect is commemorative, not religious

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. When applying *Lemon's* primary effect test to a passive display like the Memorial, courts must evaluate "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*, 559 U.S. at 720–21 (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 part and 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, 1035 (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 (refusing to view government's "use of [the challenged symbol] on a blank slate"). When evaluating the primary effect of

a display on the reasonable observer, therefore, the inquiry is not “whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the Commission] endorses religion.” *Pinette*, 515 U.S. at 780 (O’Connor, J., concurring in part and concurring in judgment); *see also* *ACLU of Ky. v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005) (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.

Whether a challenged display has the primary effect of endorsing religion must be “assessed in the context of all relevant factors.” *Salazar*, 559 U.S. at 721. Among other things, 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*, 465 U.S. at 692 (holding that a holiday display that included a crèche next to a Santa Claus, reindeer, Christmas tree, and other secular elements did not violate the Establishment Clause); (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 that a secular message is intended by the challenged display, *see, e.g., Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227, 243 (2d Cir. 2014) (finding primary effect of display of Ground Zero cross within 9/11 museum amid hundreds of other mostly secular artifacts to be “ensuring historical completeness, not promoting religion”); 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 (finding use of cross symbols in city seal not religious because city’s name—Spanish for “the Crosses”—derived from the “forest of crosses” in a make-shift cemetery that once memorialized troops and settlers massacred in the area), and how the community has perceived and used the display over time, *see, e.g., Greater Houston Chapter of*

ACLU v. Eckels, 589 F. Supp. 222, 235 (S.D. Tex. 1984) (noting that “the effect of the [religious] symbols’ presence is evidenced by what the site has been used for” and contrasting the fact that there was no record of secular use with the fact that the record showed substantial religious use).

1. The Memorial’s content, setting, and history make its primary effect one of commemoration

When observing the Memorial, the reasonable objective observer would, of course, first notice that the main design element in the Memorial is its cross-shape, and, as an “informed” observer, she would also know that a cross can have religious significance. But the reasonable observer’s observation 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, because the Fourth Circuit and Supreme Court “ha[ve] consistently concluded that displays with religious content—but also with a legitimate secular use—may be permissible under the Establishment Clause,” 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, divorced from its background and context” because “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”).

Content. Beyond its mere shape, the reasonable observer would notice that the Memorial is not simply a bare cross, but that the builders also “add[ed] a number of symbols to it to essentially make a distinctive symbol,” Ex. 6 (Piehler Rebuttal) at 13, which is a process of adaptation that helps to secularize a symbol with religious content. *See, e.g., id.* (admitting that addition of symbols secularizes

the cross-shape in the Distinguished Service Cross, Navy Cross, and Distinguished Flying Cross). For example, the reasonable observer would notice that the Memorial is shaped like a Celtic cross, which was the traditional form of a cross used for gravesites rather than worship, *see* Ex. 4 at 8. The objective observer would also notice that the symbol of the American Legion—“a private civic (and primarily secular) organization” and the Memorial’s original builder—is 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., concurring in the judgment).

Next, walking (or driving) around the Memorial, the objective observer would notice the four words written in large letters on each side of the base of the Memorial—“VALOR,” “ENDURANCE,” “COURAGE,” and “DEVOTION,” each of which communicates the Memorial’s martial theme and none of which is religious. Then, walking up to the Memorial, the objective observer would read the large plaque on the base of the Memorial, which explains 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* Ex. 1 (pictures). The plaque then lists the 49 local men who died in the war and to whose memory the Memorial was devoted, gives the dates of American involvement in the war, and concludes with a quote from President 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.” *Id.*

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 World War I. *See supra* at 7–12. By using the shape of a “central symbol of the American overseas cemetery,” Ex. 20 at 101, the reasonable observer would understand that the Memorial “reflects a series of secular events” that had touched the lives of its builders—namely, the deaths of their 49 sons, brothers, and fathers in World War I. *See, e.g., City of Las Cruces*, 541 F.3d at 1035 (holding that use of cross in city seal did not have primary effect of endorsing religion where it was reflective of “city’s unique history,” namely, fact that victims of Apache attacks had been buried 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.”). The reasonable observer would know that, after the war, “some groups adapted various forms of crosses 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.” Ex. 4 at 14; *Salazar*, 559 U.S. at 721 (plurality). And the reasonable observer would know that the cross-shape in this particular Memorial was purposefully chosen to represent the gravestones of those buried in overseas cemeteries. *See* Ex. 23 (letter from Mrs. Redman, stating that “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”); Ex. 10 at 51 (explaining that the Memorial “is supposed to be a replication of the tombstones in France”).

