APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13025

AMANDA KONDRAT'YEV, ANDREIY KONDRAT'YEV, ANDRE RYLAND, DAVID SUHOR, Plaintiffs - Appellees, versus CITY OF PENSACOLA, FLORIDA, ASHTON HAYWARD, Mayor, BRIAN COOPER, Defendants-Appellants.	D.C. Docket No. 3:16-cv-00195- RV-CJK

Appeal from the United States District Court
for the Northern District of Florida

(September 7, 2018)

Before NEWSOM and HULL, Circuit Judges, and ROYAL,* District Judge.

PER CURIAM:

The City of Pensacola, Florida appeals a district court decision ordering it to remove a 34-foot Latin cross from a public park on the ground that the City's maintenance of the cross violates the First Amendment's Establishment Clause. Having concluded that we are bound by existing Circuit precedent, we find ourselves constrained to affirm.

I

The pertinent facts are undisputed. In 1941, the National Youth Administration erected a wooden cross in the eastern corner of Pensacola's Bayview Park to be the "focal point" of what would become an annual Easter sunrise program. The program itself was organized by the Pensacola Junior Chamber of Commerce (a/k/a the "Jaycees") and soon became a tradition, with people gathering for Easter services during World War II to pray, among other things, for "the divine guidance of our nation's leaders" and for faith to "see through the present dark days of war." The services continued following the war, and in 1949 the Jaycees built a small stage—or "bandstand"—immediately in front of the cross to serve as a permanent home for the annual program.

In 1969, the Jaycees replaced the original wooden cross with the 34-foot concrete version at issue in this appeal. The new cross was dedicated at the 29th

* Honorable Charles Ashley Royal, United States District Judge for the Middle District of Georgia, sitting by designation.

annual Easter sunrise service. The Jaycees donated the cross to the City, which continues to light and maintain it at a cost of around $233 per year. Although the cross is only one of more than 170 monuments scattered throughout Pensacola's parks, it is one of only two—and the only religious display—located in Bayview Park. Over the years, the cross has continued to serve as the location for an annual Easter sunrise program, but it has also been used as a site for remembrance services on Veteran's and Memorial Days, at which attendees place flowers near the cross in honor of loved ones overseas and in memory of those who died fighting in service of the country.

The Bayview Park cross stood in the same location for nearly 75 years, essentially without incident, before the plaintiffs in this case filed suit asserting that the cross's presence on city property violates the Establishment Clause. The parties filed dueling summary judgment motions, and the district court granted the plaintiffs' motion and ordered the cross removed. This is the City's appeal.[1]

II

In relevant part, the First Amendment states that "Congress shall make no law respecting an establishment of religion …." U.S. Const. amend. I. Although by its terms the Establishment Clause applies only to Congress, and although available historical evidence indicates that it was originally understood as a federalism-based provision designed to prevent the federal government from interfering

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[1] As this appeal comes to us following a grant of summary judgment, our review is *de novo*. *See Thomas* v. *Cooper Lighting, Inc.*, 506 F.3d 1361, 1363 (11th Cir. 2007).

with state and local decisions about church-state relations, the Supreme Court has since made clear that, as "incorporated" through the Fourteenth Amendment, the Clause protects individual rights against state and local interference. *See, e.g.*, *Everson* v. *Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947). The question here, therefore, is whether the City's maintenance of the Bayview Park cross constitutes a prohibited "establishment of religion."

The City contends (1) that none of the plaintiffs here has suffered sufficient injury to have standing to sue and (2) that, in any event, the Bayview Park cross does not violate the Establishment Clause under current Supreme Court precedent. If we were writing on a clean slate, we might well agree—on both counts. But we are not—and so we cannot. As we will explain, we have concluded that we are bound by this Court's decision in *American Civil Liberties Union of Georgia* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983), which considered facts nearly indistinguishable from those here. There, with the approval of the Georgia Department of Natural Resources, the Rabun County Chamber of Commerce erected an illuminated 35-foot Latin cross in Black Rock Mountain State Park. *Id.* at 1101. Like the Bayview Park cross at issue here, the Black Rock Mountain cross replaced a similar monument that had stood for a number of years but had fallen into disrepair, and like the Bayview Park cross, it was dedicated at an annual Easter sunrise service. *Id.* The ACLU of Georgia and five named individuals sued, claiming that the Establishment Clause forbade the Black Rock Mountain cross's presence on state-owned land. A panel of this Court agreed, holding both (1) that the plaintiffs there had standing to sue and (2)

that the cross violated the Establishment Clause. *Id.* at 1108–09, 1111.

For the reasons that follow, absent en banc reconsideration or Supreme Court reversal of the holding in *Rabun*, we are bound by our "prior panel precedent" rule to follow it, and are thus constrained to affirm the district court's decision. *See, e.g.*, *Breslow* v. *Wells Fargo Bank*, 755 F.3d 1265, 1267 (11th Cir. 2014) ("It is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.") (alteration and internal quotations omitted).

A

We begin, as we must, with the question of the plaintiffs' standing to sue. *See, e.g.*, *Dillard* v. *Chilton Cty. Comm'n*, 495 F.3d 1324, 1330 (11th Cir. 2007) ("[S]tanding is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims.") (internal quotations omitted). As already indicated, we find that the Court's earlier decision in *Rabun* resolves the standing issue in the plaintiffs' favor.

In *Rabun*, the defendants contended that the plaintiffs lacked standing under the Supreme Court's then-recent decision in *Valley Forge Christian College* v. *Americans. United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). In *Valley Forge*, a nonprofit organization and four of its employees had sued to prevent the transfer of federal land to a religious institution. *Id.* at 469. The Third Circuit held that the plaintiffs had standing based on the "shared

individuated right to a government that 'shall make no law respecting the establishment of religion.'" *Americans United for Separation of Church & State, Inc.* v. *U.S. Dep't of Health, Ed. & Welfare*, 619 F.2d 252, 261 (3d Cir. 1980). The Supreme Court rejected that theory, finding that such "generalized grievances" are insufficient to confer standing, and further stated that Establishment Clause plaintiffs who cannot identify a personal injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees" lack the injury necessary to establish Article III standing. *Valley Forge*, 454 U.S. at 483, 485. Relying on *Valley Forge*, the defendants in *Rabun* insisted that none of the plaintiffs there had the necessary standing. 698 F.2d at 1103.

While the *Rabun* panel acknowledged that *Valley Forge* had "expressly held that the mere 'psychological consequence presumably produced by observation of conduct with which one disagrees' is not a cognizable injury" for standing purposes, *id*. (quoting 454 U.S. at 486), it nonetheless concluded that the plaintiffs before it had "demonstrated an individualized injury, other than a mere psychological reaction," *id*. at 1108. Specifically, the panel held that the plaintiffs had sufficiently "allege[d] that they ha[d] been injured in fact because they ha[d] been deprived of their beneficial right of use and enjoyment of a state park." *Id*. at 1103. Two of the plaintiffs, in particular, "demonstrated the effect that the presence of the cross ha[d] on their right to the use of Black Rock Mountain State Park both by testifying as to their unwillingness to camp in the park because of the cross and by the evidence of the physical and metaphysical impact of the cross." *Id*. at 1108. More particularly still, the

Rabun panel concluded, those two plaintiffs were "forced to locate other camping areas or to have their right to use Black Rock Mountain State Park conditioned upon the acceptance of unwanted religious symbolism." *Id.*

As we read *Rabun*, therefore, it is not strictly necessary for an Establishment Clause plaintiff to modify his behavior in order to avoid the alleged violation; rather, it is enough that he claim to have suffered "metaphysical"—or as the *Rabun* panel also called it, "spiritual"—injury and that his use of a public resource has been "conditioned upon the acceptance of unwanted religious symbolism." *Id.* Under *Rabun*'s expansive formulation, it seems to us that at least one of the plaintiffs in this case has alleged sufficient injury to pass Article III muster. Andre Ryland testified that he uses Bayview Park "many times throughout the year" and is "offended and feel[s] excluded by … the Bayview Cross." Although it does not appear that Ryland (or any other plaintiff for that matter) has taken any steps to avoid encountering the cross, his "offen[se]" and "exclu[sion]" would seem to qualify as the sort of "metaphysical" or "spiritual" injury that *Rabun* deems adequate. Because Ryland has standing under *Rabun*, we need not consider whether the other plaintiffs do. *See, e.g., Watt* v. *Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981).

We turn then, as did the panel in *Rabun*, to the merits of the plaintiffs' Establishment Clause claim.

B

In considering the merits, we begin, once again, with *Rabun*. The panel there analyzed the Black Rock Mountain cross under the three-prong Establishment

Clause test announced in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), which both parties "agree[d]" supplied "the correct legal standard." 698 F.2d at 1109. The *Lemon* test, the panel observed, asks "(1) [w]hether the [challenged] action has a secular purpose; (2) [w]hether the 'principal or primary effect' is one which neither 'advances nor inhibits religion;' and (3) [w]hether the action fosters 'an excessive entanglement with religion.'" *Id.* (quoting *Lemon*, 403 U.S. at 612–13). "[I]f even one of these three principles is violated," the panel continued, "the challenged governmental action will be found to violate the Establishment Clause." *Id.* The *Rabun* panel concluded that the defendants there had "failed to establish a secular purpose" for the Black Rock Mountain cross and, therefore, that "the maintenance of the cross in a state park violate[d] the Establishment Clause of the First Amendment." *Id.* at 1111. In closing, the panel acknowledged that the cross had stood in the park "[f]or many years," but held that "'historical acceptance without more' does not provide a rational basis for ignoring the command of the Establishment Clause that a state 'pursue a course of "neutrality" toward religion.'" *Id.* (quoting *Comm. for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 792–93 (1973)).

The similarities between the Bayview Park cross at issue here and the Black Rock Mountain cross at issue in *Rabun* are striking. As the district court summarized:

> In *Rabun County*, a private organization (there, the Chamber of Commerce; here the Jaycees) put up a tall illuminated Latin cross (there, a 35-foot cross; here a 34-foot cross) to replace an

> existing one. The cross was on government property (there, a state park in Black Rock Mountain; here, a city park in Pensacola), and its dedication was specifically scheduled to coincide with the annual Easter Sunrise Service (there, the 21st annual service; here, the 29th annual service), which had been held at the site of the cross for a number of years.

Doc. 41 at 10. Given the parallels between the two cases—and crosses—we think it clear that *Rabun* (with its *Lemon*-based purpose analysis) controls our analysis and requires that we affirm the district court's decision.

The City contends that the Supreme Court's more recent Establishment Clause decisions free us to disregard *Lemon*—and thus *Rabun*—in our analysis. And we cannot help but agree that the Court's contemporary jurisprudence seems to have substantially weakened *Lemon*—and thus, by extension, *Rabun*. *See, e.g.*, *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811 (2014) (never mentioning *Lemon*); *Van Orden* v. *Perry*, 545 U.S. 677 (2005) (plurality) (declining to apply *Lemon*). But our precedent—in particular, our precedent about precedent—is clear: "[W]e are not at liberty to disregard binding case law that is … closely on point and has been only weakened, rather than directly overruled, by the Supreme Court." *Fla. League of Prof'l Lobbyists, Inc.* v. *Meggs*, 87 F.3d 457, 462 (11th Cir. 1996). And at least as matters now stand, neither *Lemon* nor *Rabun* has been "directly overruled." Accordingly, our hands are tied. Absent en banc reconsideration or Supreme Court reversal, we are

constrained to affirm the district court's order requiring removal of the Bayview Park cross.

AFFIRMED.

NEWSOM, Circuit Judge, concurring in the judgment:

Reluctantly, I agree that our existing precedent—and in particular, *American Civil Liberties Union of Georgia* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983)—requires us to affirm the district court's decision, which orders the removal of a Latin cross that has stood in a remote corner of Pensacola's Bayview Park, essentially unchallenged, for 75 years. With respect to both of the key issues here—the plaintiffs' standing to contest the city's maintenance of the cross and the merits of their Establishment Clause challenge— *Rabun* is effectively on point. And under our prior-panel-precedent rule, it seems clear enough to me that we—by which I mean the three of us—are stuck with it. *See, e.g.*, *United States* v. *Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).[1]

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[1] "Under [the prior-panel-precedent] rule, a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc. While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point." *Archer*, 531 F.3d at 1352. We haven't been perfectly consistent in our articulation of the rule, and other formulations would seem to allow subsequent panels more wiggle room. *See, e.g.*, *United States* v. *Madden*, 733 F.3d 1314, 1319 (11th Cir. 2013) ("[O]ur prior precedent is no longer binding once it has been substantially undermined or overruled by ... Supreme Court jurisprudence."); *Footman* v. *Singletary*, 978 F.2d 1207,

Having said that, it's equally clear to me that *Rabun* is wrong. On neither score—standing or the merits—can *Rabun* be squared with a faithful application of Supreme Court precedent, and I urge the full Court to rehear this case en banc so that we can correct the errors that *Rabun* perpetuates.

I

First, standing. Plaintiffs Andre Ryland and David Suhor assert that they feel "offended," "affronted," and "excluded" by the Bayview Park cross. Neither, though, it seems, has been sufficiently affected to take any affirmative steps to avoid the cross. To the contrary, Ryland has explained that he continues to use Bayview Park "many times throughout the year" and that he "often" encounters the cross when "walk[ing] the trail around the park." So too, Suhor says that he "visit[ed] Bayview Park regularly" for years before filing suit and that he still encounters the cross on "regular bike rides" there. (Suhor also used the cross for his own purposes in 2016, just before filing suit—apparently for some kind of satanic ritual.)

1211 (11th Cir. 1992) ("We may decline to follow a decision of a prior panel if necessary to give full effect to a United States Supreme Court decision."); *Leach* v. *Pan Am. World Airways*, 842 F.2d 285, 286 (11th Cir. 1988) ("[A]ccording to both Eleventh and Fifth Circuit precedent [a three-judge] panel may not overlook decisions by the Supreme Court which implicitly overrule a binding circuit decision, or undercut its rationale."). As tempting as it may be to invoke one of the flabbier variants in order to "write around" *Rabun*, I'll resist the urge. The way I see it, a healthy respect for the decisions of my colleagues—both past and present—counsels a fairly rigorous application of the prior-panel-precedent rule.

Under the Supreme Court's pathmarking Establishment Clause standing case, *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), the plaintiffs' allegations here— offense, affront, exclusion—are plainly inadequate. There, the Court held, in no uncertain terms, that "the psychological consequence presumably produced by observation of [religious] conduct with which one disagrees" is "not an injury sufficient to confer standing under Art[icle] III, even though the disagreement is framed in constitutional terms." *Id.* at 485–86.

Just a year after *Valley Forge*, however, a panel of this Court upheld the standing of the two plaintiffs in *Rabun*, who sued to remove a large Latin cross from a state park in Georgia. The panel acknowledged *Valley Forge*'s holding that "psychological" injury doesn't give rise to Article III standing in an Establishment Clause case. 698 F.2d at 1106. Even so, the panel concluded that the *Rabun* plaintiffs had sufficiently alleged an injury-in-fact *both* (1) by testifying that they were unwilling to camp in the state park so long as the cross stood there *and*, separately, (2) "by the evidence of the physical and metaphysical impact of the cross." *Id.* at 1108. Thus, we said, the plaintiffs there suffered injury because they were required *either* (1) to relocate to other camping areas *or*—again, separately— (2) "to have their right to use [the state park] conditioned upon the acceptance of unwanted symbolism," the latter of which the panel described as a form of "spiritual harm." *Id. Rabun* makes clear, therefore, that at least in this Circuit, it is enough for an Establishment Clause plaintiff to allege that he has suffered "metaphysical" or "spiritual" harm as a result

of observing religious conduct or imagery with which he disagrees.[2]

Can it really be that, as *Valley Forge* clearly holds, "psychological" harm is *not* sufficient to establish Article III injury in an Establishment Clause case, and yet somehow, as *Rabun* says, "metaphysical" and "spiritual" harm *are*? And can it really be that I—as a judge trained in the law rather than, say, neurology, philosophy, or theology—am charged with distinguishing between "psychological" injury, on the one hand, and "metaphysical" and "spiritual" injury, on the other? Come on. It seems clear to me that *Rabun* was wrong the day it was decided— utterly irreconcilable with the Supreme Court's then-hot-off-the-presses decision in *Valley Forge*.

And to make matters worse, *Rabun* has only gotten more wrong as time has passed. Since 1983, the Supreme Court has consistently tightened standing requirements—emphasizing, for instance, that the "irreducible constitutional minimum" comprises three distinct elements, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992), that the "[f]irst and foremost" of those elements is injury-in-fact, *Steel Co.* v. *Citizens for Better Environment*, 523 U.S. 83, 103 (1998), and perhaps most significantly for present purposes, that an actionable injury must be not only "particularized"

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[2] In *Glassroth* v. *Moore*, we held that two plaintiffs who "altered their behavior" to avoid a large Ten Commandments monument in the rotunda of the Alabama Supreme Court had suffered and continued to suffer "injuries in fact sufficient for standing purposes." 335 F.3d 1282, 1292 (11th Cir. 2003). Having done so, we excused ourselves from deciding whether another plaintiff, "who ha[d] not altered his behavior as a result of the monument," had standing. *Id*. at 1293.

in the sense that affects the plaintiff in an individual way, but also "concrete" in the sense that it "actually exist[s]" and is "real" rather than "abstract," *Spokeo, Inc.* v. *Robbins*, 136 S. Ct. 1540, 1548 (2016). Notably, along the way—and again, in cases since *Rabun* was decided—the Court has expressly rejected "stigma[]," *Allen* v. *Wright*, 468 U.S. 737, 754–55 (1984), "conscientious objection," *Diamond* v. *Charles*, 476 U.S. 54, 67 (1986), and "fear," *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 417–18 (2013), as judicially cognizable injuries.

To be clear, the question whether Article III's standing requirement is satisfied by the sort of squishy "psychological" injury that carried the day in *Rabun*—and via *Rabun*, here—is no mere academic issue. Rather, it touches on fundamental constitutional postulates. "The law of Article III standing," the Supreme Court recently reiterated, "is built on separation-of-powers principles [and] serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U.S. at 408. In particular, the Court has emphasized that standing questions "must be answered by reference to the Art[icle] III notion that federal courts may exercise power only 'in the last resort, and as a necessity.'" *Allen*, 468 U.S. at 752 (quoting *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U.S. 339, 345 (1892)). In the same vein, with respect to concreteness—the aspect of the injury-in-fact requirement principally at issue here—the Court has underscored that when, as in this case, "a court is asked to undertake constitutional adjudication, the most important and delicate of its responsibilities, the requirement of concrete injury … serves the function of insuring that such adjudication does not take place unnecessarily."

Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974). By contrast, "[t]o permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Id*. at 222.

In short, standing rules *matter*—and the sweeping standing rule that *Rabun* embodies threatens the structural principles that underlie Article III's case-or-controversy requirement. We should take this case en banc in order to bring our own Establishment Clause standing precedent into line with the Supreme Court's and to clarify that "offen[se]," "affront[]," and "exclu[sion]" do not alone satisfy the injury-in-fact requirement.

II

I agree with the Court that *Rabun* controls the merits here, as well. The factual similarities between the two cases are indeed (as the Court says, *see* Maj. Op. at 9) "striking"—both involve 30-some-odd-foot illuminated Latin crosses that reside in public parks, that were dedicated at Easter sunrise services, and that are (or were, as the case may be) maintained by the government. Applying the since-much-maligned three-part test minted in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)—and indeed, doing so by agreement of the parties[3]—the panel in *Rabun* required removal of

[3] *See Rabun*, 698 F.2d at 1109 ("[B]oth parties agree that the district court applied the correct legal standard ….").

the cross in that case, and it seems to me that an honest reading of *Rabun* requires the same here.

But once again—this time for different reasons—*Rabun* is wrong. It simply can't be squared with the Supreme Court's intervening Establishment Clause precedent. The clearest evidence of that inconsistency is the concluding paragraph of the *Rabun* opinion. The panel there acknowledged that the cross at issue had stood "[f]or many years" but nonetheless held—quoting a now-nearly-50-year-old decision—that "'historical acceptance without more' does not provide a rational basis for ignoring the command of the Establishment Clause that a state 'pursue a course of "neutrality" toward religion.'" 698 F.2d at 1111 (quoting *Comm. for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 792–93 (1973)).