Setting. If by now the reasonable observer still questions whether the primary message of the Memorial is one of religious endorsement or commemoration of those lost in World War I, her questions would be further resolved by considering the Memorial’s setting. Most immediately, the reasonable observer would 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., concurring in the judgment). Situated on a traffic

median at the intersection of several highways, the Memorial’s “setting does not readily lend itself to meditation or any other religious activity.” *Id.*

Second, the reasonable observer would see that the Memorial “sits in a large park containing [several] monuments . . . all designed to illustrate” the same theme (here, commemoration). *Id.* In particular, the reasonable observer would note that the Memorial sits directly at the terminus of the National Defense Highway linking Washington with the United States Naval Academy at Annapolis, which, as Plaintiffs’ expert notes, were paired from their inception “to honor . . . comrades lost in the war.” Piehler Expert Report, Ex. 63 at 25 (internal quotation marks omitted). The reasonable observer would recall that these monuments grew up around the Memorial in the decades after it was built, and, in fact, that these other memorials incorporated some of the design elements already found in the Memorial, such as the use of colored aggregate concrete, use of words of dedication, and references to the words written on the base of the Memorial. *See supra* at 5–6. These facts 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. In contrast, the reasonable observer would note that the community has not erected a single *religious* monument, symbol, or relic in the area surrounding the Memorial. From these facts, the reasonable observer would understand why the area has come to be popularly called “Veterans Memorial Park,” War Memorials History 1, or simply “Peace Cross,” *see supra* at 6.

Finally, the reasonable observer would recall that the Memorial was “very purposeful[ly] and very thoughtful[ly]” placed in a historically significant location. Ex. 12 at 49–50. As the new Battle of Bladensburg memorial reminds viewers, Veterans Memorial Park is built on the grounds of that battle. *See War Memorials History; cf. Salazar*, 559 U.S. at 724 (Alito, J., concurring) (“These veterans selected Sunrise Rock in part because they believed there was a color shading on the Rock in the shape

of an American soldier or doughboy.”) (internal quotation marks omitted). And just north of the battle memorial is the George Washington House/Indian Queen Tavern and the Old Port of Bladensburg, recalling that the Memorial “was placed on what was, in the eighteenth century, the Public Landing for the busy port of Bladensburg.” Md. Historical Trust Report 6, Ex. 5. The Memorial’s location recognizes “the significance of the port of Bladensburg and its role in history from the 18th Century all the way to the 21st Century,” Ex. 12 at 49–50, and further emphasizes its commemorative message.¹⁴

History. Finally, to the extent the reasonable observer continues to wonder whether the Memorial was meant to convey a religious or commemorative message, she would not be limited merely to the information gathered from observing the Memorial. *See Pinette*, 515 U.S. at 780 (O’Connor, J., concurring). She would also be aware of the Memorial’s unique history. *See City of Las Cruces*, 541 F.3d at 1031. This history would include the facts that (a) it was conceived of, designed by, and erected by private groups—namely, the mothers of soldiers killed in World War I and the American Legion, *see supra* at 12–19; (b) the only reason the State owns the Memorial is its need to own land sitting within the median of a busy intersection, *see supra* at 19–20; (c) the Memorial’s only consistent use has been as a site for patriotic and commemorative events—namely, the Legion’s regular Veterans Day services, *see supra* at 21–22; (d) conversely, it has *never* been the site of regular religious events, with the record containing only one reference to a single religious event that was ever even planned to take place at the Memorial, *see supra* at 24–25; (e) the Memorial stood for 87 years before the first complaint was made regarding it, *see supra* at 25; and (f) during this entire time, the record does not contain a single public comment referring to the Memorial in exclusively religious terms, *see, e.g., supra* at 23–24.

¹⁴ One of the Plaintiffs recognized that the addition of the new Battle of Bladensburg memorial “gives them quite an array of monuments all around the cross, which may actually help the case for keeping the cross on the median.” Email from Fred Edwards to Steven Lowe (May 26, 2014, 7:40pm EDT), Ex. 68.

In short, the Memorial's content, setting, and history all make plain the fact that the Memorial's message is one of commemoration for the soldiers, sailors, and Marines of Prince George's County lost in World War I, not endorsement of religion.

2. Plaintiffs' post-complaint anecdotes regarding interested parties do not reflect the reasonable objective observer

Notwithstanding the objective evidence described above, Plaintiffs set forth a string of comments made by supporters and opponents of the Memorial after the complaints that started this case in an effort to prove that the primary effect of the Memorial is to endorse religion. *See* Pls. Br. at 32–40. Among others, this list includes Jason Torpy, the president of the Military Association of Atheists & Freethinkers and a board member of Plaintiff AHA, Michael Weinstein, the president of Military Religious Freedom Foundation and a supporter of the Plaintiffs, and Renee Green, an Annapolis resident and supporter of the Memorial. *See id.* at 35–36. Plaintiffs also include a series of hearsay statements from unidentifiable individuals who have been offended by Plaintiffs' efforts in this case to remove the cross, presumably drawn from the comment section of online newspaper articles and blogs, and personal emails.¹⁵ *Id.* at 33–34. Plaintiffs even go so far as to claim that the American Legion is a “sectarian organization” and that the religious affiliation of one of the law firms representing the Legion is relevant to the reasonable objective observer's interpretation of the Memorial. *Id.* at 37–40. Plaintiffs' exercises in mud-throwing aside, the views of these individuals and organizations are not probative of the conclusion that a *reasonable objective observer* would reach regarding the effect of the Memorial.

¹⁵ These statements are entirely hearsay, would not be admissible in a trial on the merits of this dispute, and “cannot be presented in a form that would be admissible in evidence.” Fed. R. Civ. P. 56(c)(2); *see also* Fed. R. Evid. 802. Notably, neither defendant has deposed any of the commenters quoted by Plaintiffs, and thus has no way to know whether their comments were motivated by a genuine belief that the Memorial is a religious monument or—more likely—by anger toward Plaintiffs and a disagreement with their position in this case.

The reasonable-objective-observer inquiry does not focus on the perceptions of individuals. Indeed, “[w]ere [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.’” *Mercer Cnty.*, 432 F.3d at 638 (quoting *Pinette*, 515 U.S. at 779 (O’Connor, J., concurring)). Nor are the views of a display’s supporters or opponents relevant to the question whether the reasonable objective observer would conclude that the display has the effect of endorsing religion. As one court observed in rejecting similar arguments, “we find unavailing the ACLU’s own assertions that it finds the display offensive and that the display diminishes its enjoyment of the courthouse. . . . Our concern is that of the reasonable person. And the ACLU, an organization whose mission is ‘to ensure that the government is kept out of the religion business,’ does not embody the reasonable person.” *Id.* (internal quotation marks and footnote omitted).

It should not be surprising that Plaintiffs and the Memorial’s other opponents, like Jason Torpy and Michael Weinstein, regard the Memorial as an unconstitutional endorsement of religion to which they take offense. Indeed, Weinstein’s organization exists “to directly battle the far-right militant radical evangelical religious fundamentalists,” see “Michael L. ‘Mikey’ Weinstein, Esq.,” *Military Religious Freedom Foundation*, <http://bit.ly/1r85Koy>, and the affidavit he submitted in this case called the Memorial “a clear relic of the foul, sectarian, and anti-constitutional plague of fundamentalist Christian supremacy, which has wreaked havoc on our country’s secular character for the greater part of the last century,” Weinstein Aff. to Pls. Mot. for Summ. J., at 3. And the AHA, on whose board Torpy serves, actively “target[s] religious or sectarian imagery and text in government buildings and public spaces.” “American Humanist Association’s Key Issues,” *American Humanist Association*, <http://americanhumanist.org/AHA/Issues>. Nor should it be surprising that some who support the

Memorial see in Plaintiffs' actions a hostility toward religion which they oppose. None of these individuals can be said to be a reasonable *objective* observer, which is the only relevant question in this case. The opinions of interested parties and inadmissible hearsay statements from blogs and online newspaper comments bear little relevance to the conclusion a reasonable observer would reach, and they cannot outweigh the objective evidence of the Memorial's content, setting, and history.

In any event, although not material to the issues in this case, it bears noting that the Plaintiffs' effort to characterize the Legion as a sectarian organization simply has no basis. Described by Plaintiffs' expert as a "remarkably diverse and ecumenical organization," Ex. 34 at 10, the only qualification the Legion has ever had for membership is honorable service in the armed forces of the United States in time of war. *See supra* at 17. The Legion has always existed to serve veterans and build a spirit of "mutual helpfulness" within the country, not to advance a particular religious creed. *See supra* at 17. In fact, while Legion posts often appoint a member to serve as a "chaplain" for their fellow members, the Legion does not even ask *chaplain applicants* whether they are religious and, if so, what religion they belong to. *See* Ex. 32 at 27. Plaintiffs' assertion that the Legion is a sectarian organization is not supported by the record, or by common sense.