Whereas the *Rabun* Court thereby effectively dismissed history as a reliable guide for Establishment Clause cases, the Supreme Court has since made clear that history plays a crucial—and in some cases decisive—role in Establishment Clause analysis. Initially, in *Van Orden* v. *Perry*, a four-justice plurality considering a challenge to a Ten Commandments monument on the Texas state capitol grounds concluded that "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence"—again, a generation earlier the *Rabun* Court had applied *Lemon* essentially by default, as the only game in town—it was "not useful in dealing with the sort of passive monument that Texas ha[d] erected on its Capitol grounds." 545 U.S. 677, 686 (2005) (plurality). Instead, the plurality explained, the proper analysis should be "driven both by the nature of the monument *and by our Nation's*

history." *Id.* (emphasis added). With respect to the latter half of that conjunction, the plurality emphasized the Court's earlier holding that "'[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.'" *Id.* (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984)). That "history," the plurality concluded, comfortably encompassed the Ten Commandments monument at issue. *See id.* at 691–92.

Even more pertinent for our purposes is the Supreme Court's recent decision in *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811 (2014). There, in an opinion by Justice Kennedy, the Court held that a city council's practice of beginning its meetings with a sectarian Christian prayer didn't violate the Establishment Clause. Notably, in so holding, the Court never so much as mentioned *Lemon*. Instead, the Court relied on its earlier decision in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), which had upheld a state legislature's practice of opening its sessions with a prayer delivered by a state-funded chaplain. Given legislative prayer's unique historical pedigree—"the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment," 134 S. Ct. at 1819—the *Greece* Court found that the challenge to the city council's practice necessarily failed: "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.*

Importantly for present purposes, the Court in *Greece* squarely rejected the suggestion—which nonetheless seems to persist in many quarters[4]—that *Marsh* "'carv[ed] out an exception'" to the usual Establishment Clause standards. *Id*. at 1818 (quoting *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting)). *Marsh*, the *Greece* Court clarified, "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id*. at 1819. Rather, the Court stressed—using broad terms that apply every bit as clearly here as they did there—*Marsh* stands for the proposition that "the Establishment Clause *must be interpreted 'by reference to historical practices and understandings*.'" *Id*. (quoting *Cty. of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)) (emphasis added).

As his self-citations indicate—and as all here seem to agree[5]—Justice Kennedy used as the blueprint for his majority opinion in *Greece* his earlier separate opinion in *Allegheny*. Notably, that opinion—which had nothing to do with legislative prayer but rather, like this case, addressed the constitutionality of a religious display—similarly emphasized the centrality of history to any legitimate Establishment Clause analysis. "*Marsh*," Justice Kennedy said there—previewing what he would later write for the full Court in *Greece*—"stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause,

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[4] *See* Oral Arg. Tr. at 14:13 *et seq*.
[5] *See* Oral Arg. Tr. at 15:12 *et seq*.

but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings." *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part). Any valid Establishment Clause standard, he emphasized, "must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Id.* By contrast, he warned, any "test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause." *Id.*

So in the light of the Supreme Court's most recent decisions, how exactly, should the Bayview Park cross's constitutionality be determined? What Establishment Clause analysis applies? Frankly, it's hard to say. The Court's Establishment Clause jurisprudence is, to use a technical legal term of art, a hot mess. *Lemon* came[6] and went,[7] and then came again[8]—and now seems, perhaps, to have gone again.[9] The Court flirted with an "endorsement" standard for a while,[10] but it too appears to have fallen out of favor. The "coercion" test may still be a going concern, although it's not quite clear when it applies, and there

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[6] *See Lemon*, 403 U.S. 602.
[7] *See Van Orden*, 545 U.S. 677 (plurality opinion) (declining to apply *Lemon*).
[8] *See McCreary Cty., Ky.* v. *American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (applying *Lemon*).
[9] *See Greece*, 134 S. Ct. 1811 (never mentioning *Lemon*).
[10] *See Edwards* v. *Aguillard*, 482 U.S. 578, 593 (1987); *Wallace* v. *Jaffree*, 472 U.S. 38, 59–60 (1985); *Lynch* v. *Donnelly*, 465 U.S. 668, 687 (1984).

seem to be competing versions of it, in any event.[11] And then, of course, *Van Orden* and *Greece* have clarified that history and tradition play central roles in Establishment Clause analysis.

Given the inconsistency—er, uncertainty—in the Supreme Court's own Establishment Clause precedent, I would leave it to the en banc Court to chart the next move for this Circuit. The one thing of which I'm pretty certain is that *Rabun*—which is what requires the three of us to affirm here—is wrong. It's hard to imagine an Establishment Clause analysis more squarely at odds with *Rabun*'s than the one that Justice Kennedy inaugurated in *Allegheny* and then cemented in *Greece*. *Rabun*'s concluding paragraph all but says that a practice's "historical acceptance" has no real bearing on its Establishment Clause footing. 698 F.2d at 1111. In stark contrast, *Greece*—which uses the terms "history" and "tradition" more than 30 times—stresses that a practice's historical acceptance is paramount. Indeed, *Greece* states an unequivocal, exceptionless rule—which, it warrants repeating, has its roots in a case (like this one) about a religious display: "[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" 134 S. Ct. at 1819 (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part)).

How and to what extent, then, do "historical practices and understandings" bear on this case?

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[11] *Compare, e.g.*, *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992) (finding psychological coercion sufficient to demonstrate Establishment Clause violation), *with, e.g.*, *Greece*, 134 S. Ct. at 1838 (Thomas, J., concurring in part and concurring in the judgment) (requiring "actual legal coercion").

Pretty clearly and strongly, it seems to me. There is, put simply, lots of history underlying the practice of placing and maintaining crosses on public land—that practice, in *Greece*'s words, comfortably "fits within the tradition long followed" in this country. *Id.*

Though not (exactly) first in time chronologically, an interesting place to begin what is necessarily an abbreviated historical survey is with the "Father Millet Cross," which currently stands in Fort Niagara State Park in upstate New York. The current cross was erected in the 1920s on what was originally federal land. Notably, though, it was put there to replace a wooden cross that had been placed in the same spot by a Jesuit priest—Father Pierre Millet—in 1688, when the territory was under French control. Father Millet was part of a rescue party that had managed to save the remnant of a frontier detachment ravaged by cold, disease, and starvation. On April 16, 1688—Good Friday—Father Millet celebrated Mass and built a wooden cross, which he dedicated to God's mercy for the survivors.

In 1925, President Calvin Coolidge set aside a 320-square-foot section of Fort Niagara Military Reservation "for the erection of another cross commemorative of the cross erected and blessed by Father Millet[]." The following year, the New York State Knights of Columbus dedicated the commemorative cross "not only to Father Millet, but to those other priests whose heroism took Christianity into the wilderness …." The cross bears the inscription "REGN. VINC. IMP. CHRS.," an abbreviation of *Regnat*, *Vincit*, *Imperat*, *Christus*—*i.e.*, Christ reigns, conquers, and commands. The Father Millet Cross was originally designated as a national monument and

administered by the federal government; ownership was transferred to the State of New York in 1949.[12]

To be sure, the Father Millet Cross was originally constructed on land that the United States didn't control (at least definitively) until after the War of 1812. But its history shows that the erection of crosses as memorials is a practice that dates back centuries, and that for a long time now, we—we Americans, I mean— have been commemorating the role that religion has played in our history through the placement and maintenance of cross monuments.

In fact, President Coolidge's proclamation was part of a tradition—in this country specifically—that stretches back much farther. Just a few examples:

- *San Buenaventura Mission Cross* (Grant Park, Ventura, California)—In 1782, Spanish missionary Father Junipero Serra placed a large wooden cross on a hilltop overlooking his recently established mission church. The original cross was replaced in the 1860s and then again in 1912, and then once again in 1941.

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[12] *See* Bob Janiskee, Pruning the Parks: Father Millet Cross National Monument, 1925-1949,
Was the Smallest National Monument Ever Established,
https://www.nationalparkstraveler.org/2009/09/pruning-parks-father-millet-cross-nationalmonument-1925-1949-was-smallest-national-monument-ever-es4482 (last updated Sept. 4, 2009); Thor Borresen, Father Millet Cross: America's Smallest National Monument,
https://www.nps.gov/parkhistory/online_books/regional_review/vol3-1e.htm (last visited Sept. 3, 2018).

The land on which the cross now stands was designated a city park in 1918.[13]

- *Cross Mountain Cross* (Cross Mountain Park, Fredericksburg, Texas)—In 1847, the first settlers of what is now Fredericksburg discovered a timber cross on a hilltop. A cross has remained there ever since; the original was replaced with a permanent lighted version in 1946, and today resides in the city-maintained Cross Mountain Park.[14]

- *Chapel of the Centurion* (Fort Monroe, Hampton, Virginia)—Since 1858, a cross has perched atop the Chapel of the Centurion at Fort Monroe, which is named for Cornelius, the Roman centurion who was converted to Christianity by St. Peter—and which, until it was decommissioned in 2011, was the United States Army's oldest wooden structure in continuous use for religious services.[15]

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[13] *See* Serra Cross Park at Grant Park, Ventura, California: History of the Cross, http://www.serracrosspark.com/history.html (last visited Sept. 3, 2018). Under threat of litigation, the plot of land surrounding the cross itself was transferred to a private entity in 2003. *Id*.

[14] *See* The City of Fredericksburg, Texas: Cross Mountain Park, https://www.fbgtx.org/415/Cross-Mountain-Park (last visited Sept. 3, 2018).

[15] *See* Chapel of the Centurion: History of the Chapel of the Centurion, http://www.chapelofthecenturion.org/history.php (last visited Sept. 3, 2018).

- *Irish Brigade Monument* (Gettysburg National Military Park, Gettysburg, Pennsylvania)—Erected in 1888 to honor soldiers from three New York regiments who fought and died at Gettysburg, the monument is a 19-foot Celtic cross. At the cross's dedication, Father William Corby held a Mass for the assembled veterans and blessed the monument.[16]

- *Jeannette Monument* (United States Naval Academy, Annapolis, Maryland)—Erected in 1890, the largest monument in the Naval Academy Cemetery, is a Latin cross dedicated to sailors who died while exploring the Arctic in 1881.[17]

- *Horse Fountain Cross* (Lancaster, Pennsylvania)—This six-foot marble cross was erected in 1898 and is maintained by the City of Lancaster. It bears the inscription "Ho! Everyone That Thirsteth" and sits atop a granite base with a small fluted basin designed to allow horses to drink from it.[18]

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[16] *See* The Battle of Gettysburg: Irish Brigade Monument at Gettysburg, http://gettysburg.stonesentinels.com/union-monuments/new-york/new-york-infantry/irishbrigade/ (last visited Sept. 3, 2018).

[17] *See* United States Naval Academy: Cemetery and Columbarium, https://www.usna.edu/Cemetery/History_and_Memory/First_Monuments.php (last visited Sept. 3, 2018).

[18] *See* Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys.: Ho! Everyone That Thirsteth, https://siris-artinventories.si.edu/ipac20/ipac.jsp?session=P5C5741562R94.5247&profile=ariall&source=~!siartinventories&view=subscriptionsummary&uri=full=3100001~!3439

- *Father Serra Cross* (Monterey, California)—This 11-foot granite Celtic cross was donated to the City of Monterey in 1905 and installed on public land in 1908. The cross features a portrait of Father Junipero Serra and an image of his Carmel Mission.[19]

- *Wayside Cross* (New Canaan, Connecticut)—This large Celtic cross sits at the intersection of Main and Park Streets on New Canaan's historic green. Erected in 1923 as a war memorial, it bears the following inscription: "Dedicated to the glory of Almighty God in memory of the New Canaan men and women who, by their unselfish patriotism, have advanced the American ideals of liberty and the brotherhood of man."[20]

I could go on, but the point is clear enough. We've been doing this— erecting and maintain crosses on public land—for a long time now, and cross monuments and memorials are ubiquitous in and around this country.

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70~!415&ri=7&aspect=Browse&menu=search&ipp=20&spp=20&staffonly=&term=Emblem+--+Cross&index=SUBJX&uindex=&aspect=Browse&menu=search&ri=7 (last visited Sept. 3, 2018).

[19] See Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys.: Serra Landing, https://siris-artinventories.si.edu/ipac20/ipac.jsp?uri=full=3100001~!341717!0 (last visited Sept. 3, 2018).

[20] See Wayside Cross, New Canaan, CTMonuments.net, http://ctmonuments.net/2011/07/wayside-cross-new-canaan/ (last updated July 8, 2011).

So where does all that leave us? As I've already confessed, I don't pretend to know—as I'm sitting here—exactly how the questions surrounding the constitutionality of the Bayview Park cross should be analyzed or resolved. Here, though, is what I do know:

1. That the Supreme Court's Establishment Clause jurisprudence is a wreck;

2. That as a lower court, we are nonetheless obliged to do our best to discern and apply it;

3. That in the last decade, the Supreme Court has increasingly emphasized the centrality of history and tradition to proper Establishment Clause analysis, culminating in its statement in *Greece* that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" 134 S. Ct. at 1819 (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part));

4. That there is a robust history—dating back more than a century, to before the time of the adoption of the Fourteenth Amendment, by which the First Amendment would eventually be applied to state and local governments—of cities, states, and even the federal government erecting and maintaining cross monuments on public land; and

5. That our now-35-year-old decision in *Rabun*—which invalidated a cross situated in a state park and, in so doing, summarily dismissed "historical acceptance" as a reliable guide for

> Establishment Clause cases—is irreconcilable with intervening Supreme Court precedent.

This case presents important questions—both for the future of Pensacola's Bayview Park cross and for the future of Establishment Clause jurisprudence in this Circuit. Those questions demand the full Court's undivided attention. I urge the Court to take this case en banc so that we can take a first step toward an Establishment Clause analysis that is not only more rational, but also more consistent with prevailing Supreme Court precedent.

III

Our 35-year-old decision in *Rabun* controls this case and requires that we affirm the district court's decision. But in the intervening years it has become (even more) clear that *Rabun* was wrongly decided—with respect to both standing and the merits. Because *Rabun* is doubly wrong, it doubly demands en banc reconsideration.

ROYAL, District Judge, concurring in the judgment:

Part I: INTRODUCTION

Good law—*stare decisis*—sometimes leads good judges to follow bad law and write the wrong order. That happened in this case. Briefly, the district court's order relied on *American Civil Liberties Union of Georgia* v. *Rabun County Chamber of Commerce, Inc.,*[1] a case that was wrongly decided, and even if it was not wrongly decided in 1983, it has been eclipsed by recent

[1] 698 F.2d 1098 (11th Cir. 1983).

Supreme Court cases that reflect a growing interest in history and historical practices. There is no injury, no harm, and no standing to support jurisdiction in this case, but there is an Eleventh Circuit rule that directs us to affirm the district court based on this flawed precedent.

Rabun County needs to be reversed, and this Court needs to devise a practical standing analysis. I believe that recent Supreme Court cases show us that way. Furthermore, I believe that the coercion test should apply to passive monuments, memorials, and displays, like the Bayview cross, and in this opinion, I explain why that test should control.

I have organized the opinion and approached the issues in the case, in part, based on the history of religious oppression. Historians know this record well; but, regrettably, most judges know little about it, and it is important.[2] So Part II of the opinion offers a brief history of establishment evils and disestablishment remedies, and it is divided into three sections. The first section outlines four religious establishments: the first one from the Roman Empire, The Edict of Thessalonica, and then one from the Medieval Age—the Catholic Church and its rule for centuries over millions of Europeans. The third begins in early modern England: King Henry VIII's Anglican Church with its *Book of Common Prayer, Thirty-Nine Articles*, and its ecclesiastical government and courts. The fourth church establishment is the Congregationalist Church in early New England.

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[2] I include myself in the ignorant judge category, but some deep study can fill the gap.

The second history section describes the ideas of early American thinkers and leaders on religious establishments, the importance of religion, and how they understood religious oppression and the solutions they proposed. The phrase "early America" covers the colonial period, the revolutionary period, and the first decades of the young republic. This second section is also important because it describes religious oppression and all its evils. I let these leaders of religion, law, and government speak for themselves so you can hear their anger, disgust, fear, dread, despair, and misery.

The third history section offers examples of colonial and state charters and constitutions that dealt with establishment issues in early America. In part, this section describes the injuries minority believers suffered for their religious beliefs and how colonial governments made religion more oppressive or devised ways to end that oppression.

I do not think we can understand the origins of the Establishment Clause without understanding what the founders identified as oppressive, the arguments they used against oppression, and how they tried to end it. So, as you read the history, pay attention to the word conscience and the array of phrases that use words like "liberty of conscience," "freedom of conscience," "the dictates of conscience," "rights of conscience," and the "free exercise of religion according to the dictates of conscience." But be careful not to apply a 21st century therapeutic culture understanding of the word. "Conscience" is not describing someone's feelings. You cannot substitute the contemporary concept of psyche for the 18th century idea of conscience.

For early American believers, the religious conscience never stood alone and apart from action. In other words, oppression meant making them do something they did not want to do or not letting them do something they believed that God had called them to do according to their consciences. For example, citizens were forced to pay tithes to a church whose theology and practices they hated or at times were prohibited from preaching because they were not approved by the established church. But there are other reasons to listen to the founders.

Without letting the founders speak, without hearing their words and reading their papers, I think it is hard for us living in our post-modern, highly secular society to understand the religiosity of early Americans and the often tyrannical adversity that beat down religious minorities like the Baptists and the Quakers. Yet, Alexis de Tocqueville understood and described this religiosity well. In his *Democracy in America*, written in the 1830s after he had spent several years traveling around the country, he said: "It was religion that gave birth to the Anglo-American societies. This must always be borne in mind. Hence religion in the United States is inextricably intertwined with all the national habits and all the feeling to which the fatherland gives rise."[3] And, as he goes on to explain, "Christianity has therefore retained a powerful hold on the American mind, and—this is the point I particularly want to emphasize—it reigns not simply as a philosophy that one adopts upon examination but as a religion in which one believes

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[3] ALEXIS DE TOCQUEVILLE: DEMOCRACY IN AMERICA 486 (Arthur Goldhammer trans., Library of America 2004).

without discussion."[4] Indeed, "Christianity itself is an established and irresistible fact, which no one seeks to attack or defend."[5]

The study of early American history teaches that Christianity was central to that history. Parenthetically then, a cross is not just a symbol of Christianity; it symbolizes America's past—a past perhaps forgotten, neglected, ignored, or even despised, but nonetheless undeniable.

Part III of the opinion wrestles with the case law on the standing issues. I agree with Judge Newsom that the Establishment Clause jurisprudence is a "hot mess," but I think of it more like a wilderness with misdirecting sign posts and tortuous paths. The bad signposts and twisted paths are the various Establishment Clause tests: separation, accommodation, history, neutrality, *Lemon*, endorsement, and coercion, all used at one time or another, in one case and then not in another. Next is the bog of concurring and dissenting opinions, and the opinions that concur in the judgment only, that leave you with the sense that you are walking on unsettled earth. Moreover, it is difficult to get out of a wilderness when all you look at is what is immediately in front of you and do not understand the patterns and directions of the past.

In this part of the opinion, I restate some of Judge Newsom's argument for continuity. I do, however, propose a way out of the wilderness. It is simple, like Ariadne's thread out of the labyrinth. As such, I limit this approach to cases involving passive monuments,

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[4] *Id*. at 486.
[5] *Id*.

memorials, and displays under Establishment Clause scrutiny like the cross in Pensacola and the cross on Black Rock Mountain in Rabun County, Georgia. My approach is simple: just don't deal with it at all because in both *Pensacola* and *Rabun County* no injury, no coercion, no oppression, and no stigmatization occurred, so Plaintiffs have no standing and no claim.

As part of the legal analysis, I also describe how the laches concept supports the coercion analysis. This cross has stood quietly in the park for seventy-five years with only one complaint[6] until this lawsuit was filed, and thousands of people have enjoyed the park for decades. The laches concept is based in recent Supreme Court cases and leaves questions like crosses to local government without invoking the federal judiciary's power. The laches concept works with the standing analysis to give district courts a workable guide to deal with passive monuments in cases where no harm has occurred. There is no case where there is no harm; history tells us what harm is, and it also tells us that no plaintiff suffered harm in this case and especially not in *Rabun County*.

On the other hand, district court judges should not be placed in the position of deciding an Establishment Clause case based on a "math problem"—count the monuments on public property to see if there are

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[6] William Caplinger's affidavit is in the record. He made a complaint to the Pensacola Director of Leisure Services. The affidavit said that the cross made him feel uncomfortable. Pl.'s Reply in Support of Motion for Summary Judgment, Doc. 39, Ex. 2. p. 36-7.

enough.[7] Likewise, they should not be placed in the position of deciding these cases based on a "geography question"—see where the monuments are on public property. If I find the crèche in one place, it is okay; but if I find it in another place, it violates the Constitution. [8] There are over 170 memorials in Pensacola parks, but only one other in Bayview Park. So the math answer and the geography answer required the finding that the City of Pensacola violated the Constitution. This kind of constitutional casuistry is folly. But this is where courts end up when separation, not establishment/disestablishment, becomes the touchstone of the analysis. (More on this later.) And I begin with some history.