3. The fact that the Memorial has been used exclusively for patriotic and commemorative purposes is compelling evidence of its effect on the reasonable observer

Finally, in an effort to paint the Memorial with some measure of religious use, Plaintiffs repeatedly claim that religious "rites," "exercises," and "services" have occurred with regularity at the Memorial since its creation. *See, e.g.*, Pls. Br. at 8, 19, 31. This argument is disingenuous. Apparently, Plaintiffs are referring to the regular patriotic events held to honor service members on Memorial Day and Veterans Day each year. While Plaintiffs seize upon 1920s-era nomenclature, the record shows that

these “rites,” “exercises,” and “services” have been unwaveringly commemorative, not religious. *See, e.g.*, Ex. 50; *supra*, at 21–22 (describing Legion’s 2014 Veterans Day service).

Plaintiffs focus on the fact that “prayers,” “invocations,” and “benedictions” are generally a part of events honoring veterans held at the Memorial, consistent with longstanding military tradition. *See, e.g.*, Pls. Br. at 9-10. As *Town of Greece v. Galloway* makes clear, however, simply because an event includes a prayer does not automatically turn that event into a religious service. *See generally* 134 S. Ct. 1811 (2014). The prayers offered in *Town of Greece*—many of which were undeniably sectarian—did not turn the legislative session into a religious service. Neither do nonsectarian invocations and benedictions at Veterans Day and Memorial Day patriotic events held at the Memorial turn those events into religious services.

At bottom, the fact that only one religious event was ever even planned for the Memorial in the 90 years it has stood is compelling, objective evidence that the community does not regard the Memorial as a religious monument. Indeed, community perceptions as reflected in past practices may be the closest thing possible to the views of the reasonable objective observer on the primary effect of the challenged monument. *See Port Auth.*, 760 F.3d at 241-43 (calling the reasonable objective observer a “personification of a community ideal of reasonable behavior” “possessing not only basic familiarity with the charged display but also reasonable knowledge of the overall circumstances attending the display”). The fact that Plaintiffs can identify no expressly religious use of the Memorial in the nine decades it has stood is fatal to their case.

C. Lawnmowing and infrequent concrete repair do not amount to an excessive entanglement with religion, but removing the Memorial would

Lastly, there is no excessive entanglement in this case. As the Fourth Circuit 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). Here, there is neither state surveillance nor religious exercise.¹⁶

The only regular state action on record concerns routine upkeep of the Memorial—groundskeeping and lighting, Ex. 12 at 22–23—and occasional repairs, apparently carried out every few decades, *see id.* at 25–27. 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) (holding that display of “In God We Trust” motto on government building does not excessively entangle government in religion). The Memorial “was not erected and is not maintained by any religious organization.” *Suhre v. Haywood Cnty.*, 55 F. Supp. 2d 384, 398 (W.D.N.C. 1999) (finding no entanglement in display of Ten Commandments on courthouse wall). The Memorial is not affiliated with or sponsored by any “religious faith, denomination or organization.” *Id.* “There is no constant government monitoring.” *Id.*

If state action is minimal, religious exercise is simply absent. There is no evidence of any such exercise at the Memorial since the Commission took ownership in 1961. The only religious event discussed in the record was planned (it is unknown if it was actually held) in 1931. And again, Legion ceremonies are not somehow religious because their programs—unquestionably focused on honoring veterans and their sacrifices—incorporate traditional invocations or benedictions. *See Galloway*, 134 S. Ct. at 1825 (plurality portion); *cf. Engel*, 370 U.S. at 435 n.21.

¹⁶ Potential for “divisiveness” is not a factor in the Fourth Circuit’s analysis of whether a passive display creates excessive entanglement. Rather, as it recognized in *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 291 (4th Cir. 2000), the Supreme Court has confined the divisiveness test to “cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.” *Mueller v. Allen*, 463 U.S. 388, 403 n.11 (1983). *See also Lambeth*, 407 F.3d at 273 (“The Court’s ‘political divisiveness’ rubric is thus inapplicable to [a challenge to a passive display].”).

In contrast, while lawnmowing and occasional repairs do not entangle the Commission in religion, tearing down or mutilating the Memorial would. When the government acquires a private monument for reasons entirely unrelated to its content, the least disruptive approach is to maintain the monument and do nothing else. To affirmatively destroy or deface the Memorial would “exhibit a hostility toward religion that has no place in our Establishment Clause traditions.” *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment).

D. Under *Lemon*, the Memorial’s content, setting, and history all demonstrate its secular, commemorative purpose and effect

There is no evidence that the Commission owns the Memorial for any reason other than its proximity to highways. In light of the ample and undisputed evidence of the Memorial’s secular, commemorative purpose and effect, summary judgment under *Lemon* is appropriate.¹⁷

III. THE ESTABLISHMENT CLAUSE DOES NOT MAKE GOVERNMENTAL USE OF A CROSS-SHAPE *PER SE* UNCONSTITUTIONAL

Cutting across all of Plaintiffs’ arguments is one overriding and erroneous premise: Because a cross is a recognizable symbol of religion, it must violate the Establishment Clause whenever a government uses it. Thus, when arguing that the Memorial violates *Lemon*’s “purpose” prong, Plaintiffs assert that “[d]ue to its patently religious nature, the only purpose which can be ascribed to the display of the cross is to either advance or endorse the Christian religion.” Pls. Br. at 17 (internal quotation marks omitted). And, similarly, when analyzing whether the primary effect of the Memorial is to endorse religion, Plaintiffs argue that “[d]ue to its inherently religious nature, the government’s

¹⁷ The Court should also grant summary judgment because none of the named plaintiffs has standing to sue. Specifically, Plaintiffs Edwards, Lowe, and McNeill all admitted in their depositions that they have never suffered cognizable injury-in-fact from their alleged offense upon observing the Memorial. Specifically, none of the individual plaintiffs has forgone any legal rights (e.g., the right to drive on the public highways running through Veterans Memorial Park) because he does not wish to come into contact with the Memorial. *See* Edwards Dep. 29:4-8, Ex. 64; McNeill Dep. 26:15-18, Ex. 65; Lowe Dep. 34:21-35:3, Ex. 66. And because Plaintiff American Humanist Association’s standing derives solely from the injuries of its members Edwards and Lowe, it lacks standing as well. However, the Legion recognizes that controlling Fourth Circuit precedent forecloses this argument, so it raises the issue here to preserve for appellate review.

prominent display of [a cross] inevitably advances religion and conveys the message that Christianity is preferred.” *Id.* at 24. Plaintiffs’ asserted *per se* rule must be rejected. Because Establishment Clause cases are fact-specific, they do not lend themselves to fixed, rigid, *per se* rules like the one proposed by Plaintiffs. Moreover, such a *per se* rule incorrectly equates recognition that a symbol has religious significance with endorsement of religion by the symbol. Finally, the cases Plaintiffs rely upon to support their asserted *per se* rule are distinguishable and do not control the result in this case.

A. The Establishment Clause inquiry is intensely fact-specific and cannot be reduced to *per se* rules like that proposed by Plaintiffs

In Establishment Clause matters, “no fixed, *per se* rule can be framed,” *Lynch*, 465 U.S. at 678, because “[t]here is no single mechanical formula that can accurately draw the constitutional line in every case,” *Myers*, 418 F.3d at 402 (quoting *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment)). Rather, analyzing whether a religious display violates the Establishment Clause is “very case-specific, as it asks th[e] court to examine carefully the particular context and history of these displays before concluding what effect they would likely have on the reasonable observer.” *Duncan*, 616 F.3d at 1157 (citing *County of Allegheny*, 492 U.S. at 605–08).

For this reason, the mere fact that a symbol is religious does not mean that a government’s use of that symbol is *per se* unconstitutional. As one court has explained:

That [the Ten Commandments] are religious merely begs the question whether *this display* is religious; it does not answer it. “The Establishment Clause inquiry cannot be distilled into a fixed, *per se* rule.” *Pinette*, 515 U.S. at 718 (O’Connor, J., concurring); see *Lee v. Weisman*, 505 U.S. 577, 597-98 (1992). Although treating the subject matter categorically would make our review eminently simpler, we are called upon to examine [the defendant’s] actions in light of context. . . . Moreover, “focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.” . . . In short, “proving” that the Ten Commandments themselves are religious does not prove an Establishment Clause violation.

Mercer Cnty., 432 F.3d at 639–40 (some citations omitted) (quoting *Pinette*, 515 U.S. at 778 (O’Connor J., concurring), and *Lynch*, 465 U.S. at 680).