Part II: A SHORT HISTORY OF RELIGIOUS ESTABLISHMENTS

In some recent Supreme Court Establishment Clause cases, the Court has used history as a guide for

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[7] *Van Orden* v. *Perry,* 545 U.S. 677, 681, 691–92 (2005) (finding "[t]he 22 acres surrounding the Texas State Capitol contain 17 monuments and 21 historical markers commemorating the 'people, ideals, and events that compose Texan identity,'" and that "[t]he inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government," which did not violate the Establishment Clause).

[8] *Cty. of Allegheny* v. *Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 599– 600, 109 S. Ct. 3086, 3104 (1989), *abrogated by Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811 (2014) ("Thus, by permitting the display of the crèche in this particular physical setting, the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message.") (internal citations and quotations omitted).

deciding the issues.[9] That history, however, is generally limited to the specific activity, practice, monument, or display in dispute. But the broader history of religious establishments teaches what the founders understood about the oppression that religious establishments imposed and, therefore, their reasons for enacting the First Amendment. There is considerable scholarly work on religious persecution and the strife it provoked in Britain that caused early Americans to flee their homeland to find religious freedom in the New World.

The founding of the Massachusetts Bay Colony in 1630 is a well-known example of this kind of religious migration. In fact, approximately twenty thousand Puritans settled in New England between 1630 and 1640.[10] They were religious refugees. There is also much history describing religious persecution in early America, and it helps to understand this history. So I begin with four examples of religious establishments. Most of the founders were well-educated men, and some of them trained at Cambridge, Oxford, Harvard, Yale, or Princeton. They would have known this history and even lived through some of it.

1. Four Religious Establishments

First, in 380 A.D., by the Edict of Thessalonica, Roman Emperor Theodosius I established the Nicene Creed form of Christianity as the official religion of the

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[9] *Salazar* v. *Buono*, 559 U.S. 700, 716 (2010); *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014).

[10] R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD 143 (Alford A. Knopf, Inc., 3d ed. 1967) (1950).

Roman Empire.[11] The Edict affirms and commands a Trinitarian statement of Christianity and was designed, in part, to end the Arian heresy taught by the Arian bishops whose influence was widespread in the Empire. They attacked the Trinitarian understanding of the deity of Christ. More importantly, the Edict imposed punishments.

It proclaims that those who do not subscribe to the Trinitarian theology are

> Judge[d] to be mad and raving and worthy of incurring the disgrace of heretical teaching, nor are their assemblies to receive the names of churches. They are to be punished not only by Divine retribution but also by our own measures, which we have decided in accordance with Divine inspiration.[12]

Here, in the space of two paragraphs, we find the key elements of religious oppression and establishment tyranny.

The emperor, the sovereign, passed a law imposing religious beliefs for all peoples within the empire. Some were happy with the Edict because they already believed what it required. Others recognized that it condemned them, their beliefs, and what they taught. The law was coercive and oppressive and empire-wide, and it stigmatized all unbelievers by calling them madmen and heretics. It threatened them with harm and prohibited them from teaching and practicing

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[11] CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES 6-7 (Sidney Z. Ehler & John B. Morrall eds., Biblo & Tannen Publishers, 1967). Emperors Gratian and Valentinian II also endorsed the edict.
[12] *Id.* at 7.

their version of Christianity, or whatever was their religion, in a way that contradicted the established theology. This Edict shows the common pattern of religious oppression.

The second establishment is the Roman Catholic Church that held sway for centuries across most of Europe until the time of the Reformation. The Catholic Church exerted great power over the lives of most Europeans, and in the century before the Protestant Reformation began, many Europeans resented the birth to death sacraments, the Mass, the religious taxes, the decadent ecclesiastical hierarchy, and the canon law.

But when the Protestant revolt began against Catholic control, Europe erupted into one of the most destructive conflagrations the West has ever known. A good example of this control is well-known. Henry VIII wanted to divorce Catherine of Aragon, and the Pope said no, primarily for political reasons. This shows the Pope's power: the King of England had to ask the Pope for permission to divorce his wife. (She had not produced a male heir.) And because the Pope said no, Henry established the Anglican Church to replace the Catholic Church in England. The Anglican Church is the third establishment.

England's struggle with Catholic enemies like France and Spain from the outside and the problems with the enemies of the new Anglican Church, the Dissenters, on the inside, compounded by the strife between English Catholics and English Protestants, controlled much of British history for two hundred years. Indeed, it spun British society out of control.

For example, in 1543, at King Henry's direction, Parliament passed the Act of Supremacy that declared him to be the supreme head of the Anglican Church and its clergy. As part of the Act, all subjects had to swear allegiance to King Henry as their religious leader and thereby required them to reject the Pope. You no doubt know the story of Sir Thomas More who refused to take the oath and was beheaded. Henry also seized all the properties of the Catholic Church in England and gave the land to his friends. And in 1536, he suppressed a Catholic rebellion.[13]

For the next 200 years, religious persecution continued in England. Shortly after King Henry died, his daughter Mary, the daughter of Catherine of Aragon, took the throne. She tried to re-Catholicize England and earned the name Bloody Mary because of all the Protestants she put to death. But it was not just Catholic versus Protestant strife and hatred. There was also the problem of the Anglicans versus the Dissenters and the Separatists, which included the Puritans, the Congregationalists, and the Presbyterians, all of whom had some theological ties and most of whom objected to or despised the Anglican Church. The Puritans wanted to purify the Church of England from its Catholic tendencies, and that is how they got their name.

I have given a brief overview of a complex history of England and the Anglican Church, the Catholic Church, and the Dissenters. As Pulitzer Prize winning historian T. Harry Williams explained: "These events of seventeenth-century England form an essential part

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[13] R.R. PALMER & JOEL COLTON, *supra*, note 10, at 77-78.

of American history. They help to explain the causes and course of English colonization."[14] Armed with this summary, it is now easy to understand how old religious oppressions haunted the New World. So the fourth establishment I describe is the Congregationalist Church in New England.

A group of Puritans founded the Massachusetts Bay Colony in 1630, and they established a Congregationalist style of church government and followed many of John Calvin's teachings. They desired a purer Christian church than the Anglican Church that they had left in England. They strived for purity among their church members, and while they required everyone in the colony to go to their parish churches each Sunday, only the true believers could participate in government.[15] But it was not enough to attend church; everyone had to support the Congregationalist church.

In 1692, the colonial government enacted a tax that required all citizens to support the local Congregationalist church and its minister.[16] As a result, this law forced conscientious dissenters to support the Congregationalist church when they wanted to support their own church, the Baptists for example.[17] And, as it happened with the Anglican

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[14] T. HARRY WILLIAMS ET AL., A HISTORY OF THE UNITED STATES (TO 1877) 29 (Alford A. Knopf, Inc., 2d ed. rev. 1966) (1959).
[15] DIARMAID MACCULLOCH, THE REFORMATION A HISTORY 538 (Penguin Books 2005).
[16] John D. Cushing, *Notes on Disestablishment in Massachusetts, 1780-1833*, Vol. 26, No. 2, THE WILLIAM AND MARY QUARTERLY, 169, 169-90 (Apr. 1969).
[17] *Id*. at 171.

Church in England, dissenters arose in Massachusetts, and the Congregationalists applied harsh measures against the "Separates."

For example, in 1635 Anne Hutchinson criticized the framework of Puritan piety. After two years of listening to her preaching and complaining, the Congregationalists banished her from the colony, and she moved to Rhode Island.[18] The Congregationalists also treated the Quakers harshly. The Quakers moved to Massachusetts to escape persecution in England and began proclaiming a very different Christian message from the Puritan teaching. In response to the perceived threat to their churches and their colony, the Congregationalists publicly flogged some Quakers and cropped their ears. Four of them were hanged because of their missionary activity, including a woman—Mary Dryer. And as late as 1784, John Murray, a Universalist minister, was fined fifty pounds for performing an illegal marriage ceremony. It was illegal because he was not an ordained minister according to Congregationalist requirements.[19] He fled to England to avoid being fined for all the marriages he had performed.

Connecticut was another Congregationalist colony that imposed various forms of oppression. Like Massachusetts, Connecticut required its citizens to support the parish churches. In 1745, in Norwich, Connecticut, thirty dissenters refused to pay the tax. One of them was Isaac Backus, whom I will discuss below. They had "separated" and set up their own church and elected their own pastor. Many were

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[18] MACCULLOCH, *supra*, note 15, at 539.
[19] Cushing, *supra*, note 16, at 173-74.

imprisoned in the Norwich Goale, including Isaac Backus's brother for twenty days and his mother for thirteen days.[20] Isaac Backus became one of the most influential religious leaders in 18th century America.

Religious oppression in New England and in Virginia was well-known to the founders, as was the history of persecution in England. The next section describes some of their ideas about oppression and church establishments.

2. Commentators, Founders, and Leaders in Early America and One English Philosopher

Justice Joseph Story (1779-1845)

I begin this second history section with Justice Joseph Story's *Commentaries on the Constitution* because his three-volume work helps introduce church-state relationships in early America. Story served on the Supreme Court from 1812 to 1832 and published his *Commentaries* in 1833. He was a great legal scholar. His commentaries on the Constitution offer a valuable history about the early American understanding of the relationship between government, law, and the Christian religion, including the limitations on that relationship, and about the importance of religion in general in early America.

As Story explains about the colonial period,

> every American colony, from its foundation down to the revolution, with the exception of Rhode Island, (if, indeed, that state be an

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[20] THE GREAT AWAKENING, DOCUMENTS ON THE REVIVAL OF RELIGION, 1740-1745, 105-06 (Richard L. Bushman ed., University of North Carolina Press 1989) (1970).

> exception,) did openly, by the whole course of its laws and institutions, support and sustain, in some form, the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the states down to the present period, without the slightest suspicion, that it was against the principles of public law, or republican liberty.[21]

This is consistent with how Alexis de Tocqueville described America in the 1830s and the importance of Christianity. No doubt Story is speaking generally, but he is describing the prevailing ideas of the day.

Story goes on to explain the sentiments of the times about religion and government.

> Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.[22]

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[21] THE FOUNDERS' CONSTITUTION 108 (Philip B. Kurland & Ralph Lerner eds., vol. 5, Indianapolis: Liberty Fund, 2001).
[22] *Id.* at 109.

One of the main reasons for the idea that government and religion should work together was because in that era many people believed that good religion was necessary for good morals and that good morals were necessary for a stable and prosperous society.[23]

But they also understood that a line had to be drawn and a limit imposed on the church/state relationship. People had to be secure in their faith from harms or limits on their freedom of religious conscience and their freedom to worship. It was not simply a matter of a free state of mind; it was also about actions: Believers could not be forced to do what their religion rejected nor prohibited from doing what it required. As Story explains:

> But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner, which, they believe, their accountability to him requires. It has been truly said, that 'religion, or the duty we owe to our Creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence.'[24]

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[23] A good example of this belief comes from John Locke in "An Essay on Toleration" wherein he says: "I must only remark * * * that the belief of a deity is not to be reckoned amongst purely speculative opinions, for it being the foundation of all morality, and that which influences the whole life and actions of men, without which a man is to be considered no other than one of the most dangerous sorts of wild beasts, and so incapable of all society." LOCKE: POLITICAL ESSAYS 137 (Mark Goldie ed. Cambridge University Press 2006) (1997).

[24] Kurland & Lerner, *supra*, note 21, at 109.

And those were the problems: the churches' use of force and violence to suppress dissent and impose conformity. The founders addressed these problems in the First Amendment.

Story explains the founders' goals in enacting the First Amendment. It was not to advance other religions

> by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age.[25]

In other words, religious persecution had been a problem for almost two millennia.

He goes on to explain how this history of religious oppression affected the founders in enacting the First Amendment.

> It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic, as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject * * *. Thus, the whole power over the

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[25] *Id.*

> subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.[26]

Religious toleration, therefore, was for everyone, and the federal government could not establish a national church. This protected religious freedom in the new country. But state governments could be involved in religion, and "separation" only operated at the national level.

Now with this brief introduction from Justice Story's *Commentaries*, I will move on to what some of the important early American leaders had to say about religious establishments. One theme prevails throughout: liberty of religious conscience, meaning not being required to act against it or being denied or hindered in the right to follow it.

Reverend Jonathan Mayhew (1720-1766)

Reverend Mayhew was a Congregationalist minster in Boston who trained at Harvard and Edinburgh. He coined the phrase "No taxation without representation." [27] He and other

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[26] *Id.* at 109-110.

[27] Judge Grant Dorfman, *The Founders' Legal Case: "No Taxation Without Representation" Versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377, 1378 (2008) ("See Dr. Jonathan Mayhew, A Discourse Concerning Unlimited Submission and

Massachusetts leaders were alarmed when they learned that the Archbishop of Canterbury, Thomas Secker, had decided to send bishops to the Anglican Church in Massachusetts in the early 1760s. Despite the fact that the Congregationalists held the power in Massachusetts, it was an English colony, and as English citizens, they were required to support the Anglican Church. One of the reasons that the Anglicans had not succeeded in Massachusetts was because their churches had no bishops there. But that is not the point of quoting Mayhew. Listen to how he grieves about an Anglican Church rising to power in New England:

> When we consider the real constitution of the church of England; and how aliene her mode of worship is from the simplicity of the gospel, and the apostolic times: When we consider her enormous hierarchy ascending by various gradations from the dirt to the skies and that all of us be taxed for the support of *bishops* and their *underlyings*, can we help crying out Will they never let us rest in peace, except *where all the weary are at rest*? Is it not enough, that they persecuted us out of the old world? Will they pursue us into the new to convert us here?—

Non-resistance to the Higher Power, Sermon before the West Church in Boston (Jan. 30, 1750), as reprinted in Pulpit of the American Revolution 39, 77, 94-95 (Burt Franklin 1970) (1860) (arguing that one is bound by God to pay taxes to the King; that the Lords and Commons are representatives of the people and extensions of the King, so the people are bound by God to pay taxes to them; but when the King or his extension act above the law and infringe on the rights of the people, the people are not bound to the King, and thus no longer must pay him taxes).").

> *compassing sea and land to make US proselytes*, while they neglect the heathen and heathenness plantations! What other new world remains as a sanctuary for us from their oppressions, in case of need? Where is the Columbus who explores one for, and pilot us to it, before we are * * * deluged in a flood of episcopacy?[28]

Here Mayhew poignantly expresses the pain of religious oppression and the fear that hovers with it. He fears the coming strife and the end of peace. He also expresses his deeply held religious convictions and the threat posed by a religious establishment to those outside of and opposed to that establishment.

Reverend Isaac Backus (1724-1806)

Isaac Backus was born in Connecticut and was one of early America's greatest proponents of the freedom of conscience and separation of church and state. He was the foremost leader and spokesman for the Baptist churches in New England in the 18th century. He conferred with delegates to the First

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[28] BERNHARD KNOLLENBERG, ORIGIN OF THE AMERICAN REVOLUTION, 1759-1766, 84-85 (The Free Press, 1965), *Mayhew's Attack on Plain for Colonial Bishops, Mayhew's Observations*, 155-56. The Congregationalists were concerned about having Anglican Bishops imposed on them for several reasons, including setting up ecclesiastical courts and the expense of maintaining the bishops, which in England was exorbitant. At this time the Congregationalists outnumbered the Anglicans about 30 to one. Secker's bishop controversy had the effect of strengthening the unity of the Massachusetts churches and separating them from England. Knollenberg, 82-83, 86.

Continental Congress in 1774 in Philadelphia and served as a delegate to the Massachusetts convention that ratified the Constitution.[29]

In "An Appeal to the Public for Religious Liberty," Backus describes the punishments imposed by the Congregationalists and the suffering endured by their victims, the Baptists. In this essay Backus describes the Baptist view of freedom of conscience and their sufferings for demanding such freedoms.[30]

The Baptists' major conflict with the Congregationalists was pedobaptist worship or baptizing infants, a practice that the Baptists denied had any biblical basis. But, as explained above, the Massachusetts Congregationalists imposed a tax on all citizens to support the Congregationalist church and minister in each parish. For the Baptists, that meant supporting false teaching, which violated their liberty of conscience. It also violated their pocketbooks and limited their support for their own churches. Moreover, the penalties for failing to pay the levy were severe.

For example, William White had his cow taken because he did not pay the pedobaptist minister's rate.[31] In another town some Baptists had several hundred acres confiscated and sold at auction below value to satisfy the tax.[32] Baptists were falsely accused of crimes, imprisoned, whipped, had their

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[29] POLITICAL SERMONS OF THE AMERICAN FOUNDING, 1730-1805, 328 (Ellis Sandoz ed., vol. 1, 2d ed. Liberty Fund 1998).
[30] *Id.* at 366.
[31] *Id.* at 368.
[32] *Id.* at 350.

goods pillaged, and some were banished from the Massachusetts colony because they denied infant baptism.[33] They were also stigmatized when the government accused them of being covetous for not paying the tax. And as Backus explained, paying the levy required the Baptists to "uphold men from whom we receive no benefit, but rather abuse."[34]

At the beginning of the essay, Backus makes a plea for religious freedom, and he describes what I have mentioned several times about the freedom of conscience not being some state of mind but instead the freedom to carry out one's religious duties according to the dictates of conscience. As he explains,

> [t]he true liberty of man is, to know, obey and enjoy his Creator, and to do all the good unto, and enjoy all the happiness with and in his fellow-creatures that he is capable of; in order to which the law of love was written in his heart, which carries in its nature union and benevolence to being in general, and to each being in particular, according to its nature and excellency, and to its relation and connexion to and with the supreme Being, and ourselves.[35]

Thomas Jefferson (1743-1826)

I begin with how Jefferson described religious persecution in Virginia. It sounds familiar. The Anglican Church was the established church in the

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[33] *Id.* at 345, 354. In 1664 the court at Boston passed an act to banish people who denied infant baptism. *Id.* at 247.
[34] *Id.* at 348.
[35] *Id.* at 331.

Virginia colony, and the Old World church practiced Old World oppression in Virginia.

In his "Notes on the State of Virginia," Jefferson described an act of the Virginia Assembly of 1705 that penalized atheists, those who did not believe in the Trinity, those who were polytheists, those who denied the truths of Christianity, and those who denied the authority of Scripture. For the first offense, the offender lost the capacity to hold any office in government or be employed in any ecclesiastical, civil, or military jobs. For a second offense, the offender lost the power to sue, to take any gift or legacy, to be a guardian, executor, or administrator, and was subjected to three years imprisonment. Furthermore, a father could forfeit his right to his children. A Virginia court could take them away and "put [them], by the authority of a court, into more orthodox hands." [36] Jefferson condemned this as religious slavery.

He also condemned the way Quakers were treated when they came to Virginia. It sounds like what happened in New England:

> The poor Quakers were flying from persecution in England. They cast their eyes on these new countries as asylums of civil and religious freedom; but they found them free only for the reigning sect. [37] Several acts of the Virginia assembly of 1659, 1662, and 1693, had made it

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[36] Kurland & Lerner, *supra*, note 21, at 79.

[37] The Quakers were a Christian religious group started by George Fox that largely rejected religious formalism and looked for the inner experience of the Spirit of Christ. They came to America to flee persecution.

> penal in parents to refuse to have their children baptized; had prohibited the unlawful assembling of Quakers; had made it penal for any master of a vessel to bring a Quaker into the state; had ordered those already here, and such as should come thereafter, to be imprisoned till they should abjure the country; provided a milder punishment for their first and second return, but death for their third * * *.[38]

Jefferson despised this oppression, but he explained that the Anglicans had complete control over the colony for about 100 years. And in 1769, when he became a member of the Virginia legislature, he complained: "Our minds were circumscribed within narrow limits by an habitual belief that it was our duty to be subordinate to the mother country in all matters of government * * * and even to observe a bigoted intolerance for all religions but hers."[39] The English Anglican mindset and practices continued in Virginia. But Jefferson did not rest with this intolerance. He acted to overcome it.

In 1779, as Governor of Virginia, he drafted a bill to establish religious freedom. It summarizes some of his important ideas about freedom of conscience. He wanted to end civil and church abuses directed toward influencing or commanding certain religious beliefs by "temporal punishments or burthens, or by civil incapacitations, [which] tend only to beget

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[38] Kurland & Lerner, *supra*, note 21, at 79.

[39] THOMAS JEFFERSON, WRITINGS 5 (Merrill D. Peterson ed., The Library of America 1984).

habits of hypocrisy and meanness."[40] This is tyranny. He explains

> [t]hat the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking, as the only true and infallible, and as such, endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time: That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.[41]

He denounced church oppression and argued that citizens' civil rights should not depend on their religious opinions. His denunciation brings to light another problem in early America caused by established churches in the colonies.

Citizens with dissenting religious views were deprived of the right to hold public office unless they renounced their offensive religious opinions. Jefferson said that this denied them their civil rights. The wide-spread practice of the civil authority imposing religious views or condemning dissenting views destroys religious liberty. And in his bill on religious freedom, Jefferson sums up his attack on religious oppression in this way:

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[40] Kurland & Lerner, *supra*, note 21, at 77.
[41] *Id.* at 77.