Consequently, the *per se* rule asserted by Plaintiffs that a government violates the Establishment Clause whenever it allows use of a cross-shaped symbol has no home in the case law. *See Van Orden*, 545 U.S. at 690 (plurality opinion) (“Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”); *Duncan*, 616 F.3d at 1157 n.9 (“We reject Plaintiffs’ argument that any time government conduct involves the use of a Latin cross, there is an Establishment Clause violation.”). Clearly, “[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm.” *Salazar*, 559 U.S. at 718 (plurality opinion); *Brown v. Gilmore*, 258 F.3d 265, 274 (4th Cir. 2001) (“[T]he Religion Clauses must not be interpreted with a view that religion be suppressed in the public arenas in favor of secularism.”). “Such absolutism,” Justice Breyer wrote in *Van Orden*, “is not only inconsistent with our national traditions but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.” 545 U.S. at 699.¹⁸

Given this proper understanding of the Establishment Clause, it is unsurprising that there are multiple cases upholding the use of cross-shaped symbols on public property. *See, e.g., Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991) (use of a cross on city’s seal derived from Stephen Austin’s coat of arms); *Port Auth.*, 760 F.3d 227 (display of cross-shaped wreckage from the remains of the World

¹⁸ Plaintiffs’ related assertion that “[t]he use of religious means to achieve a secular end is unconstitutional”—which they derive from an unpublished decision from the Central District of California—is similarly inappropriate and, in fact, directly contravened by prevailing case law. Pls.’ Brief at 20 (quoting *Am. Humanist Ass’n v. City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, *22 (C.D. Cal. Feb. 25, 2014)). *See, e.g., Salazar*, 559 U.S. at 718 (plurality opinion) (“The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm.”); *Lee v. Weisman*, 505 U.S. 577, 598 (1992) (“A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.”); *Port Auth.*, 760 F.3d at 239 (“[T]he Establishment Clause is not properly construed to command that government accounts of history be devoid of religious references. Nor is a permissible secular purpose transformed into an impermissible religious one because the government makes an historical point with an artifact whose historical significance derives, in whole or in part, from its religious symbolism.”).

Trade Center in a public museum); *City of Las Cruces*, 541 F.3d 1017 (use of cross-shape in city seal derived from name of city and its origins as a cemetery); *Briggs v. Mississippi*, 331 F.3d 499, 506–07 (5th Cir. 2003) (use 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).

B. Government use of a cross-shape does not violate the Establishment Clause merely because a cross is a recognizable religious symbol

Given their emphasis on the *per se* rule for which they advocate, Plaintiffs devote the bulk of their factual discussion to establishing that a cross is a recognizable symbol of religion. To do this, Plaintiffs cite various sources, including comments by the Memorial’s sponsors near the time of its construction, the fact that the Legion’s Veterans Day and Memorial Day services have included prayers, and comments made by various individuals who presumably posted on blogs and the comment section of online newspapers.¹⁹ For Plaintiffs, the fact that the sponsors knowingly used a symbol also affiliated with a religion to honor local soldiers killed in World War I means that their purpose was the advancement of religion. And the fact that community members today recognize that a cross shape can have religious significance shows that the primary effect must be the endorsement of religion. Neither conclusion, however, is justified or dispositive.

While Plaintiffs’ evidence may show that members of the community *recognize* that a cross can be a religious symbol, this actually says very little about whether the primary effect of the Memorial is to endorse religion. As the Fourth Circuit has made clear, “[t]he Government may, through speech and

¹⁹ Plaintiffs also allege that the Commission, the Legion, and Amici “perceive the Bladensburg Cross as a Christian symbol.” Pls. Br. 11, 37. This allegation is without merit or support in the record.

actions, recognize religion or a religious holiday, *see Lynch*, 465 U.S. at 676, but it may not overtly endorse a religion, or religion in general.” *Koenick*, 190 F.3d at 267. Thus, the test under the Establishment Clause is not whether a display contains religious content, leaving everything “not wholly secular” excluded by the First Amendment. *Lambeth*, 407 F.3d at 271. Instead, “[t]he proper analysis is the converse: 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.* And using this analysis, 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.* (citing *Cnty. of Allegheny*, 492 U.S. at 579).