> no man shall be compelled to frequent or support any religious Worship place of Ministry whatsoever, nor shall be enforced. Restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief, but that all men shall be free to profess, and by argument to maintain their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[42]

There was another side to Jefferson's view on religion and government that is not well-known. But first, and for context, this is what is generally known.

When Jefferson became President, unlike George Washington and later Abraham Lincoln, he refused to proclaim a day of prayer because he believed such a day violated the separation of church and state—the state being the national government. He wrote a letter to Reverend Samuel Miller in 1808 to defend his decision:

> I consider the government of the US. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the states the power not delegated to the U. S. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the

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[42] *Id.*

> general government. It must then rest with the states, as far as it can be in any human authority.[43]

Next is what is not well-known. In 1774, the British Parliament passed the Boston Port Act, and in response Jefferson followed the pattern of New England Puritans and set June 1, 1774, as a day of "fasting, humiliation & prayer, to implore heaven to avert from us the evils of civil war, to inspire us with firmness in support of our rights, and to turn the hearts of the King & parliament to moderation & justice."[44] This, of course, was Virginia action, not national government action, but nonetheless, it was religious establishment action.

More importantly, in 1776, Jefferson prepared a draft of a bill exempting dissenters from supporting the Anglican Church in Virginia. The text of the bill highlights an important part of English church history that continued in Virginia and other colonies. It required Virginians to pay taxes to support the churches. Here is what the bill said:

> Whereas it is represented by many of the Inhabitants of this Country who dissent from the Church of England as by Law established that they consider the Assessments and Contributions which they have been hitherto obliged to make towards the support and Maintenance of the said Church and its Ministry as grievous and oppressive, and an Infringement of their religious Freedom: Be it Enacted by the General Assembly of the

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[43] *Id.* at 98.

[44] Peterson, *supra*, note 39, at 8.

> Common Wealth of Virginia and it is hereby Enacted by the Authority of the same that all Dissenters of whatever Denomination from the said Church shall from and after the passing this Act be totally free and exempt from all Levies Taxes and Impositions whatever towards supporting and maintaining the said Church as it now is or may hereafter be established and its Minsters.[45]

As I have shown, taxing citizens to support the established church was common in the colonial period. It was also common to tax those who objected to the practices and beliefs of that church. So Jefferson's proposed bill dealt with a serious issue of that day and long before, and it offered relief to dissenters by excusing them from supporting a church that contradicted their religious consciences.

Here is the important part of Jefferson's bill for my purposes. His bill relieved the Virginia dissenters from having to pay the Anglican church tax, but it still required them to pay the tax for their own churches. Furthermore, his bill required Anglicans in Virginia to pay the tax to support the Anglican churches. This is a classic establishment practice. So the idea that Jefferson was a strict separationist is correct at the national level but not at the state level. And this leads to Jefferson's "wall of separation" metaphor.

In his 1802 letter to the Danbury Baptist Association, Jefferson used the wall of separation metaphor that Justice Black later adopted in

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[45] Kurland & Lerner, *supra*, note 21, at 74.

Everson v. *Board of Education*[46] in 1947. Roger Williams, the dissenter who established the colony of Rhode Island, had used that phrase at least a century before Jefferson.[47] Richard Hooker used the walls of separation metaphor in his book *Of the Laws of Ecclesiastical Polity* at the end of the 16th century.[48] And we can go back before that when John Calvin expressed the substance of the idea in 1536 in his *Institutes of the Christian Religion*. In talking about the difference between the civil and the ecclesiastical power, Calvin said: "The difference therefore is very great; because the Church does not assume to itself what belongs to the magistrate, nor can the magistrate execute that which is executed by the Church * * *."[49]

Of course, in the context of the Danbury letter, Jefferson used the wall metaphor to apply to "the Church and State."[50] He does not say between the churches and the states. Moreover, according to the letter, the Establishment Clause is between the American people and their legislature, not their legislatures. So for good or ill, the *Everson* court used the wall metaphor, but it moved Jefferson's wall by applying it to the states.

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[46] 330 U.S. 1, 16 (1947).
[47] Williams used the phrase in his 1644 tract entitled "Mr. Cotton's Letter Lately Printed, Examined & Answered." DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 76 (New York University Press 2002).
[48] DREISBACH, *supra*, note 47, at 73.
[49] Kurland & Lerner, *supra*, note 21, at 44.
[50] *Id.* at 96.

Jefferson, on the other hand, understood the Establishment Clause to apply only to the federal government. It is clear from his writing that he did not want Congress to establish a national church like Henry VIII's Anglican Church. Indeed, in a letter to Benjamin Rush in 1800, he said that the goal of the Episcopalians and Congregationalists to establish their denomination as a national church had been aborted by the return of good sense in the country.[51] He is referring to the Constitution and the Bill of Rights that prohibited a national church.

Consistent with that idea, in 1878 the Supreme Court recognized this limitation in *Reynolds* v. *U.S.* The Court said that the First Amendment "deprived [Congress] of all legislative power over mere opinion, but [ ] left [it] free to reach actions which were in violation of social duties or subversive of good order."[52] In other words, Congress could not control religious opinion, but it could control religious practices when they violated the good order of society. The *Reynolds* Court held that Mormon polygamy violated that social order.

In the same paragraph in *Reynolds*, however, the Court makes a curious statement about Jefferson's wall metaphor: "Coming as this does from an acknowledged leader of the advocates of the [First Amendment], [the wall metaphor] may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."[53] I have

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[51] Peterson, *supra*, note 39, at 1082.

[52] *Reynolds*, 98 U.S. 145, 164 (1878) (upholding the constitutionality of a Utah criminal statute outlawing polygamy).

[53] *Id.*

found nothing in my studies that indicates that Jefferson used the metaphor before he wrote his Danbury Baptist letter or thereafter or that he intended it to be the touchstone of Establishment Clause jurisprudence. According to Jefferson scholar Daniel Dreisbach,

> [t]here is no evidence that Jefferson considered the metaphor the quintessential symbolic expression of his church-state views. There is little evidence to indicate that Jefferson thought the metaphor encapsulated a universal principle of religious liberty or the prudential relationships between religion and all civil government (local, state, and federal.)[54]

Since *Everson*, the Supreme Court's First Amendment jurisprudence often relies on this phrase, this metaphor, twisted out of its historical context, transferred into a new context with little evidence that Jefferson ever intended to use the wall metaphor in that way. Nonetheless, it has become the standard of Establishment Clause analysis. It is one thing to say, however, it is the standard; it is something different to say that Jefferson was the champion of that standard, and therefore we, the courts, are following Jefferson. And perhaps without thinking much about it, the Supreme Court has replaced the key word in the First Amendment—establishment—with a word not in the First Amendment—separation.

I believe that in focusing on separation, the Everson Court shifted away from the history that led up to the First Amendment. It shifted away from the

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[54] DREISBACH, *supra*, note 47, at 69-70.

historical establishment/disestablishment language to the separation language. But as Judge Cardoza explained: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." [55] Chief Justice Burger likewise warned that "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstance of a particular relationship."[56]

And Chief Justice Rehnquist may be the most forceful critic of the wall metaphor. As he said in *Wallace* v. *Jaffree*, "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 Years." [57] The separation concept has many critics.

In Everson, Justice Black used strong separation language that goes beyond what I believe "disestablishment" requires. He described separation not simply as limiting the government from setting up a national church or the other types of religious oppression I have shown. He devised a strict list of what the government could not do in the religious sphere. The list goes beyond disestablishment. The problem is that "separation" tends to lead to the sanitization of any evidence of

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[55] *Berkey* v. *Third Ave. Ry. Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).
[56] *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971).
[57] *Wallace* v. *Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

religion in the public sphere. That has led to the *Lemon* test, which is a sanitization test. And the Pensacola cross is about to get sanitized.

Placing a cross in a public park that many people have enjoyed for decades, that stands mute and motionless, that oppresses no one, that requires nothing of anyone, and that commands nothing does not violate the Establishment Clause. Nor is it religious oppression. The cross can only cast a shadow; it cannot cast any harm. Only someone with a strict separationist view could find a violation, and such a finding would not be based on an actual injury that satisfies the standing requirement. For the strict separationist, the cross has to go because it is there, not because it causes injury. But now I move to the third and final section on the history of religious oppression.

3. Colonial and State Charters, Constitutions, and Proposed Constitutional Amendments

In this section I offer some government documents from early America on religious freedom. These are not simply the ideas and actions of individuals; they are the actions of government. The purpose is to give more background about the founders' thoughts on religious freedom and how that thinking ended in state action that led to or influenced the First Amendment. Some of these documents offer profound statements supporting religious freedom. Some documents established churches, and some show the kinds of penalties imposed on dissenters and non-conformists that the Establishment Clause was designed to prohibit. Others show that many colonial and state

governments acted to support religion for their citizens' benefit.

The first act is the "Maryland Act concerning Religion" of 1649. This act required anyone who blasphemed God, denied the Trinity, or uttered reproachful words "concerning the blessed Virgin Mary the Mother of our Saviour or the holy Apostles or Evangelists" to pay a fine or be whipped or imprisoned, and upon the third offense, be banished from the province.[58] It should remind you of the Edict of Thessalonica because it imposes a Trinitarian system of religious beliefs on Maryland citizens.

Twenty years later, the Carolina Fundamental Constitutions of 1669 established the Anglican Church as the only true church in the Carolina colony. It further authorized the colonial government to maintain churches and employ ministers.[59] The act offers another example of the early American idea about the importance of religion for society. The Carolina government wanted to promote Christianity in the colony, and despite establishing Anglicanism, it allowed groups to form their own churches.[60] It, however, also contained the harsh penalties that were common in the mid-seventeenth century by divesting the unchurched of all their rights.

This kind of oppression began to fade in the middle part of the 18th century. Beginning around the time of the revolution, the founders began drafting state constitutions that often included

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[58] Kurland & Lerner, *supra*, note 21, at 49.
[59] *Id.* at 51.
[60] *Id.*

religious freedom protections. These provisions usually described religious freedom as a freedom based in liberty of conscience. One of the most influential statements is in the Virginia Declaration of Rights of 1776.

> 16. That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.[61]

Beyond the focus on conscience, the act founds the right to religious freedom in the Christian religion itself and explains that the Christian religion requires forbearance, love, and charity to all. A similar provision was offered at the Virginia Convention to ratify the U.S. Constitution.[62] Also in 1776, the Virginia Assembly passed a bill that exempted dissenters from paying support to the Anglican Church and specifically revoked every English act or statute that imposed criminal penalties for religious action in the colony.[63] And finally, I turn to New England.

The Massachusetts Constitution of 1780 offers a concise example of the language used in state constitutions at the time that protected religious liberty:

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[61] *Id.* at 70.
[62] *Id.* at 89.
[63] *Id.* at 75.

> Art. II It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.[64]

The Massachusetts Constitution offers a valuable summary of how it and other constitutions of that era tried to protect religious freedom and to define what that freedom meant. Specifically, it shows the importance of religion by calling it a duty. It also conveys a right to liberty of religious conscience, and in exercising that right, protection from being hurt, molested, restrained, or losing one's property. It also illustrates the thought of the age in which religious freedom was understood as a fundamental right.

I could add other state constitutions from late eighteenth century America that speak in the same voice, use the same words, and protect the same rights. But I end here and move on to show what this history says about the Establishment Clause and the standing issue when no coercion and no harm have occurred.

Part III: LEGAL ISSUES

When you examine the history of religious oppression that led, in part, to the founding of our

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[64] *Id.* at 77.

country and the enactment of the Establishment Clause, it becomes clear how incongruent the "harm" is in *City of Pensacola* and *Rabun County* with the harms the Establishment Clause was designed to prevent. Standing that authorizes Article III jurisdiction requires harm; and as *Town of Greece, N.Y.* v. *Galloway*, [65] makes clear, it must be something more than annoyance, discomfort, or some other psychological harm. And standing requirements are important.

Standing requirements ensure that the federal judiciary only consider cases where actual harm has occurred or been threatened, and leave to the political process the "abstract questions of wide public significance which amount to generalized grievances * * * ."[66] And although, as Judge Newsom says in his concurrence, Circuit precedent in *American Civil Liberties Union of Georgia* v. *Rabun County Chamber of Commerce*, [67] constrains us to find that plaintiffs suffered sufficient injury to confer standing, that finding contradicts recent Supreme Court rulings—specifically its decision in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*,[68] and *Town of Greece*. Moreover, this finding is inconsistent with the history of religious oppression in Britain and early America that the Establishment Clause guards against.

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[65] 134 S. Ct. 1811 (2014).
[66] *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (internal quotations and citations omitted).
[67] 698 F.2d 1098 (11th Cir. 1983).
[68] 454 U.S. 464 (1982).

The "irreducible constitutional minimum" of standing consists of three elements, and the first one is at issue here: "[T]he plaintiff must have suffered an injury in fact—an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[69] In his concurrence, Judge Newsom makes two points regarding standing that I would like to emphasize. First, he states, "Rabun was wrong the day it was decided— utterly irreconcilable with the Supreme Court's then-hot-off-the-presses decision in *Valley Forge*." Later, Judge Newsom stresses how "standing rules matter—and the sweeping standing rule that Rabun embodies threatens the structural principles that underlie Article III's case or controversy requirement."

I agree with Judge Newsom that *Rabun County* was wrongly decided. Ultimately, Rabun County is irreconcilable with *Valley Forge* because the ruling on standing is based on a flawed distinction that conflates active government coercion with a passive religious monument. It also fails to take any account of history, and history has become important for the Supreme Court since 1983 in Establishment Clause cases. So the *Rabun County* panel read *Valley Forge* and misunderstood it and then misapplied it.

The panel distinguished the plaintiffs' lack of standing in *Valley Forge* from plaintiffs' standing in *Rabun County* based on the plaintiffs' choice between not using the park or using the park and suffering psychological consequences. The panel found

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[69] *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotations omitted).

possible psychological harm sufficient to confer standing despite the fact that before filing suit, no plaintiff had ever camped in Black Rock State Park, no plaintiff lived in Rabun County, Georgia,[70] and only one plaintiff had even seen the cross, and then, only from flying over it in an airplane. The other plaintiffs learned about the cross from anonymous phone calls and news releases.[71] The panel held that, unlike the non-resident plaintiffs in *Valley Forge*, "the plaintiffs in [*Rabun*] are residents of Georgia who make use of public parks which are maintained by the State of Georgia; these factors thus provide the necessary connection, which was missing in Valley Forge, between the plaintiffs and the subject matter of the action."[72]

Furthermore, the *Rabun* panel primarily based its finding of standing on two reasons—neither of which justifies a holding so incompatible with the standing limits mandated by *Valley Forge*. First, the panel determined that the Supreme Court had recognized a legally protected interest in the use and enjoyment of land in Sierra Club v. Morton,[73] *United States* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), [74] and *Duke Power Co.* v.

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[70] It is interesting to note that the citizens of Rabun County were so attached to their cross, they eventually resurrected it on private land not far from its previous location and started a non-profit to raise money for its upkeep.
[71] *Rabun*, 698 F.2d at 1107-08.
[72] *Id.* at 1107.
[73] 405 U.S. 727 (1972).
[74] 412 U.S. 669 (1973).

Carolina Environmental Study Group., Inc. [75] Indeed, the Supreme Court had recognized a legally protected interest in the use and enjoyment of land/natural resources in *Sierra Club*, *SCRAP*, and *Duke Power Co.*[76] However, the harm, or threatened harm, in these cases was environmental destruction—a real, concrete, and perceptible injury that does not support the proposition that one's interest in the use and enjoyment of a public park that has a cross on it violates the Constitution.

Second, the *Rabun* panel determined that the injuries complained of in *Rabun County* were more comparable to the plaintiffs' injuries in *School*

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[75] 438 U.S. 59 (1978). The *Rabun* Panel also cited a D.C. Circuit Establishment Clause case. However, this case was also pre-*Valley Forge* and has no precedential value.

[76] In *Sierra Club*, the Supreme Court stated the road to be built through Sequoia National Park threatened an injury in fact in that "'would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations.'" 405 U.S. at 734. The Court stated it did "not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing," but found the plaintiffs in that case failed to allege the injury was sufficiently personal. *Id.* at 734,735. In *SCRAP*, the Supreme Court held that since Plaintiffs "used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact * * *," this was sufficient to establish an injury in fact. 412 U.S. at 685. In *Duke Power*, the Supreme Court held that "the environmental and aesthetic consequences of the thermal pollution of the two lakes in the vicinity of the disputed power plants is the type of harmful effect which has been deemed adequate in prior cases to satisfy the 'injury in fact' standard." 438 U.S. at 73-74 (internal citation omitted).

District of Abington Township v. *Schempp*,[77] rather than the non-injury in *Valley Forge*. In *Valley Forge*, the Supreme Court reiterated its "earlier holdings that standing may be predicated on noneconomic injury" and cited *Abington* as a case in which the plaintiffs did have such standing.[78] In analogizing the injury in *Abington* to the injury in *Rabun County*, the *Rabun* panel focused on the dilemma the plaintiffs in *Abington* faced—"the schoolchildren were 'subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them,'"—and concluded "[n]o less can be said of the plaintiffs in the instant case."[79]

Although the panel conceded that there might be a difference in degree of injury, it was "unable to find any qualitative differences between the injury suffered by the plaintiffs in [*Rabun*] and that which the Court found in *Abington*."[80] But there is a major difference—a difference based in history. The *Abington* facts fall within the type of religious oppression I have described in this opinion. The Bible reading program that Pennsylvania legislated into its schools smacks of the kind of establishment action that I have described in Part II of this opinion. The law required that the Holy Bible be read every day in the classroom. Although it may be subtle, it is still coercion, and it is not passive. That a student could be excused from the daily reading might mitigate or soften the coercion, but it does not end it because it

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[77] 374 U.S. 203 (1963).
[78] 454 U.S. at 486, 487 n.22 (citing *Sch. Dist. of Abington Twp., Pa.* v. *Schempp*, 374 U.S. 203 (1963)).
[79] 698 F.2d at 1108 (quoting 454 U.S. at 487 n.22).
[80] 698 F.2d at 1108.

left the student with only two choices: stay in class and be proselytized by the Bible reading or suffer being ostracized or stigmatized by leaving the room. This is not so far from the Edict of Thessalonica as it might seem.

The Pennsylvania legislature was the sovereign, the state was the realm of that sovereignty, and the law imposed Bible reading, the fundamental document of the Christian faith, on all the children in the public schools no matter their creed or faith. This is classic establishment action.

So the qualitative differences between the injuries in *Rabun County* and *Abington* are obvious when one understands the history of religious oppression. Plaintiffs' injuries in *Rabun County* amounted to nothing more than disliking a religious monument on public land. Whereas in *Abington*, the children's parents had to choose between allowing a public school to proselytize their children by reading the Bible in class daily or by forcing their children to endure the stigma of being excused from the class. The qualitative differences are multiple: (1) overt direct government action endorsing the Christian religion in class every day versus a passive monument donated by a private organization; (2) public stigma associated with removing children from their classroom versus the personal choice of avoiding a park because it contains a cross that in no way restricts your activities in the park; (3) the compulsory nature of sending one's child to school versus an adult's decision to visit a public park on his or her free time; and (4) the fundamental parental right to choose a child's religious education, or lack thereof, versus an adult's choice to visit a park for

recreation. The differences between the harms in these two cases are clear, and there is no history that I found from the time the Protestant Reformation began until the Bill of Rights was passed of protecting the "right" not to see a cross.

The problem with finding that the "harm" in Rabun County is qualitatively the same as the harm in *Abington* is that it authorizes standing in a case like this one, where Plaintiffs' only harm is feeling offended and excluded. As such, their only injury is the psychological consequence of seeing a cross they don't like—the kind of injury that the Supreme Court said in *Valley Forge* would not create standing.

The Pensacola cross does not stigmatize, penalize, coerce, or injure anyone, and psychological harm alone does not satisfy the standing requirement. Furthermore, the psychological harm claims in *City of Pensacola* and *Rabun County* are not the same as the religious conscience harm that the Founders wanted to end.

As I have shown, the history of the idea of the religious conscience was central to the history of religious freedom in early America and in Europe. But religious conscience was not understood as separate from religious action. It was not simply some psychological phenomenon or something that you had on your mind. Protestants and Catholics did not fight the Wars of Religion for almost 100 years because some religious image made them feel uncomfortable, unwelcome, or uneasy. Furthermore, in the 16th, 17th, and 18th centuries, men and women were not burned at the stake, beheaded, hung, flogged, banished, jailed, beaten, taxed, had their ears cropped, or were divested of their property

or their rights as citizens because of their state of mind. It was because of their actions and because their actions arose out of their religious convictions. To counter dissidents' religious actions, churches and governments imposed penalties, and that is what the Establishment Clause was designed to protect against.

You can listen to this march of horrors, abuse, cruelty, and death and recognize that it was not a walk in the park. And despite the fact that I am careful to avoid trite statements in my orders, all this case is about is a walk in the park. (Perhaps, because it is a walk in a public park with a cross in it, it is walking on stilts in the park, as Jeremy Bentham might say.)[81] But in *Rabun County* there was not even the walk because none of the plaintiffs had ever been to the Black Rock Mountain State Park. The fact that one of those plaintiffs might one day camp in the park near the cross was enough for the panel to find standing, which means that the Rabun County panel based standing on nothing more than a personal contingency.

Some courts have lost sight of why so many fought for so long at such great cost for religious freedom. It was not to protect people from looking at crosses in public parks. That demeans and debases the sacrifices of millions of people. And it is striking that the evils that were fought against for centuries and that the Establishment Clause was designed to end

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[81] "*Natural* rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—the nonsense upon stilts." Jeremy Bentham, Anarchical Fallacies (1796).

have come to the place in our history to include a cross in the public square.

And if we follow the standing ruling in *Rabun County*, someone who doesn't like a cross in a park can file suit in federal court and have it taken down. "I don't like it" is all that is required. Can one person in a democracy who does not like the cross in the park trump the thousands who enjoyed the park for years with nothing more at stake than personal dislike or annoyance? This amounts to generalized grievances. That is not enough for standing. It has to be more than offensive.

There is no evidence of any oppression, compulsion, stigmatization, or penalties imposed in this case or in *Rabun County*. No plaintiff in this case or *Rabun County* was hurt, molested, or restrained, nor did they lose any personal property or pay any tax to build or support the cross. No strife erupted in either park. No plaintiff suffered injury. All the old evils are absent. So what has happened to the standing requirement in Establishment Clause cases?

My review of some Establishment Clause cases leads me to suspect that some judges, by an unwitting sleight of hand, transfer the establishment question back to support the standing requirement. In other words, judges think they see an establishment problem and use that to support standing even though there is no harm. This looks like what happened in *Rabun County*. But when this standing sleight of hand occurs, no matter how unwittingly, or when courts do not require an injury for standing, the standing requirement becomes a phantom, a kind of constitutional moonbeam—

something to look at, something to talk about, but it cannot be grasped. For example, in *Rabun County*, the panel found that,

> because the cross is clearly visible from the porch of his summer cabin at the religious camp which he directs as well as from the roadway he must use to reach the camp, plaintiff Karnan has little choice but to continually view the cross and suffer from the spiritual harm to which he testified.[82]

It's not a moonbeam, but it is nothing more than a light beam. The light of the cross "harms" him, and he is not even in the park. And the harm in this context is "spiritual harm"—what is that if it is not abstract harm? Where does that fit in with being burned at the stake or losing your children? Does a court have to sanitize all of *Rabun County* from the light of a cross? In *Rabun County*, the panel let a flyover plaintiff and a front porch plaintiff bring the full panoply of the federal judiciary to bear on a cross simply because they didn't like it.

Courts should not embrace unharmed plaintiffs because of an unpleasant psychological state. As the Supreme Court explained in *Valley Forge*, the plaintiffs

> fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequences presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to

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[82] 698 F.2d at 1108.

> confer standing under Art. III, even though the disagreement is phrased in constitutional terms.[83]

Yet only psychological consequences provide the basis for standing in *City of Pensacola* and *Rabun County*. Plaintiffs' affidavits in the Pensacola case prove this standing failure.

According to his affidavit, Plaintiff Andre Ryland has been to the park numerous times for numerous events, including picnics and meetings at the Senior Center, and he walks along the park trail. He seems to enjoy the park and has not been molested, penalized, or harmed in any way or kept from his activities.

According to Plaintiff David Suhor's affidavit, he rides his bike regularly in the park, as often as twice a week, despite the fact that he first encountered the cross in 1993. And while Suhor claims in his affidavit that he "does not wish to encounter Bayview Cross in the future," he recently booked the amphitheater by the cross for his satanic ritual. That the City permitted a satanic ceremony by a Christian cross demonstrates classic religious freedom. It also shows religious pluralism. The City did not coerce him to do anything, and more importantly, he was not restrained from enjoying his satanic ceremony in the exercise of his religious freedom. Consequently, the City did not disparage or deprecate his beliefs or dictate his behavior in the park, and the cross did not stigmatize or ostracize him. The presence of the cross did not turn him into a religious hypocrite, which Jefferson said was one of the results of religious

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[83] 454 U.S. at 485.

oppression. Furthermore, he was not subjected to any City-sponsored religious exercises, and if the City does sponsor or encourage religious events at the cross, that is a separate Establishment Clause violation. (You don't need a cross in the park to do that.) But there is a limit to federal court intervention.

As the Supreme Court explained in *Lee* v. *Weisman*: "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation."[84] And offense is all we have in this case and in *Rabun County*.

The Supreme Court further explains that "a relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."[85] This is what I have called "sanitizing" the public square of all religion. That is what the plaintiffs accomplished in *Rabun County* and what the plaintiffs want in this case.

Of course, just because a monument, memorial, or display is passive does not mean that by following my coercion analysis, a district court can never find an Establishment Clause violation involving a cross. A good example is when someone is directly taxed for the monument like the laws in early America that required dissenters to support churches against their

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[84] 505 U.S. 577, 597 (1992).
[85] *Weisman*, 505 U.S. at 598.

conscience.[86] Likewise, any government that coerces someone, directly or indirectly, to take certain action or refrain from certain action because of the monument, memorial, or display would violate the Constitution. But there is no direct or indirect injury, so there is no redressable injury in this case. The cross does not dictate, control, or require anything. This is clear from Plaintiffs' affidavits.

The second point in Judge Newsom's concurrence that merits emphasis is that standing rules matter. They matter because they keep the federal judiciary from exceeding its constitutionally-mandated role. Finding that Plaintiffs have standing here is contrary to this purpose because the Bayview Cross litigation is precisely the sort of dispute that the courts should leave to the political process and not let clutter the federal courts.

The Supreme Court has warned that without standing limitations "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."[87] Here, there is no actual, concrete, or particularized injury, and there is no violation of a legally protected interest. A private organization, whose mission was non-religious, erected a cross on public property. The City of Pensacola spends $233 per year maintaining

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[86] "Absent special circumstances, however, standing cannot be based on a plaintiff's mere status as a taxpayer." *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 134, 131 S. Ct. 1436, 1442, 179 L. Ed. 2d 523 (2011).

[87] *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975).

it, or .03% of the City's annual maintenance budget, not the full budget, and the cross has stood for approximately 75 years with only one complaint before this law suit was filed. There is no evidence that representatives of other religious faiths attempted to place monuments in Bayview Park but were denied by the City. [88] So the citizens of Pensacola should decide if the cross should be removed, not the federal courts.

As Justice Goldberg eloquently stated in his concurrence in Abington:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."[89]

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[88] Presumably such representatives would have standing to challenge the City's actions in that case. In *Spokeo*, the Supreme Court cited *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009) for the proposition that intangible injuries can be concrete enough to be injuries in fact. 136 S. Ct. at 1549. In *Pleasant Grove*, the City denied a religious organization's request to donate and erect a monument in a park where a Ten Commandments monument was already erected. 555 U.S. at 465-66.

[89] 374 U.S. at 308 (Goldberg, J., concurring).

And this case only involves shadows.

In addition, the fact that the Bayview Cross has stood in Bayview Park for 75 years without any significant controversy further shows the lack of injury in this case and the lack of an Establishment Clause violation. According to Plaintiffs' own evidence, the majority of people in Pensacola feel that the cross is a cherished monument in their community. [90] Indeed, Plaintiffs only submitted evidence of one complaint other than those alleged in the lawsuit. Seventy-five years and only one complaint confirms that the Bayview Cross does not cause harm sufficient to violate the Establishment Clause.

Moreover, "the principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various guises."[91] Although this language comes from a case involving laches, and not the Establishment Clause, the analogy is sound. "It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief." [92] I am not suggesting we apply the laches doctrine to preclude relief in this case or that it is a defense; however, the longstanding history of the Bayview Cross gives us further evidence that there is no injury, and therefore, no standing for Article III jurisdiction. In a sense, the laches concept works with the coercion

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[90] Pl.'s Mot. for Summary Judgment, Doc. 31, Ex. 15. p. 247-52.
[91] *City of Sherrill, N.Y.* v. *Oneida Indian Nation of New York*, 544 U.S. 197, 217 (2005).
[92] *Id.*

test to answer the standing question, and history is important.

The Supreme Court has recognized the importance of history in determining whether some government action violates the Establishment Clause. In Marsh v. Chambers, the Court said that while "no one acquires a vested or protected right in violation of the Constitution by long use," "an unbroken practice ... is not something to be lightly cast aside."[93] In *Lynch* v. *Donnelly*, although the Court did not base its no-violation finding on history, it noted that the crèche at issue had been included in the Christmas display for 40 years or more.[94] More recently, in *Van Orden*, Justice Breyer emphasized in his concurrence the importance of the fact that the Ten Commandments display had "stood apparently uncontested for nearly two generations" in finding that it did not violate the Establishment Clause.[95] In *Salazar* v. *Buono*, the Court noted that the cross at issue "had stood on Sunrise Rock for nearly seven decades," and that "the cross and the cause it commemorated had become entwined in the public consciousness."[96] And most recently, in *Town of Greece*, the Court stated that "the Establishment Clause must be interpreted by reference to historical practices and understandings."[97]

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[93] 463 U.S. 783, 790 (1983) (quoting Walz, 397 U.S. at 678).
[94] 465 U.S. 668, 671 (1984).
[95] *Van Orden* v. *Perry*, 545 U.S. 677, 704 (2005) (Breyer, J. concurring).
[96] 559 U.S. 700, 716 (2010).
[97] *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014).

The Bayview Cross is embedded in the fabric of the Pensacola community. It is rooted in Pensacola's history. If the cross is a problem, it is only a local problem, not a constitutional problem. As Justice Thomas stated in his concurrence in *Van Orden*, "[t]his Court's precedent elevates the trivial to the proverbial 'federal case,' by making benign signs and postings subject to challenge." [98] So the 75-year history of the Bayview Cross is another reason its fate should be left to the local government. And now I finish this part of my opinion explaining the Supreme Court's ruling in *Town of Greece*.

Town of Greece is important because the plaintiffs' complaints in that case sound like the complaints about the Bayview Cross, and also because the Court used history as a guide and discussed the element of coercion. I focus on the coercion analysis. In that case the town supervisor invited a member of the local clergy to deliver an invocation at the beginning of every town board meeting. The prayers were mostly Christian prayers because most of the churches in the community were Christian.

The plaintiffs in *Town of Greece* went to the town meetings to talk about local issues, not for recreation. One plaintiff complained that the prayers were "offensive," "intolerable," and "an affront to a diverse community."[99] The plaintiffs also contended that the prayers were coercive. More specifically they argued that,

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[98] *Van Orden*, 545 U.S. at 694 (Thomas, J. concurring).
[99] 134 S. Ct. at 1817.

> [t]he setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board. The sectarian content of the prayer compounds the subtle coercive pressures, they argue, because the nonbeliever who might tolerate ecumenical prayer is forced to do the same for prayer that might be inimical to his or her beliefs.[100]

The Court considered the plaintiffs' coercion argument and observed that the government cannot coerce or compel a citizen "to support or participate in any religion or its exercise."[101] But the Court went on to say that "on the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance."[102] That the prayers made the plaintiffs feel excluded and disrespected and gave them offense does not equate to coercion.[103] As the Court explained:

> Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person

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[100] *Id.* at 1820.
[101] *Id.* at 1825.
[102] *Id.*
[103] *Id.* at 1826.

> experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions.[104]

In concluding the opinion, the Court said that "neither choice represents an unconstitutional imposition as to mature adults, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'"[105] Plaintiffs did not ask the court to stop; they wanted non-sectarian prayers, specifically non-Christian.

Although *Town of Greece* did not involve a standing issue, the case supports the proposition that there has to be more than personal complaints to support standing. That is all that there is in this case, which leads to the conclusion that *Rabun County* and *City of Pensacola* were wrongly decided.

CONCLUSION

Federal courts are courts of limited jurisdiction, precluded from considering certain cases and certain issues. The jurisdictional standing requirement is a Constitutional limitation just as the amount in controversy requirement in diversity requirement is a Congressional limitation. These limitations stand for the fundamental proposition that there are certain matters a federal court has no business deciding. The legality of a cross in a city park is one such issue. The doctrines of federalism and

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[104] *Id.* at 1827.
[105] *Id.*

separation of powers counsel that this case does not belong in federal court.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

AMANDA KONDRAT'YEV, ET AL., Plaintiff's, v. CITY OF PENSACOLA, FLORIDA, ET AL. Defendants.	Case No. 3:16cv195-RV/CJK

ORDER

This case involves the alleged unconstitutionality of a cross in a remote corner of a public city park. Discovery is now closed, and the parties have filed motions for summary judgment (docs. 30, 31). I held a hearing in this matter on June 14, 2017.

I. Background

The relevant facts are undisputed and can be stated briefly.

Bayview Park is a 28-acre city park in the East Hill neighborhood of Pensacola, Florida. It overlooks Bayou Texar, a large body of water that empties into Pensacola Bay. In 1941, the National Youth Administration (a New Deal agency) erected a wood cross in the eastern corner of the park to be dedicated at the first annual Easter Sunrise Service held there.

Several years later, a small amphitheatre was built right in front of the cross to serve as a permanent home for the church service. Two decades thereafter, in 1969, the Pensacola Jaycees (a civic group) replaced the wood cross with a concrete one for dedication at the 29th annual Easter Sunrise Service. The concrete cross, which still stands and is the subject of this dispute, is a 34-foot white "Latin cross." A Latin cross consists of a vertical bar and a shorter, horizontal one. It is a widely recognized symbol of Christianity.

The Bayview Cross is part of the rich history of Pensacola and of Bayview Park in particular. Thousands upon thousands of people have attended services in the park over the years. It has also been the site of remembrance services on Veteran's Day and Memorial Day, during which flowers were placed at the foot of the cross in honor of loved ones overseas and in memory of those who sacrificed their lives for our country. The cross is currently being maintained by the City, which for the past eight years has spent an average of $233 per year (out of a $772,206 annual maintenance budget, or about .03%) to keep it clean, painted, and illuminated at night.

Even though the cross costs very little to maintain, has hosted tens of thousands of people, and has stood on public property in one form or another for approximately 75 years (apparently without incident), four people—Amanda Kondrat'yev; Andreiy Kondrat'yev; David Suhor; and Andre Ryland—contend they are "offended" by it and want it removed. They have brought this lawsuit against the City of Pensacola, Mayor Ashton Hayward, and Director of

Parks and Recreation Brian Cooper (together, "the City"), alleging that it violates the First Amendment.[1]

As previously indicated, both sides have filed motions for summary judgment. Summary judgment is a pre-trial vehicle through which a party in a civil action must prevail if the record establishes that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). Resolution by summary judgment is proper, in other words, when the facts are not in dispute and all that remains are questions of law. The parties agree that the pertinent facts are not

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[1] Three of the four plaintiffs arguably lack standing to continue this lawsuit. The Kondrat'yevs have relocated to Canada, which necessarily means their "use and enjoyment" of Bayview Park (and the "peace and tranquility" that it provided them) are no longer being "overshadowed by a religious symbol that signifies torture and violence" (doc. 1 at ¶¶ 9, 12). And although Mr. Suhor still resides in Pensacola and claims to feel "personally offended" and "excluded" by the Bayview Cross (*id.* at ¶ 16), that claim is highly attenuated in light of the fact that just last year he booked the amphitheatre for Easter Sunday—which required a church that had planned to use the site to move to another area of the park—so that he could use the space for his self-described "satanic purposes." Nevertheless, it is undisputed that the fourth plaintiff, Mr. Ryland, has standing in this action, and that is sufficient. *See Watt* v. *Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) ("Because we find California has standing, we do not consider the standing of the other plaintiffs."); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain this suit."); *accord Mountain States Legal Found.* v. *Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (stating that if standing is shown for at least one plaintiff with respect to each claim, "we need not consider the standing of the other plaintiffs to raise that claim").

disputed and that this case should be decided as a matter of law.

II. Discussion

This case requires an interpretation and application of the First Amendment to the United States Constitution. The First Amendment contains two "religion clauses:" the Free Exercise Clause and the Establishment Clause. The Establishment Clause, the one at issue in this lawsuit, provides that "Congress shall make no law respecting an establishment of religion * * *." From these ten words has sprung a body of law that is historically unmoored, confusing, inconsistent, and almost universally criticized by both scholars and judges alike. But I will begin at the beginning.

The available evidence strongly suggests—if not conclusively shows—that the Establishment Clause was intended to prevent Congress from establishing a *national* religion, that is, from officially preferring one rival sect over another. *See Wallace* v. *Jaffree*, 472 U.S. 38, 91-107 (1985) (Rehnquist, J., dissenting) (extensively reviewing the historical record). It obviously did not preclude the establishment of religions per se. We know this because several states maintained "established" religions at the time the First Amendment was ratified, and they continued to do so many years thereafter. *Separation of Church & State Comm*. v. *City of Eugene*, 93 F.3d 617, 621 & n.3 (9th Cir. 1996) (O'Scannlain, J., concurring in judgment) (noting same and identifying six states that maintained state religions: Connecticut, Georgia, Maryland, Massachusetts, New Hampshire, and South Carolina). Thus, as one scholar has stated: "What united the representatives of all the states, both

in Congress and in the ratifying legislatures, was a much more narrow purpose: to make it plain that *Congress* was not to legislate on the subject of religion, thereby leaving the matter of church-state relations to the individual states." Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U. L. Rev. 1113, 1133 (1988). In other words, it was concerns about federalism, and not about governmental endorsement of religion, that motivated the ratification of the Establishment Clause. *City of Eugene*, 93 F.3d at 621 (O'Scannlain, J., concurring in judgment); *accord, e.g.,* Zachary N. Somers, Note, *The Mythical Wall of Separation: How the Supreme Court has Amended the Constitution*, 2 Geo. J. L. & Pub. Pol'y 265, 271 (2004) (the ratifiers understood it to have two functions: "First, [it] forbade the national government from installing a national religion or giving a preferred status to one religious sect over another. Second, the carefully chosen word 'respecting' was used to ensure that not only would the national government not set up a national religion, but it would also be prohibited from interfering with the several states' decisions regarding church-state relations.").

Consistent with this reading and understanding of the Establishment Clause's "narrow purpose," it was generally accepted in the early period of this nation that the First Amendment did not require the government to be indifferent or neutral (let alone hostile) to religion, particularly Christianity. Indeed, prayer was a "prominent part of governmental ceremonies and proclamations." *Lee* v. *Weisman*, 505 U.S. 577, 633-36 (1992) (Scalia, J., dissenting) (citing multiple examples, including, *inter alia*, George Washington including prayer as his first official act as President; the First Congress opening with a

chaplain's prayer; and benedictions at public school graduations dating back to the first high school graduation ceremony in 1868). In addition, the words "In God We Trust" were impressed on our coins starting in 1865, and "[c]ountless similar examples could be listed, but there is no need to belabor the obvious." *Engel* v. *Vitale*, 370 U.S. 421, 449-50 (1962) (Stewart, J., dissenting).

As Supreme Court Justice, Harvard Law Professor, and preeminent nineteenth century legal scholar Joseph Story observed in his treatise on the Constitution in 1851:

> Probably at the time of the adoption of the Constitution, and of the Amendment to it now under consideration [i.e., the First Amendment], *the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State* so far as was not incompatible with the private rights of conscience and the freedom of religious worship. *An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.*
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> The real object of the [Establishment Clause] was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the

> vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age * * *.

2 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1874, 1877 (2d ed. 1851) (emphasis added); *accord* Thomas Cooley, *Principles of Constitutional Law* at 224-225 (3d. ed. 1898) ("it was never intended by the [First Amendment] that the Government should be prohibited from recognizing religion"); *see also Wallace*, 472 U.S. at 98 (surveying the evidence and referring to as "indisputable" that James Madison, principal author of the Bill of Rights, "did not see it as requiring neutrality on the part of government between religion and irreligion") (Rehnquist, J., dissenting).

All this to say, the historical record indicates that the Founding Fathers did not intend for the Establishment Clause to ban crosses and religious symbols from public property. Indeed, "the enlightened patriots who framed our constitution" [*Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824)] would have most likely found this lawsuit absurd. And if I were deciding this case on a blank slate, I would agree and grant the plaintiffs no relief. But, alas, that is not what we have here.