Thus, the question in this case is not whether an observer could *recognize* a cross to be a religious symbol—one clearly could. It is whether the reasonable objective observer would interpret the government’s tolerance of the Memorial’s cross-shape as having the purpose or effect of *endorsing* religion, even though it is in public hands only because of highway expansion. *See Mercer*, 432 F.3d at 639. “To endorse is necessarily to recognize, but the converse does not follow.” *Id.* Indeed, the possibility of endorsement is diminished considerably when such symbols acquire independent significance through their association with a historical event such as World War I. *See Salazar*, 559 U.S. at 721 (plurality opinion) (explaining that a cross-shaped World War I memorial “evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten”). As the Ninth Circuit has held, “[e]ven a purely religious symbol may acquire independent historical significance by virtue of its being associated with significant non-religious events.” *Ellis*, 990 F.2d at 1526.

Such is the case here. The Memorial's cross symbol may indicate religious influence in American history—and especially during World War I—but it does not thereby endorse religion. While a cross certainly has religious significance, it has also acquired secular and historical significance due to its strong association with the losses of that War. *See id.; supra* at 7–12. Based on the Memorial's content, setting, and history, the reasonable objective observer would know that the secular/historical/commemorative purpose was intended and would understand that the Memorial was meant to commemorate those lost in the War, not to endorse a particular religion.

C. Plaintiffs' cases do not control the result here and are distinguishable

Finally, in support of their supposed *per se* rule, Plaintiffs rely heavily on cases from other courts analyzing different contexts with different facts before them. *See* Pls. Br. at 13–15, 24–26. Of these cases, Plaintiffs pay particularly close attention to several cases holding that a cross-shaped memorial violated the Establishment Clause—*Trunk*, 629 F.3d 1099; *Duncan*, 616 F.3d 1145; *Eugene*, 93 F.3d 617; and *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988).²⁰ As a court within this Circuit recently explained, however, 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 (M.D.N.C. 2014) (emphasis added). Perhaps unsurprisingly then, given the fact-intensive nature of the Establishment Clause inquiry, the cases relied upon by Plaintiffs are distinguishable.

²⁰ Plaintiffs also rely heavily on an unpublished decision from the Central District of California, *Am. Humanist Ass'n v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014). *Lake Elsinore*, however, involved a cross-motif in a memorial that the government itself was constructing to honor veterans generically, which is quite different from the Memorial, which was constructed by private individuals specifically to honor certain World War I veterans with an iconic image of the war in which they died.

For example, the cross-shaped memorials at issue in *Eugene*, *Jewish War Veterans*, and *Duncan*, did not have the “independent historical significance [acquired] by virtue of [their] being associated with significant non-religious events,” *Ellis*, 990 F.2d at 1526, that the Memorial has in this case. While, in *Eugene*, the monument at issue served as a memorial for *all* veterans, 93 F.3d at 618–19, in *Duncan*, for state troopers killed in the line of duty, *see* 616 F.3d at 1150, and, in *Jewish War Veterans*, for service members lost in Southeast Asia, 695 F. Supp. at 6, the Memorial in this case serves as a memorial for a certain group of individuals that died in a particular war—World War I. This is a significant difference. While there is ample evidence that the cross became an internationally recognized symbol of World War I, and that the original builders of the Memorial chose the cross-shape specifically for that purpose, there may not be such compelling evidence that the cross is so linked with military service generally, police service, or conflicts in Southeast Asia that it can be said to convey as clearly a secular message of commemoration for these.

This is exactly the type of distinction that is critical for a proper Establishment Clause analysis. *See Salazar*, 559 U.S. at 721 (plurality opinion) (explaining that a cross-shaped World War I memorial “evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten”). Because the reasonable objective observer will be acquainted with the history of the practice at issue—namely, the fact that a cross was “the principal grave marker in the WWI cemeteries,” Ex. 16 at 994 (Piehler), was “distinctively associated with the sacrifice of American soldiers who died in World War I,” Ex. 4 at 3 (Winter), and became an internationally recognized symbol of that war—a World War I memorial shaped like a cross carries a far clearer message of commemoration than one honoring military service generally, police service, or conflicts in Southeast Asia.

Similarly, *Trunk* also does not control the result here because the facts of *Trunk* are materially different from the facts of this case. Among other things, for example, the monument at issue in *Trunk* had been “the subject of contentious litigation for the last two decades,” *Trunk*, 629 F.3d at 1103, which is in stark contrast to the fact that the Memorial in this case has stood unchallenged for the last 90 years. As *Van Orden* makes clear, “those [90] years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the [Memorial] as amounting, in any significantly detrimental way, to a governmental effort to favor a particular religious sect [or] primarily to promote religion over nonreligion.” *Van Orden*, 545 U.S. at 702. In any event, members of the Supreme Court have twice questioned whether the Establishment Clause requires removal of the memorial at issue in *Trunk*, making it a questionable candidate for Plaintiffs to hang their case on. See *Trunk v. United States*, 132 S. Ct. 2535, 2535–36 (2012) (statement of Alito, J.) (noting that “the constitutionality of the Mt. Soledad Veterans Memorial is a question of substantial importance,” but agreeing with decision to deny certiorari because the cases were in an interlocutory posture); *San Diegans for the Mt. Soledad Nat’l War Mem’l v. Paulson*, 126 S. Ct. 2856 (2006) (Kennedy, J.) (granting stay as circuit justice to prevent removal of Mt. Soledad Veterans Memorial).