Starting in 1947, the Supreme Court began to retreat from the well-established original understanding of the Establishment Clause. In *Everson* v. *Board of Ed. of Ewing Tp.*, 330 U.S. 1 (1947), a five-member majority of the Court for the very first time (in an opinion authored by Justice

Black) adopted the now oft-quoted "wall of separation" metaphor in analyzing First Amendment claims:

> Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

Id. at 16. The foregoing quote comes from a letter that Jefferson wrote to the Danbury Baptist Association in 1802, wherein he said: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861). But, as Justice Rehnquist has noted:

> Thomas Jefferson was of course in France at the time the * * * Bill of Rights [was] passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.

Wallace, 472 U.S. at 92. Nevertheless, Jefferson's metaphor became "the focus for subsequent Establishment Clause analysis and set a philosophical tone that resonated through all post-World War II

decisions regarding church and state. Operating under the assumption that the 'wall of separation' represented the Establishment Clause's correct meaning, the Court gradually developed a series of tests designed to determine if a particular governmental practice or statute impermissibly breached that wall." *City of Eugene*, 93 F.3d at 622 (O'Scannlain, J., concurring in judgment). There have been several Establishment Clause tests. Chief among them is the *Lemon* test, derived from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

Lemon has been widely criticized (and sometimes savaged) by scholars, courts, and individual Supreme Court Justices. *See, e.g., Chabad-Lubavitch of Ga.* v. *Miller*, 5 F.3d 1383, 1388 & n.8 (11th Cir. 1993) (collecting sources); *Barnes* v. *Cavazos*, 966 F.2d 1056, 1063 (6th Cir. 1992) ("The *Lemon* test has received criticism from virtually every corner and we add our voices to those who profess confusion and frustration with *Lemon's* analytical framework."); *see also Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (recognizing and agreeing with "the long list of constitutional scholars who have criticized *Lemon*") (Scalia, J., dissenting). The Eleventh Circuit has stated, however:

> We follow the tradition in this area by beginning with the almost obligatory observation that the *Lemon* test is often maligned. *But it is even more often applied.*
>
> What the Supreme Court said ten years ago remains true today: "*Lemon*, however frightening it might be to some, has not been overruled." *Lamb's Chapel*, 508 U.S. at 395 n.7.

Glassroth v. *Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003) (internal citations omitted) (emphasis added); *accord Smith* v. *Governor for Alabama*, 562 F. App'x 806 (11th Cir. 2014) (applying *Lemon* as recently as three years ago).

To pass constitutional muster under *Lemon*, a government practice must have (1) a secular purpose; (2) it must neither advance nor inhibit religion in its principal or primary effect; and (3) it must not foster an excessive entanglement with religion. 403 U.S. at 612-13. "If [the challenged government action] violates any of these three principles, it must be struck down under the Establishment Clause." *Stone* v. *Graham*, 449 U.S. 39, 40-41 (1981). As for the first prong—and as particularly relevant for this case—it has been recognized that "the Latin cross is unmistakably a universal symbol of Christianity * * * and it has never had any secular purpose. In fact, *no federal case has ever found the display of a Latin cross on public land * * * to be constitutional.*" *Mendelson* v. *City of St. Cloud*, 719 F. Supp. 1065, 1069 (M.D. Fla. 1989) (citations omitted) (emphasis added). Thus, if *Lemon* applies, the Bayview Cross is in trouble, as the City acknowledged during the June 14th hearing in this case.

But *Lemon* is not consistently used, and, as noted, there are several other tests as well. For example, there is: (1) the "endorsement test" from *Lynch* v. *Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring); (2) the "*Marsh* test" from *Marsh* v. *Chambers*, 463 U.S. 783 (1983); (3) a "narrow coercion test" from *Lee* v. *Weisman*, 505 U.S. at 642 (Scalia, J., dissenting); and *County of Allegheny* v. *ACLU*, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring in part and dissenting in part); (4) a "broad coercion test" from

Lee, 505 U.S. at 586-99; and (5) a "nonpreferentialist test" from *Wallace*, 472 U.S. at 91-114 (Rehnquist, J., dissenting). *See generally* Steven G. Gey, *"Under God," The Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. Rev. 1865, 1883, 1891-92, 1919 & ns. 67, 106-108, 226 (2003) (noting each of these tests). Some members of the Court have suggested that still other tests should govern. *See Van Orden* v. *Perry*, 545 U.S. 677, 692-94 (2005) (where Justice Thomas argued that even if the Establishment Clause is incorporated and applies to the states, which he believes it should not, the Court should return to "the original meaning of the word 'establishment,'" as the Framers understood that term). Sometimes the Justices have advocated no discernible formal test at all (but rather a standardless ad hoc approach), or they have embraced "different analyses at different times, without ever abandoning their earlier approaches, or recognizing the incompatibility of the various tests." Gey, *supra*, 81 N.C. L. Rev. at 1883 n.67.

Unsurprisingly, this hodgepodge has caused significant confusion in the lower courts. *Utah Highway Patrol Ass'n* v. *American Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari) ("Lower courts have understandably expressed confusion. This confusion has caused the Circuits to apply different tests to displays of religious imagery challenged under the Establishment Clause.") (citing, *inter alia*, *Green* v. *Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1235 n.1 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing) (noting that "whether *Lemon* and its progeny actually create discernable 'tests,' rather than a mere ad hoc patchwork, is debatable," and describing the "judicial morass resulting from the Supreme Court's opinions");

Card v. *City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (recognizing that current Establishment Clause jurisprudence has been described as "'Limbo'"); *id.* at 1023-1024 (Fernandez, J., concurring) (applauding the majority's "heroic attempt to create a new world of useful principle out of the Supreme Court's dark materials," but noting that the "*Lemon* test and other tests and factors, which have floated to the top of this chaotic ocean from time to time," remain "so indefinite and unhelpful that Establishment Clause jurisprudence has not become more fathomable"); *Skoros* v. *New York*, 437 F.3d 1, 13 (2d Cir. 2006) ("[W]e confront the challenge of frequently splintered Supreme Court decisions" and Justices who "have rarely agreed—in either analysis or outcome—in distinguishing the permissible from the impermissible public display of symbols having some religious significance."); *ACLU* v. *Mercer Cty., Ky.*, 432 F.3d 624, 636 (6th Cir. 2005) ("we remain in Establishment Clause purgatory")).

In light of the foregoing, how is the Bayview Cross supposed to be analyzed? By applying *Lemon*; one of the other tests; or no formal test at all? May I look to what the Founding Fathers intended (in which case the cross is certainly constitutional), or must I look to how the "wall of separation" metaphor has been applied (in which case it is probably unconstitutional)? Ultimately, these are not difficult questions—legally speaking—because there is controlling precedent directly on point.

In *ACLU of Georgia* v. *Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983), the Eleventh Circuit considered this exact issue on virtually identical facts. In *Rabun County*, a private

organization (there, the Chamber of Commerce; here the Jaycees) put up a tall illuminated Latin cross (there, a 35-foot cross; here a 34-foot cross) to replace an existing one. The cross was on government property (there, a state park in Black Rock Mountain; here, a city park in Pensacola), and its dedication was specifically scheduled to coincide with the annual Easter Sunrise Service (there, the 21st annual service; here, the 29th annual service), which had been held at the site of the cross for a number of years. As the plaintiffs have pointed out, however, *Rabun County* differs from this action in at least one notable respect: when the government received objections to the cross in *Rabun County*, it asked the Chamber of Commerce to remove it, but the organization refused (and the government did not push the issue). Here, by contrast, when the plaintiffs complained about the cross (and threatened suit), the City did not try to have it removed. To the contrary, Mayor Hayward told the press that he did not want it removed because "I hope there is always a place for religion in the public square."

Thus, in *Rabun County*, the ACLU and five individuals (here, four individuals) filed an action against the city and the Chamber of Commerce, seeking to permanently enjoin the maintenance of the cross as a violation of the First Amendment. The district court ruled for the plaintiffs and ordered the cross removed. The defendants appealed.

The Eleventh Circuit began its analysis by expressly stating that the *Lemon* test was the "correct" and "controlling" legal standard to apply. *Rabun County*, 698 F.2d at 1109 & n.20. Applying that test, the court wasted very little time—barely one page of

its thirteen page opinion—concluding that the cross failed the first prong of *Lemon*. The court noted that there was "ample evidence" that the cross was not erected for a secular purpose, specifically: (1) "the Latin cross is universally regarded as a symbol of Christianity;" and (2) the city chose "an Easter deadline for completion of the cross [and decided] to dedicate [it] at Easter Sunrise Services * * *." *See id.* at 1110-111. The Court of Appeals agreed with the district court that these facts clearly "point[ed] to the existence of a religious purpose." *Id.* at 1111. The opinion concluded as follows:

> For many years, a cross on Black Rock Mountain State Park has shone over the North Georgia mountains. Yet "historical acceptance without more" does not provide a rational basis for ignoring the command of the Establishment Clause that a state "pursue a course of 'neutrality' toward religion." Moreover, we cannot close our eyes to the light of the cross on the ground that it represents only a minor encroachment of this constitutional command, for the "breach of neutrality that is today a trickling stream may all too soon become a raging torrent." Accordingly, the cross must be removed.

Id. (internal citations omitted).

If the cross under review in *Rabun County* violated the First Amendment and had to be removed, the cross here must suffer the same fate. Indeed, not only are both of the above facts also present here (i.e., it is a Latin cross that was completed by, and dedicated at, an Easter Sunrise Service), but the mayor has said that he does not want the cross taken down specifically

because he hopes there will "always [be] a place for religion in the public square," which is essentially an admission that the cross has been sustained for a religious purpose.

Thus, if *Rabun County* is still good law, it is binding on me and the resolution of this case is clear. *See, e.g., Fox* v. *Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) (noting that district courts within the Eleventh Circuit are "bound by this court's decisions"); *Litman* v. *Mass. Mut. Life Ins. Co.*, 825 F.2d 1506, 1508 (11th Cir. 1987) (cautioning that "[a]bsent a Supreme Court decision to the contrary, district courts are *compelled* to follow mandates of appellate courts") (emphasis added).[2] To get around *Rabun County*, the

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[2] In their responsive memorandum, the City suggested that *Rabun County* (decided almost 35 years ago) is an old case. "Judicial decisions, however, are not spoilable like milk. They do not have an expiration date and go bad merely with passage of time." *ComTran Group, Inc.* v. *U.S. Dep't of Labor*, 722 F.3d 1304, 1314 (11th Cir. 2013) (Vinson, J.).

At the hearing, the City also tried to distinguish *Rabun County* by noting that the cross in that case (which had replaced an earlier, longer-standing one) had only been in place for a few years. The cross here, by contrast, has been standing for about 75 years. (When the original Bayview Cross was erected in 1941, the Establishment Clause was not construed as an obstacle). But there is no reason to believe the relative age of the cross in *Rabun County* had any bearing on the Eleventh Circuit's ruling. Quite to the contrary, as stated in the text, the panel concluded its opinion by intimating that regardless of how "many years" the cross had been standing, "'historical acceptance without more' does not provide a rational basis for ignoring the command of the Establishment Clause that a state 'pursue a course of 'neutrality' toward religion.'" Insofar as the City argues that later Supreme Court case law authorizes courts to consider passage of time and historical acceptance, that argument will be considered immediately above.

City argues that *Lemon* (which *Rabun County* relied on) no longer applies to cases like this one. The City's argument is based principally on the Supreme Court's intervening decision in *Van Orden* v. *Perry*, 545 U.S. 677 (2005).

The question in *Van Orden* was whether the Establishment Clause permitted the display of a 6-foot monolith inscribed with the Ten Commandments on state capitol grounds in Texas. The monument was among 16 other *non-religious* monuments and 21 historical markers in the 22 acres surrounding the capitol, each of which was meant to commemorate the "'people, ideals, and events that compose Texan identity.'" 545 U.S. at 681. The monolith (one of more than a hundred around the country, along with thousands of paper replicas) had been donated forty years prior by the Fraternal Order of Eagles of Texas—a national social, civic, and patriotic organization—as part of its national program to combat juvenile delinquency. The bottom of the monument bore an inscription that read: "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS, 1961." *Id.* After someone complained and sued to have the monolith removed, the district court held that it *did not* violate the Establishment Clause inasmuch as the state had a valid secular purpose in recognizing and commending the Eagles group for their efforts to reduce juvenile delinquency. *Id.* at 682. The district court held "that a reasonable observer, mindful of the history, purpose, and context, would not conclude that this passive monument conveyed the message that the State was seeking to endorse religion." *Id.* The Fifth Circuit agreed with the district court and affirmed.

The case was appealed to the Supreme Court, which also affirmed. A plurality of Justices (Rehnquist, Scalia, Kennedy, and Thomas) stated as follows:

> Over the last 25 years, we have sometimes pointed to [*Lemon*] as providing the governing test in Establishment Clause challenges. *Compare Wallace* v. *Jaffree*, 472 U.S. 38 (1985) (applying *Lemon*), *with Marsh* v. *Chambers*, 463 U.S. 783 (1983) (not applying *Lemon*) * * *. Many of our recent cases simply have not applied the *Lemon* test. Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.
>
> Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, *we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.* Instead, our analysis is driven both by the nature of the monument and by our Nation's history.

Id. at 685-86 (some internal citations omitted) (emphasis added).

The plurality opinion then went on to discuss the significant role that the Ten Commandments have played "in our Nation's heritage," as evidenced by the fact that they are widely displayed in courtrooms (including, notably, the Supreme Court itself) and throughout the Nation's capital. *Id.* at 688-89. In addition, the historical role of the Ten Commandments has also been recognized in Supreme Court case law and by the Executive and Legislative branches as well.

Id. at 689-90 (citations omitted). The plurality continued:

> Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.
>
> * * *
>
> * * * Texas has treated its Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a *dual significance*, partaking of both religion and government. We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.

Id. at 690-91 (emphasis added). Notably, the plurality specifically stated in a footnote that: "we need not decide in this case the extent to which a *primarily religious purpose* would affect our analysis because it is clear from the record that there is no evidence of such a purpose in this case." *Id.* at 691 n.11 (emphasis added).

The City highlights the portion in *Van Orden* where the plurality said that it did not find *Lemon* "useful." *See id.* at 686. Seizing on this language, the City argues that the *Lemon* test is no longer appropriate to evaluate passive monuments. And thus, to the extent *Rabun County* relied on and applied *Lemon*, the City contends that it is no longer controlling precedent. I disagree for three reasons.

First, on the same day that *Van Orden* was issued, the Supreme Court decided *McCreary County, Kentucky* v. *ACLU of Kentucky*, 545 U.S. 844 (2005). Just like *Van Orden*, that action involved a First Amendment challenge to the Ten Commandments being posted on public property. A five-member majority in *McCreary County* applied *Lemon*—specifically, the purpose prong—to *strike down* the display, whereas the *Van Orden* plurality opined that *Lemon* was not "useful" and *upheld* the display. Whatever else may be said (and much has been said) about the apparent inconsistency between these two decisions and the confusion generated by the ten(!) separate opinions in the cases, [3] one thing is reasonably clear: *Van Orden's* plurality opinion did not overrule or otherwise nullify the *Lemon* test in

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[3] Edith Brown Clement, *Public Displays of Affection * * * for God: Religious Monuments After McCreary & Van Orden*, 32 Harv. J. L. & Pub. Pol'y 231 (2009); *see also, e.g., Card* v. *Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (observing that courts have been "[c]onfounded by the ten individual opinions in the two cases"); *accord* Linda Greenhouse, *Justices Allow a Commandments Display, Bar Others*, N.Y. Times, June 28, 2005 (reporting that when the Supreme Court announced the ten separate opinions, Justice Rehnquist joked: "I didn't know we had that many people on our Court").

religious monument cases (nor could it), or else *McCreary County's* majority would not have applied it that very same day.

Second, the *Van Orden* plurality did not say that the *Lemon* test was not useful in evaluating *all* religious monuments. Rather, it merely said the test was "not useful in dealing with the sort of passive monument" that Texas erected in *that* case. *See Van Orden,* 545 U.S. at 686. And the "sort" of monument in that case (positioned among almost 40 other non-religious monuments and historical markers) was a monolith of the Ten Commandments, which the plurality noted has played both a historical/legal role in this nation as well as a religious one. That is not the situation here as a solitary Latin cross ("a universally recognized symbol of Christianity," *see Rabun County*, 698 F.2d at 1103) would not appear to have such dual significance. *King* v. *Richmond Cty., Ga.*, 331 F.3d 1271, 1285 (11th Cir. 2003) (referring to the cross as an "exclusively religious symbol"). Indeed, the plurality in *Van Orden* declined to speculate how its analysis would be affected if the monument there—as in this case—had a "*primarily religious purpose*." 545 U.S. at 691 n.11 (emphasis added).[4]

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[4] The City concedes (as it must) that the Bayview Cross is obviously a symbol of Christianity. However, it suggests that it is not *merely* a religious symbol. Rather, it is "intertwined in Pensacola history" and has been a place where "many thousands of Pensacolians" have gathered over the years to support our country and honor fallen soldiers. I don't disagree. Despite briefly implying that the Bayview Cross is a war memorial in its motion, however, the City did not actually make that claim at the hearing or tender any evidence to suggest that the cross was dedicated as a war memorial or intended to be one. Nor, apparently, would it

Third and lastly, the plurality decision and its disregard of the *Lemon* test is not the "controlling" opinion in *Van Orden*. Justice Breyer's separate concurrence is. *See, e.g., Card,* 520 F.3d at 1017 n.10 ("the controlling opinion in *Van Orden* is, of course, that of Justice Breyer"); *Staley* v. *Harris County, Texas*, 485 F.3d 305, 308 n.1 (5th Cir. 2007) ("Justice Breyer's concurrence is the controlling opinion in *Van Orden*") (both cases quoting *Marks* v. *United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'")). And Justice Breyer did not express hostility toward the *Lemon* test, say that it was inapplicable in all passive religious monument cases, or suggest that it should be overruled. In fact,

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have made a difference if it had (*see* doc. 31 at 14-15 (citing numerous appellate and district court cases ordering the removal of war memorial crosses)); *see also Separation of Church & State Comm.* v. *City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996) ("Though the cross has a secular purpose as a war memorial, observers might reasonably perceive the City's display of such a religious symbol on public property as government endorsement of the Christian faith. Further, the City's use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans.") (O'Scannlain, J., concurring in judgment).

The City also points out that the Bayview Cross is one of two displays in the park, the second one being a memorial to Tim Bonifay, a Pensacola resident who died in a skiiing accident on Bayou Texar. But the presence of that second monument in the park does not alter the fact that the Bayview Cross obviously had—and still has—a primarily religious purpose, as evidenced, *inter alia*, by the mayor's own words to that effect.

perhaps in response to the plurality's suggestion to the contrary, he stated that *Lemon would* continue to be "useful" in Establishment Clause cases. *Van Orden,* 545 U.S. at 700.[5]

However, Justice Breyer went on to say that in "difficult borderline cases," it would be better to use legal judgment—instead of the *Lemon* test—which would allow courts to "reflect and remain faithful to the underlying purposes of the [Establishment Clause and] * * * take account of context and consequences measured in light of those purposes." *See id.* Justice Breyer determined that the monument under review in *Van Orden* presented a "borderline case" because (as the plurality had already recognized) the Ten Commandments carried not only a religious message, but "secular moral" and "historical" messages as well. *See id.* at 700-01. Consequently, he employed his "legal judgment test" and found that the monolith passed that test based on: (1) the "physical setting" where it was placed (i.e., it was situated in a large park with *dozens* of nonreligious monuments and historical markers, which "suggests little or nothing of the sacred"); (2) the length of time it stood there (about 40

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[5] Indeed, Justice Breyer was part of the majority bloc in *McCreary County, Kentucky* v. *ACLU of Kentucky*, 545 U.S. 844 (2005), which, as previously discussed, was decided the same day as *Van Orden* and applied *Lemon* in a different Ten Commandments display case. And furthermore, Justice Breyer made a point to specifically say in *Van Orden* that he disagreed with Justice Scalia's dissent in *McCreary County*, where he (Justice Scalia) had argued that the *Lemon* test was "bad;" criticized its "brain-spun" logic; and asserted that its purpose prong—incidentally, the prong that was applied in *Rabun County*—should be "abandoned."

years); and (3) the fact that the group that donated it sought to "highlight the Commandments' role in shaping civil morality as part of that organization's efforts to combat juvenile delinquency." *Id.* at 700-03. He also noted that the monolith "prominently acknowledge[d] that the Eagles donated the display, a factor which, though not sufficient, * * * further distances the State itself from the religious aspect of the Commandments' message." *Id.* at 701-02.[6]

After considering all the foregoing, I have to conclude that *Van Orden* did not overrule or nullify *Lemon/Rabun County*. At most, the plurality said that *Lemon* was not "useful" in considering passive monuments of the "sort" at issue in that case (i.e., a

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[6] One writer has opined that Justice Breyer's *Van Orden* concurrence, which "insulated from constitutional challenge the thousands of Ten Commandment markers that were erected in the 1950s and 1960s by the Fraternal Order of Eagles," is "a laudable act of judicial statesmanship" in that it "defends an important principle of liberal constitutionalism—a firm separation of church and state. Yet at the same time, it acknowledges political reality and makes a wise concession to the force of public opinion." Michael J. Klarman, *Judicial Statesmanship: Justice Breyer's Concurring Opinion in Van Orden* v. *Perry*, 128 Harv. L. Rev. 452 (2014). But not all the reviews have been so positive. *See, e.g.,* John E. Nowak and Ronald D. Rotunda, *Constitutional Law* 1570 (8th ed. 2010) ("To say that Justice Breyer's opinion concurring in the judgment in *Van Orden* will provide little guidance to lower court judges when they consider establishment clause challenges to government displays would be an understatement."); *see also id.* (further opining that "it is difficult to understand how anyone other than Justice Breyer could apply his analysis, which contains neither any formal tests nor any clear guideposts for how lower courts could anticipate [his] judgment").

longstanding Ten Commandments display with "*dual significance*"), and, in such "borderline cases," Justice Breyer would apply his "legal judgment test" to consider context, history, and the overall purpose of the Establishment Clause. Or as the Ninth Circuit has described it: "*Van Orden* expressly establishes an 'exception' to the *Lemon* test in certain 'borderline cases' regarding the constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a non-religious context." *See Trunk* v. *City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (citation omitted). If I were to apply that test here (and look to context, history, passage of time, placement of the cross, and overall purpose of the Establishment Clause), the Bayview Cross might well pass constitutional muster. However, Justice Breyer's "test"—which is not really a test at all—is inappropriate here because this is not a "borderline case." Indeed, based on the undisputed facts (i.e., the nature of the Latin cross, its dedication at the Easter Sunrise Service, and the mayor's statements), the Bayview Cross clearly has a primarily—*if not exclusively*—religious purpose. Thus, the *Lemon* test controls, and not *Van Orden's* "legal judgment test."

The City contends, however, that it is "reasonable to assume [that the Eleventh Circuit] would apply *Van Orden*" to this case instead of *Lemon*. But as Circuit Judge Edith Brown Clement has observed: "Most courts of appeals have concluded that the *Lemon* tripartite test of purpose, effect, and entanglement still stands after *Van Orden* * * *. Out of the ten-plus religious monuments cases actually decided by the courts of appeals since *Van Orden*, only two have expressly declined to apply *Lemon*, and both did so on

extremely narrow grounds." *See* Edith Brown Clement, *Public Displays of Affection * * * for God: Religious Monuments After McCreary & Van Orden*, 32 Harv. J. L. & Pub. Pol'y 231, 246-47 & n.100 (2009) (collecting cases). It thus seems more likely that the Eleventh Circuit would continue to apply the *Lemon* test to cross cases, as several post-*Van Orden* courts have done, including at least one district court in this circuit. *American Atheists, Inc.* v. *City of Starke*, 2007 WL 842673, at *5-7 (M.D. Fla. 2007). Notably, the City conceded during the June 14th hearing that in the twelve years since *Van Orden* was decided, there is apparently no case by any court—in this circuit or beyond—holding that it overruled *Lemon* or supplanted its analysis in a cross case like this one.[7] It is not "reasonable to assume" that the Eleventh Circuit would be the first to do so.

Indeed, such an assumption would be particularly untenable in light of *Rabun County*, which is not only binding precedent on me *but on the Court of Appeals as well*. To apply the legal judgment test from *Van Orden* to this case instead of *Lemon* would relegate *Rabun County* to the dustbin of history, which the Eleventh Circuit could only do en banc. Indeed, in this circuit, "'it is the firmly established rule * * * that each succeeding panel is bound by the holding of the first

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[7] However, it was noted at the hearing that in *Trunk* v. *City of San Diego*, 629 F.3d 1099 (9th Cir. 2011), the Ninth Circuit analyzed a "cross case" under both *Lemon* and *Van Orden* because the court concluded that on the facts of that particular case the result would be the same regardless. *See id.* at 1107 ("Ultimately, we need not resolve the issue of whether *Lemon* or *Van Orden* controls our analysis of the Memorial * * * [because] both cases guide us to the same result.").

panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.'" *Breslow* v. *Wells Fargo Bank,* 755 F.3d 1265, 1267 (11th Cir. 2014) (citation omitted). Unless the subsequent Supreme Court decision and the previous circuit precedent are "clearly inconsistent," the Court of Appeals is "bound to follow" its existing precedent until it is overruled en banc. *See Garrett* v. *University of Alabama at Birmingham Bd. of Trustees,* 344 F.3d 1288, 1292 (11th Cir. 2003) (citations omitted). As I have said, *Van Orden* and *Rabun County* can be reconciled: the latter applies to single purpose religious symbol cases, whereas the former applies to "borderline" dual purpose (and arguably only Ten Commandment) cases. They are not clearly inconsistent. I believe the Eleventh Circuit Court of Appeals would have to continue to follow *Rabun County* in cross cases unless and until the *full court* decided to take a different path and follow *Van Orden*, and I think that unlikely.[8]

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[8] In its memoranda, the City quotes several concurring, dissenting, and plurality opinions from some more recent First Amendment cases decided by the Supreme Court in other contexts. Together, these quotes arguably suggest that *Lemon*/*Rabun County* (and certain parts of Establishment Clause jurisprudence as a whole) have been weakened and may be poised to be reconsidered. However, it is well established that "we are not at liberty to disregard binding case law that is so closely on point and has only been weakened, rather than directly overruled, by the Supreme Court." *Florida League of Prof'l Lobbyists, Inc.* v. *Meggs*, 87 F.3d 457, 462 (11th Cir. 1996). Notably, "this is so even if we are convinced that the Supreme Court will overturn its previous decision the next time it addresses the issue. Though wounded, [binding precedent] still marches on and we are ordered to follow. We will join the funeral procession only after the Supreme Court has decided to bury it."

Lemon is routinely criticized, but it is still the law of the land and I am not free to ignore it.[9] Nor am I free to ignore *Rabun County*, which expressly states that *Lemon* provides the "correct" analytical framework in cases such as this. Accordingly, *Rabun County* controls. And consistent with that directly-on-point and binding case law, the Bayview Cross fails the first prong of the *Lemon* test and, thus, runs afoul of the First Amendment as currently interpreted by the Supreme Court.[10]

United States v. *Gibson*, 434 F.3d 1234, 1247 (11th Cir. 2006) (citations omitted). Here, the Eleventh Circuit may be "following" for a long time as it is unclear if *Lemon* will ever be truly buried. *See Lamb's Chapel* v. *Center Moriches Union Free School Dist.,* 508 U.S. 384, 398 (1993) (comparing *Lemon* to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried;" stating that "no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart * * * and a sixth has joined an opinion doing so," but it still "stalks our Establishment Clause jurisprudence") (Scalia, J., dissenting).

[9] *Lemon* has not only been criticized by several Justices, but, as noted, it has occasionally been bypassed or ignored by the Supreme Court. *See Lynch* v. *Donnelly*, 465 U.S. 668, 679 (1984) (noting multiple times where the Court did not apply it); *Lamb's Chapel*, 508 U.S. at 399 ("When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely.") (Scalia, J., dissenting). The Supreme Court can do that, as it did in *Van Orden*. But as the Tenth Circuit has said: "While the Supreme Court may be free to ignore *Lemon*, this court is not. Therefore, we cannot * * * be guided in our analysis by the *Van Orden* plurality's disregard of the *Lemon* test." *Green* v. *Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 797 n.8 (10th Cir. 2009).

[10] The plaintiffs contend that the Bayview Cross fails all three prongs of the *Lemon* test. I need not address that argument or

To be clear: None of this is to say that the cross would have to come down if the City sold or leased the area surrounding it to a private party or non-governmental entity (so long as the transfer was bona fide and not a subterfuge). Nor would there be a constitutional problem with worshipers using a temporary cross for their services in the park (counsel for plaintiffs conceded that point during the hearing). However, after about 75 years, the Bayview Cross can no longer stand as a permanent fixture on city-owned property. I am aware that there is a lot of support in Pensacola to keep the cross as is, and I understand and respect that point of view. But, the law is the law.

III. Conclusion

As one author has noted, "[i]n a rare and remarkable way, the Supreme Court's establishment clause jurisprudence has unified critical opinion: people who disagree about nearly everything else in the law agree that establishment doctrine is seriously, perhaps distinctively, defective." *See* Steven D. Smith, *Separation and the "Secular:" Reconstructing the Disestablishment Decision*, 67 Tex. L. Rev. 955, 956 & ns.1 & 2 (1989) (citing multiple "scathing" judicial and scholarly criticisms, including: Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* 163 (1986) ("the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices"); Rex Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. Rev. 337 (1986) ("A decent argument can be made that the net contribution of the Court's precedents toward a

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analyze the other two prongs of the test as *Rabun County* is dispositive on the first prong.

cohesive body of law * * * has been zero. Indeed, some would say that it has been less than zero.")); *Edwards* v. *Aguillard*, 482 U.S. 578, 639 (1987) ("our embarrassing Establishment Clause jurisprudence") (Scalia, J., dissenting); *see also, e.g., Wallace*, 472 U.S. at 110 (criticizing *Lemon* as having "no more grounding in the history of the First Amendment" than the view that the framers intended to build a "wall of separation" between the church and state) (Rehnquist, J., dissenting).

Count me among those who hope the Supreme Court will one day revisit and reconsider its Establishment Clause jurisprudence, but my duty is to enforce the law as it now stands.

Accordingly, it is hereby ORDERED AND ADJUDGED that:

(1) The plaintiffs' motion for summary judgment (doc. 31) is GRANTED;

(2) The defendants' motion for summary judgment (doc. 30) is DENIED;

(3) The Bayview Cross violates the Establishment Clause of the First Amendment to the United States Constitution, as interpreted by the Supreme Court and circuit precedent, and it must be removed within thirty (30) days;

(4) The City is ordered to pay damages to the plaintiffs in the amount of $1.00; and

(5) The parties are directed to follow the local rules of this court with regard to attorney fees to which plaintiffs may be entitled.

DONE and ORDERED this 19th day of June, 2017.

/s/ Roger Vinson
ROGER VINSON
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

AMANDA KONDRAT'YEV, ET AL., Plaintiff's, v. CITY OF PENSACOLA, FLORIDA, ET AL. Defendants.	Case No. 3:16cv195-RV/CJK

ORDER

The plaintiffs brought this civil action against the City of Pensacola, and others, challenging the constitutionality of the "Bayview Cross" under the First Amendment's Establishment Clause. The parties filed motions for summary judgment, and I entered an order addressing those motions on June 19, 2017 (doc. 41).

I began my 23-page order by recognizing that the Bayview Cross—which was donated by a private organization and costs the City very little to maintain—is part of the rich history of Pensacola. Order at 2. Indeed, a cross has stood in a remote corner of Bayview Park ever since April 1941, and it has been the site of innumerable events attended by tens of thousands of people over those 76 years, apparently without any incident. *Id.* at 1-2. Nevertheless, four

individuals—two of whom currently reside in Canada—were offended by it and filed this lawsuit to have it removed. *Id.* at 2 & n.1.

I then proceeded to discuss the history and purpose of the Establishment Clause. *Id.* at 3-6. I speculated that the Founding Fathers, while having carefully drafted the First Amendment to ensure separation of church and state, "would have most likely found this lawsuit absurd." *Id.* at 6. I went on to state that I personally agreed with that assessment. *Id.* However, my personal views do not control. Rather, I am bound by Supreme Court precedent—namely, *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)—even though (as I wrote) that precedent is "historically unmoored, confusing, inconsistent, and almost universally criticized by both scholars and judges alike." *Id.* at 3; *see also, e.g., Glassroth* v. *Moore*, 335 F.3d 1282, 1302 n.6 (11th Cir. 2003) ("all * * * federal courts are bound to follow decisions of the United States Supreme Court"); *United States* v. *Hough*, 803 F.3d 1181, 1197 (11th Cir. 2015) ("We are bound to follow [binding] precedent even if we disagree with it, but we are not bound to remain silent about whether it is wrong.") (Carnes, Ed., J., concurring).

Notably, lower courts are bound to follow Supreme Court precedent even when it appears that the Supreme Court may be willing to overrule that precedent. *See, e.g., Hohn* v. *United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts

should conclude our more recent cases have, by implication, overruled an earlier precedent."); *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Citing each of the foregoing opinions, the Eleventh Circuit has expressly stated: "We take those admonitions seriously." *Powell* v. *Barrett*, 541 F.3d 1298, 1302 (11th Cir. 2008) (collecting additional cases); *see also Evans* v. *Secretary Fl. Dep't of Corr.*, 699 F.3d 1249, 1263 (11th Cir. 2012) ("We must not, to borrow Judge Hand's felicitous words, 'embrace the exhilarating opportunity of anticipating' the overruling of a Supreme Court decision.") (internal citation omitted) (collecting additional cases).

It is for these reasons that I have reluctantly followed the law as set out by the Supreme Court in *Lemon* and Eleventh Circuit precedent, *ACLU of Georgia* v. *Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983) (applying *Lemon* on virtually identical facts). However, I concluded my order with an invitation for the Supreme Court to revisit and reconsider its Establishment Clause jurisprudence. *See* Order at 22. Apparently taking the first step to that end, the City has filed a motion to stay my judgment pending an appeal to "the Eleventh Circuit Court of Appeals, and, if necessary, the Supreme Court" (doc. 43). The plaintiffs do not oppose this motion. A court will consider four general factors before granting a stay pending appeal: (1) whether the movant has made a "strong showing" that it is likely

to succeed on the merits; (2) whether the movant will be "irreparably injured" absent a stay; (3) whether issuance of the stay will "substantially injure" other parties interested in the case; and (4) where the "public interest" lies. *See Nken* v. *Holder*, 556 U.S. 418, 425-26 (2009). Although the first factor (strong showing of success on appeal) is ordinarily "the most important," a stay can be "granted upon a lesser showing of a 'substantial case on the merits' when the balance of the equities identified in factors 2, 3, and 4 weighs heavily in favor of granting the stay." *Garcia-Mir* v. *Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (some quotation marks and brackets omitted). Indeed, binding precedent in our circuit has specifically "emphasized" that granting a stay that maintains the status quo pending appeal "is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the [stay] would inflict irreparable injury on the movant." *Ruiz* v. *Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (quotation omitted).

I conclude—and by not opposing the City's motion the plaintiffs presumably agree—that these factors weigh in favor of granting a stay. *See, e.g., San Diegans for Mt. Soledad Nat. War Memorial* v. *Paulson*, 548 U.S. 1301, 1303 (2006) (Kennedy, J., in chambers) (granting the stay of a lower court judgment ordering the removal of a "prominent Latin cross" on city property; concluding that "altering the memorial and removing the cross" would disrupt the status quo and cause "irreparable harm" to the city pending appeal). Thus, for all the reasons the City has articulated in its unopposed motion to stay (doc. 43), that motion is hereby GRANTED. My order of June 19th will be

STAYED, subject to (and effective as of) the filing of the anticipated appeal.

The plaintiffs' motion for attorney's fees (doc. 42) is also STAYED pending resolution of the appeal.

DONE and ORDERED this 3rd day of July, 2017.

/s/ Roger Vinson
ROGER VINSON
Senior United States
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

AMANDA KONDRAT'YEV,
ANDREIY KONDRAT'YEV,'
ANDRE RYLAND, and DAVID SUHOR,

Plaintiffs,

v.

CASE NO.: 3:16cv195-MCR/CJK

CITY OF PENSACOLA, FLORIDA, ASHTON HAYWARD, in his official capacity as Mayor of the City of Pensacola, and BRIAN COOPER, in his official capacity as Director of the City of Pensacola Parks & Recreation Department,

Defendants.

_____/

DECLARATION OF ANDRE RYLAND

Andre Ryland declares, pursuant to 28 U.S.C. §1746, as follows:

1. I am a resident and taxpayer of Escambia County, Florida, and live just outside Pensacola. I have a Pensacola address.

2. I have lived in Escambia County for seven years.

3. I live about seven and a half miles from the Bayview Cross and have had unwelcome contact with it numerous times. I do not wish to encounter it in the future. I first encountered it in 2010 and was immediately affronted by the message of governmental promotion of religion and affiliation with religion it embodies.

4. I have been a member of the American Humanist Association for about fifteen years and a member of the Freedom From Religion Foundation for about ten years.

1. I visit Bayview Park many times throughout the year for numerous events, including group picnics and meetings at the Senior Center, and I often walk the trail around the park.

2. I view the Bayview Cross as Christian symbol and as a governmental endorsement and promotion of Christianity.

3. As a non-Christian, I am offended and feel excluded by the governmental message of support for Christianity over other religious beliefs represented by the Bayview Cross.

4. As a non-Christian, I also feel excluded by the support the City of Pensacola has given to the Easter Sunrise Services held in Bayview Park, religious services that the government has commemorated with the Bayview Cross.

5. Attached herein as Exhibit A are true and accurate pictures of the cross I took on April 2, 2017.

6. On April 2, 2017, I placed a yardstick on the

platform of the cross to estimate its height. Based on the true and accurate photographs shown in Exhibit A, depicting the yardstick and cross, the cross stands at approximately 30 feet tall. The arms extend approximately 5 feet wide from the center.

7. The Bayview Cross, and the City support of Easter Sunrise Services it represents, are a constant reminder that I, as a non-Christian, am an outsider and unwelcome in the community.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 10, 2017.

Andre Ryland

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

AMANDA KONDRAT'YEV,
ANDREIY KONDRAT'YEV,
ANDRE RYLAND, and DAVID SUHOR,

Plaintiffs,

v.

CASE NO.: 3:16cv195-MCR/CJK

CITY OF PENSACOLA, FLORIDA, ASHTON HAYWARD, in his official capacity as Mayor of the City of Pensacola, and BRIAN COOPER, in his official capacity as Director of the City of Pensacola Parks & Recreation Department,

Defendants.

_____/

DECLARATION OF DAVID SUHOR

David Suhor declares, pursuant to 28 U.S.C. §1746, as follows:

1. I am a resident and taxpayer of Pensacola, Florida.
2. I have lived in Pensacola for twenty-four years.
3. I am a member of the American Humanist

Association, the Freedom From Religion Foundation, and the Humanists of West Florida, an AHA chapter.

4. I live about a mile and a half from the Bayview Cross and encounter it on regular bike rides, as often as twice a week.
5. I also visit Bayview Park regularly, where I encounter the Bayview Cross. Due to its size and placement, I do not think the cross can be ignored or overlooked.
6. I first encountered the Bayview Cross in the summer of 1993.
7. I view the Bayview Cross as Christian symbol and as a governmental endorsement of Christianity, placed primarily for religious purposes, including aggrandizing Easter Sunday services.
8. As a non-Christian, I am offended and feel excluded by the governmental message of support for Christianity over other religious beliefs represented by the Bayview Cross.
9. As a non-Christian, I also feel excluded by the support the City of Pensacola has given to the Easter Sunrise Services held in Bayview Park, religious services that the government has commemorated with the Bayview Cross.
10. The Bayview Cross, and the City support of Easter Sunrise Services it represents, are a constant reminder that I, as a non-Christian, am an outsider and unwelcome in the community.
11. I do not wish to encounter Bayview Cross in the future.

I declare under penalty of perjury that the

foregoing is true and correct.

Executed on: April 10, 2017.

David Suhor

Map Key:

1	Jogging/Walking Trail
2	Dog Park
3	Amphitheatre
4	Tennis Courts
5	Bocce Ball Court
6	Playground
7	Dog Park
8	Bonifay Memorial
9	Pier
10	Amphitheatre/Jaycees Cross
11	Bonifay Memorial
12	Boat Ramp/Dock
13	Boat Ramp/Dock


DEDICATED TO C. FRASIER PHELPS
OCT. 15, 1907 — DEC. 30, 1950
PRES. JR. CHAMBER OF COMMERCE 1942
CHM. OF EASTER SUNRISE COM. 1941
HE LIVED FOR OTHERS
SPONSORED — DONATED
JUNIOR CHAMBER
OF COMMERCE
4 — 17 — 1949

History of Pensacola Parks

A Project of the Pensacola Parks & Recreation Department

Overview

The City of Pensacola maintains 93 parks and open spaces designed to enhance the quality of life of all citizens and visitors of Pensacola. To preserve the heritage of our parks, the Pensacola Parks and Recreation Department launched a project in 2016 to document the history of Pensacola parks. Since then, City staff and volunteers have visited every park, researched the history of those parks, and documented the monuments and other amenities in the parks. The following chart summarizes the history of Pensacola's parks and the monuments located there.