Finally, in addition to the cases analyzing cross-shaped war memorials discussed above, Plaintiffs also discuss several other cases whose factual resemblance to this case is marginal and which thus say little about whether the use of a cross in a World War I memorial like the Memorial passes constitutional muster. For example, Plaintiffs cite several cases analyzing the use of a cross as part of a city seal, despite the fact that these cases often emphasize the significance of the city seal as the central symbol of the city’s authority.²¹ Similarly, Plaintiffs cite a number of cases involving the use of crosses

²¹ See *Harris v. City of Zion*, 927 F.2d 1401, 1412 (7th Cir. 1991) (“The seal of Rolling Meadows acts as the City’s imprimatur for official correspondence, property and business. The conspicuous depiction of the pre-eminent symbol of a

in holiday displays, which often turn on the fact that, because a cross is not a traditional symbol of Christmas, the display of a cross promotes the religious rather than secular aspects of the holiday.²²

Finally, Plaintiffs cite several cases considering crosses that were erected by or with the consent of the government for explicitly religious purposes.²³ None of these cases involves facts like those at issue in this case, and, as a result, none are relevant to the issues at hand.²⁴

CONCLUSION

For the reasons set forth above, the Legion respectfully requests that the Court grant its cross-motion for summary judgment and deny Plaintiffs' motion for summary judgment.

(continued...)

particular faith on that 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) (“An objective and reasonably informed observer would conclude from the seal that adherence to Christianity is somehow relevant to a citizen’s standing in the political community.”).

²² See *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986); *ACLU v. Mississippi State Gen. Servs. Admin.*, 652 F. Supp. 380 (S.D. Miss. 1987) (lighted cross on side of building for Christmas held to have a religious purpose and effect that was not mitigated by non-visible secular displays on opposite side of building); *Libin v. Town of Greenwich*, 625 F. Supp. 393 (D. Conn. 1985) (holding that a Christmas display including a cross violated the Establishment Clause because a cross does not have the same historic connection to Christmas as a crèche and its only connection to Christmas was religious); *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) (Christmas display cross violated California’s “No Preference” clause because it promoted the “spiritual content” of Christmas and Easter in a way that Easter bunnies or Christmas trees would not have).

²³ See *ACLU v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (85-foot cross erected in a state park and dedicated on Easter Sunday to replace another cross that had served as a meeting place for Easter services); *Gilfillan v. City of Phila.*, 637 F.2d 924 (3d Cir. 1980) (cross erected by the city as part of a platform to be used by Pope John Paul II to celebrate mass during his visit to the city); *Eckels*, 589 F. Supp. 222 (county commissioner erected three crosses at a “mediation site” in a public park, which served as the site for religious and Easter services); *Gonzales*, 4 F.3d 1412 (town erected a crucifix with a figure of Jesus on the cross and a plaque representing the phrase “Jesus of Nazareth, King of the Jews”).

²⁴ Plaintiffs additionally cite to several other cases involving fact patterns that bear little resemblance to this case, see *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013) (city approved a church’s plan to place thirty-one crosses on public riverfront property for two weeks); *Granzeier v. Middleton*, 955 F. Supp. 741 (E.D. Ky. 1997) (city conceded violation of the Establishment Clause for a sign announcing that the court was closed for Good Friday that included a four-inch high crucifix), or that involve California’s “No Preference Clause,” despite the fact that “[i]n general, the religion clauses of the California Constitution are read more broadly than their counterparts in the federal Constitution.” *Carpenter v. City & Cnty. of San Francisco*, 93 F.3d 627, 629 (9th Cir. 1996); see also *Ellis*, 990 F.2d 1518 (same); but see *Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (holding, contrary to binding Ninth Circuit precedent that the “No Preference Clause” is coextensive with the federal Establishment Clause).

Dated: June 10, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2015, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, causing it to be served on all registered users.

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