This document remains a work in progress and will be updated periodically. If you have additions or corrections, please send them to our Marketing Division at prmarketing@cityofpensacola.com. Thank you for supporting your Parks and Recreation Department, and we hope you enjoy Pensacola's wonderful parks.

1. ADMIRAL MASON PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
200 South 9th Ave.	c. 1940s	5.8
HISTORICAL/CULTURAL SIGNIFICANCE		
From the 1950s to the early 1980s, this was the site of a baseball stadium called Admiral Mason Park, named in honor of Admiral Charles P. Mason, a Vice Admiral in the United States Navy and two-time mayor of Pensacola. The 2000-seat stadium was the home for minor league baseball in Pensacola. The league folded in 1962, and the park languished for two decades before being demolished. In 1991, the City of Pensacola appropriated the site of the former stadium for the planned Wall South, a replica of the Vietnam Veteran's Memorial in Washington, D.C. The site has since become known as Veteran's Memorial Park and is the home to several other monuments.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*See Veteran's Park listing for monuments.		

2. ALABAMA SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
401 West Gonzalez St.	1884	1.3
HISTORICAL/CULTURAL SIGNIFICANCE		
Alabama Square is one of the city's oldest squares, appearing on a map from 1884.		

3. ALLEN PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
141 Calloway Ave.	c. 1955	1.9
HISTORICAL/CULTURAL SIGNIFICANCE		
This park was dedicated and named for the late Mr. James A. Allen.		

4. ANDALUSIA SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1501 E. Cervantes St.	1884	2.4
HISTORICAL/CULTURAL SIGNIFICANCE		
Alabama Square is one of the city's oldest squares, appearing on a map from 1884.		

MONUMENTS IN PARK AND SIGNIFICANCE		
*Concrete marker noting a tree that was planted in honor of Miss Nell Burrow. Miss Burrow was president of the Pensacola Federation of Garden Clubs from 1931 – 1933.		
5. ARAGON PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
540 Aragon St.	c. 1945	0.25
HISTORICAL/CULTURAL SIGNIFICANCE		
Aragon Park was completed in October 1972 when over 100 men, women, and children got together and did the work themselves. The park is adjacent to what was a public housing community and is now a development of luxury homes. When dedicated in 1972, the park was under the authority of the Aragon Park Recreation Association.		
6. ARMSTRONG PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
300 West Lakeview Ave.	c. 1950's	2.1
HISTORICAL/CULTURAL SIGNIFICANCE		
Armstrong Park was established by the Rotary Club, which also furnished all of the playground equipment.		

7. AVIATION DISCOVERY PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
4200 Jerry Maygarden Rd.	October 7, 2006	0.82
HISTORICAL/CULTURAL SIGNIFICANCE		
The General Daniel "Chappie" James, Jr. Aviation Discovery Park project in Pensacola was undertaken by Pensacola Area Flight Watch, an organization dedicated to the interests of general aviation, and the promotion of aviation among our youth. It has also been used as a way to garner support for the airport among citizens of the area by making the airport and its operations easily visible to them. It also is a way to generate an interest in aviation on the part of younger citizens.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Signage describing how the park came to be and the many hours, volunteers and money that went into making the park a reality. *Donor Wall of Honor showing donor names etched in stone tiles. *Located on the LEAP Trail near Aviation Discovery Park is a granite marker under a tree dedicated to the memory of Daniel Eric Doelker.		

8. BAARS PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
4340 N. 12th Ave.		14.0
HISTORICAL/CULTURAL SIGNIFICANCE		
The Baars family has included prominent landowners in Pensacola since the early 1900s. Henry Gerhard Baars came to Pensacola after the Civil War to enter the pitch pine trade. He married Mary Ellison Dunwody and they had 8 children, of whom only 4 lived to adulthood. It was Henry's son Theo Baars who started acquiring massive acres of land and helped shape real estate in Pensacola. Although it is not known when the land for Baars Park was given to the city, a newspaper clipping from January 1955 makes mention of Theo Baars giving the land to the city for the park.		

9. BARTRAM PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
211 Bayfront Pkwy.	1977	2.3
HISTORICAL/CULTURAL SIGNIFICANCE		
Bartram Park is named for naturalist William Bartram who wrote about his travels in Alabama, Florida, Georgia and South Carolina. An overnight stay in Pensacola on September 5, 1775, offered William Bartram a chance to write down his impressions of the sleepy little shipping village of Pensacola. He related in his book *Travels*, published in 1791, how pleased he was to have visited Pensacola.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Identifying signage. *Informational signage titled "Supremacy, Siege, and the Sea." *Informational signage titled "Defending a Coastal Colony." *Informational signage relating to the DeSoto Trail. *Bronze memorial plaque to Timmothy David Showalter. *Wooden bench in memoriam of Timmothy David Showalter. *Sculpture entitled *Muscle Beach*.		

*Plaque for sculpture entitled *Muscle Beach*. *Homemade memorial to Cecil Warren Davis. *Fiesta of Five Flags monument depicting past De Lunas. *Memorial pavers around the monument.		
10. BAY BLUFFS PRESERVE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
3400 Scenic Hwy.	1984	26.0
HISTORICAL/CULTURAL SIGNIFICANCE		
Dating back to the 1750s, abundant clay deposits in these highly eroded bluffs provided the raw material for brickyards of the day. Rising from 50 to 75 feet above Escambia Bay, the bluffs are a landmark and unique geological feature in Florida.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Dedication Monument dated September 14, 1984. *City signage.		

11. BAYCLIFF ESTATES		
LOCATION	**DATE ESTABLISHED**	**ACRES**
4150 Monteigne Dr.	c. 1970	8.5
HISTORICAL/CULTURAL SIGNIFICANCE		
The Baycliff Estates subdivision began in the early to mid 1970s. This park is named for the subdivision.		
12. BAYOU TEXAR BOAT RAMP		
LOCATION	**DATE ESTABLISHED**	**ACRES**
2700 East Cervantes St	1984	2.6
HISTORICAL/CULTURAL SIGNIFICANCE		
In 1984, Bayou Blvd. was closed from Strong Street to Cervantes Street to allow for the construction of the boat ramp.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Dedication monument August 24, 1984.		

13. BAYVIEW PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
2001 E. Lloyd St.	1905	29
HISTORICAL/CULTURAL SIGNIFICANCE		
Bayview Park was the site of City's first Independence Day celebration. The park has gone through many changes over the years. At one time, it was a popular swimming spot in Pensacola, boasting a large diving tower in Bayou Texar. For decades it has been the site of the annual Easter Egg Hunt that attracts hundreds of children every year. Marriages are performed there, and concerts and charity events have long been staple activities conducted in Bayview Park.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Blue wooden cat. *Granite monument dedicated to the memory of Tim Bonifay, an avid skier who passed away in 1979. *Plaque dedicated to C. Frasier Phelps, sponsored and donated by the Junior Chamber of Commerce on April 17, 1949. Mr. Phelps was President of the Junior Chamber of Commerce in 1942 and the Chairman of the Junior Chamber of Commerce's Easter Sunrise committee in 1941.		

*Amphitheater.
*Bayview Tennis Courts monument c. 1920, by the Friends of Tennis.
*Plaque in memory of Larry Caton who passed away in 2009.
*Signage on Dog Beach dedicated to Byron and "Charley" Campbell. Mr. Campbell was an avid dog person and was instrumental in the development of the dog parks at Bayview Park. Charley was his beloved four legged friend.
*Bayview Cross, erected in 1941 by the Pensacola Junior Chamber of Commerce.
*Bayview Tennis Courts monument c. 1920, by the Friends of Tennis.
*Plaque in memory of Larry Caton who passed away in 2009.
*Signage on Dog Beach dedicated to Byron and "Charley" Campbell. Mr. Campbell was an avid dog person and was instrumental in the development of the dog parks at Bayview Park. Charley was his beloved four legged friend.
*Bayview Cross, erected in 1941 by the Pensacola Junior Chamber of Commerce.

14. BAYWOODS PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
4597 Baywoods Dr.		12.0
HISTORICAL/CULTURAL SIGNIFICANCE		
Named for the subdivision in which it was developed.		

15. BELVEDERE PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
4001 San Gabriel Dr.		6.6
HISTORICAL/CULTURAL SIGNIFICANCE		
Named for the neighborhood in which it is located.		

16. BILL GREGORY PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
150 N. "W" St.		5.9
HISTORICAL/CULTURAL SIGNIFICANCE		
The park is named after Bill Gregory. At the present time, the park is closed due to the construction of a retention pond. After completion, all park signage will be returned and the little league field will be reconstructed and once again named for Edward O'Brien Pursell, who was instrumental in bringing little league baseball to the area.		

17 .BRYAN PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1200 Langley Ave.	2011	6.2

HISTORICAL/CULTURAL SIGNIFICANCE
For many years this park was a passive field, with soccer being the only purpose. In 2008, the Tryon Branch Library was relocated to the site and opened the door for the development of the park as it is today. Completed in 2011, the park developed through public and private funds now boasts some unique features, including the Born Learning Trail, a sensory garden, as well as a pirate ship play structure.
MONUMENTS IN PARK AND SIGNIFICANCE
*Bronze plaque alongside a bench, in memory of Joel Norman, friend and neighbor.

18. CAMELOT PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
7705 Gallahad Rd.		3.3
HISTORICAL/CULTURAL SIGNIFICANCE		
Named for the subdivision in which it was developed.		

19. CATALONIA SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
2300 N. 12th Ave.	1884	2.4

HISTORICAL/CULTURAL SIGNIFICANCE
Catalonia Square is one of the city's oldest squares, appearing on a map from 1884.

20. CECIL T. HUNTER POOL		
LOCATION	**DATE ESTABLISHED**	**ACRES**
2300 N. 12th Ave.	1884	2.4
HISTORICAL/CULTURAL SIGNIFICANCE		
Cecil T. Hunter served on the City Council for 12 years and during that time served on a variety of boards and committees. He was the driving force behind the construction of the pool.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Dedication monument.		

21. CHAPPIE JAMES MEM. PK.		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1608 Dr. MLK, Jr. Blvd.	1920	0.27
HISTORICAL/CULTURAL SIGNIFICANCE		

General Daniel "Chappie" James was born in the house in 1920 that has now become the Daniel "Chappie" James Memorial Park. General James rose quickly through the ranks in the Air Force, becoming the first African American 4 Star General in 1975. General James became a Tuskegee Airman in 1943. He flew 101 combat missions in the Korean Conflict. In 1966 he was named vice commander of the 8th Tactical Fighter Wing in Thailand, flying 78 combat missions over North Vietnam. As commander of an Air Force base in Libya, General James faced down a threatening Libyan Colonel named Mohamar Khadafi over his attempted entry into the General's base. Throughout his career he was always proud of his Pensacola roots.

MONUMENTS IN PARK AND SIGNIFICANCE

*The Daniel "Chappie" James birthplace has been placed on the National Register of Historic Sites and is so signified by an informational marker at the site.

22. CHIMNEY PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
5500 Scenic Hwy.	1980s	2.2

HISTORICAL/CULTURAL SIGNIFICANCE

The park is centered around the remnants of a brick chimney, once part of the steam power plant for the Hyer-Knowles Planing Mill. When Confederate General Braxton Bragg evacuated his forces from Pensacola in March 1862, he was given a "scorched

earth" command by Secretary of War Judah P. Benjamin to "destroy all machinery private and public, which could be useful to the enemy: especially disable the sawmills in and around the bay."
MONUMENTS IN PARK AND SIGNIFICANCE
*Hyer-Knowles Planing Mill informational marker. *Glass case containing the history of the chimney. *Bronze Plaque in a brick monument signifying that the property was listed on the National Register of Historic Places by the United States Department of the Interior on May 24, 2012. *Memorial plaque to Christopher Wallace 1953-2012.

23. COBB COMM. CENTER		
LOCATION	**DATE ESTABLISHED**	**ACRES**
602 E. Mallory St.	1967	1.5
HISTORICAL/CULTURAL SIGNIFICANCE		
Cobb Center is named for Dr. Eli Sanford Cobb. He graduated from Washington High School and Meharry Medical College in Nashville, Tennessee. He began his practice in 1916 in Pensacola. He entered the army during World War I in 1918. Upon his discharge in 1919, he resumed his practice in Pensacola. A lover of sports, Dr. Cobb		

organized two semi-pro teams – the Pensacola Seagulls Baseball Team and the Pensacola Giants Football Team.
MONUMENTS IN PARK AND SIGNIFICANCE
*Bronze informational marker.

24. COMM. MARITIME PK.		
LOCATION	**DATE ESTABLISHED**	**ACRES**
300 W. Main St.	2012	16.0
HISTORICAL/CULTURAL SIGNIFICANCE		
The Vince Whibbs, Sr. Community Maritime Park opened in 2012. It is the home to Fetterman Field, the home of the Blue Wahoos Double A baseball team and the Randal K. and Martha A. Hunter Amphitheater. Vince Whibbs served as Mayor of Pensacola from 1978-1991, and was a superb ambassador for all things City of Pensacola.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Life-size statue of Vince Whibbs. *Bronze plaque thanking the Downtown Pensacola Rotary Club for their leadership role in the design, fund raising, construction, and opening of the Centennial Rotary Playground.		

*Maritime Park Dedication plaque. *Fetterman Field Dedication plaque. *Blue Wahoos Mission Statement plaque. *Randal K. and Martha A. Hunter Amphitheater signage. *Paver noting 100 years of Rotary by Bob and Cindy Hart. *Paver memorial to Stacy Swartz. *Paver honoring grandchildren of Frank and Sylvia Bell. *Numerous pavers.

25. CORDOVA SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
620 E. Government St .	1884	2.4
HISTORICAL/CULTURAL SIGNIFICANCE		
Cordova Square is one of the city's oldest squares, appearing on a map from 1884.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Signage on gazebo signifying that the gazebo was built by the East Hill Neighborhood Association and depicting their mission. The gazebo was built in honor of Colleen McDonough, founding member of the EHNA.		

26. CORINNE JONES PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
620 E. Government St .		4.6
HISTORICAL/CULTURAL SIGNIFICANCE		
Corinne Harvey Jackson Jones was born September 1, 1897 in Pensacola, FL. She was named for, given to and raised by her Godmother Mrs. Corinne Harvey, who had no children of her own. Mrs. Jones began her significant civic contributions in the 1930s by using her home to house the Works Progress Administration's Pensacola headquarters, where she helped train hundreds of men and women for jobs. When WWII broke out, Mrs. Jones went to work as an aircraft mechanic at Pensacola's Naval Air Station. During that time, she founded the first black Girl Scout troop in Pensacola. After the war, she was offered the job as Director of Fricker Community Center, where she worked from 1945 until 1962, when she retired. Throughout her life, Mrs. Jones was active in youth and adult organizations including the YWCA, Fiesta of Five Flags, the Green Thumbs Garden Club and the American Cancer Society. In 1965, the Recreation Board voted to name the community center known as the West Side Building after Mrs. Jones.		

In 2004, Hurricane Ivan destroyed that facility, along with Sanders Beach Community Center. The funds from insurance and other sources were combined to rebuild the facility at Sanders Beach. It was determined that that facility would share the name of Mrs. Jones.		
27. D'EVEREUX PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
4437 D'Evereux Dr.		2.4
HISTORICAL/CULTURAL SIGNIFICANCE		
Named for the neighborhood in which it is located.		
28. DURANT PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
Barcia and 9th Ave.		0.69
HISTORICAL/CULTURAL SIGNIFICANCE		
This park was formerly known as Barcia Park. The name was changed to honor Dr. Alvin L. Durant, who has been the pastor of Macedonia Baptist Church for over 60 years.		

29. DUNMIRE WOODS PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1135 Northbrook Ave		2.8
HISTORICAL/CULTURAL SIGNIFICANCE		
Named for the neighborhood in which it is located.		
30. DUNWODY PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
3600 McClellan Dr.		5.7
HISTORICAL/CULTURAL SIGNIFICANCE		
This park is named for the family of Mary Ellison Dunwody Baars. Her father was John Franklin Dunwody of Dairen, Ga. She was the wife of Henry Gerhard Baars.		
31. EASTGATE PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
3500 Forest Glen Dr.		6.6
HISTORICAL/CULTURAL SIGNIFICANCE		
Named for the neighborhood in which it is located.		

32. EASTGATE-ELIZABETH FERNIANY PEADEN PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
6385 Audubon Dr.		2.1
HISTORICAL/CULTURAL SIGNIFICANCE		
This park was formerly known as Audubon-Eastgate Park. Improvements to this park were the results of the efforts of Elizabeth Ferniany Peaden. Mrs. Peaden was instrumental in securing a gazebo and other amenities. In 2009, the City changed the name to honor Mrs. Peaden.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Plaque dedicating the gazebo to Elizabeth Ferniany Peaden, January 22, 2009.		

33. EPH CENTER		
LOCATION	**DATE ESTABLISHED**	**ACRES**
3208 E. Gonzalez St.		0.35
HISTORICAL/CULTURAL SIGNIFICANCE		
Named for the neighborhood in which it is located.		

34. EPH LIONS CLUB PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
2900 E. Gonzalez St.		2.6
HISTORICAL/CULTURAL SIGNIFICANCE		
Named for the support of the Lions Club and the neighborhood in which it sits.		
35. ESTRAMADURA SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1500 E. Lakeview Ave.		2.4
HISTORICAL/CULTURAL SIGNIFICANCE		
Estramadura Square is named for a Spanish region bordering Portugal.		
36. MIKE DESORBO EXCHANGE PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
3100 E. Lakeview Ave.		14.0
HISTORICAL/CULTURAL SIGNIFICANCE		

Exchange Park is named for the Exchange Club of Pensacola, who pledged their support for the field as it was being developed in 1970. Since then, they have devoted countless dollars and time to the success of the park. Recently, the name of Michael J. DeSorbo has been added to Exchange Park to honor Mr. DeSorbo, who was a long time City Councilman and all time sports supporter. He currently serves as park manager there.		
37. FAIRCHILD PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
2029 Fairchild Dr.		5.1
HISTORICAL/CULTURAL SIGNIFICANCE		
Named for the street on which it is located.		
38. FIRESTONE PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1900 E. Baars St.		0.09
HISTORICAL/CULTURAL SIGNIFICANCE		
This park is named for Mary Firestone Baars, wife of Theo Baars, who was a very prominent land holder in Pensacola.		
39. FIVE FLAGS PARK		

LOCATION	DATE ESTABLISHED	ACRES
1401 E. Gregory St.		0.43
HISTORICAL/CULTURAL SIGNIFICANCE		
This park is significant in that it showcases the flags of the five countries that have ruled Pensacola. Those countries are: Spain, France, Britain, the Confederacy, and the United States.		
40. FORT GEORGE PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
501 N. Palafox St.	c. 1778	0.43
HISTORICAL/CULTURAL SIGNIFICANCE		
Fort George was a British fort at Pensacola, likely built in 1778. It was the largest of three forts constructed by the British. It surrendered to Spanish forces led by General Bernardo de Gálvez following the Battle of Pensacola in 1781. The Spanish government never occupied the fort and it was allowed to deteriorate. The site was added to the National Register of Historic Places on July 8, 1974.		
MONUMENTS IN PARK AND SIGNIFICANCE		

*Dedication plaque commemorating the American Revolution.
*Plaque dedicated to the Sons of the American Revolution Florida Society.
*Informational plaque – Native Americans.
*Informational plaque – the Soldiers of 1781.
*Informational plaque – Fuerte San Miguel.
*Informational plaque – Jackson's Invasion.
*Plaque explaining Archaeology at Fort George.
*Wall of informational plaques.
*Cannons used in American Revolution.
*Plaque signifying Colonial Archaeological Trail.
*Informational plaque – British Pensacola.
*Informational plaque – Fort George.
*Informational plaque – Gálvez.
*Informational plaque – Battle of Pensacola.
*Stone monument and bust of Bernardo de Gálvez, donated by Spain on the 200th anniversary of the Battle of Pensacola.
*Battle of Pensacola roadside marker.
*Cannons atop hill.

41. FRICKER COMM. CENTER		
LOCATION	**DATE ESTABLISHED**	**ACRES**
900 N. "F" St.		2.1
HISTORICAL/CULTURAL SIGNIFICANCE		
Fricker Community Center is named for Frank Fricker who was an original member of the Recreation Board. His service began in 1943 and continued until 1958.		

42. GEORGIA SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1000 N. Palafox St.	c. 1880s	0.74
HISTORICAL/CULTURAL SIGNIFICANCE		
Georgia Square is one of the city's oldest parks. In 1908, the board of public works had to devise a plan to build a hard road on Palafox Street to divert a road that had been cut through the park for convenience. At the time, there was nothing in the park but overgrown wilderness, so travel took a short cut through the square. In 1969, half of Georgia Square was named Miranda Square. It seemed that the city had a bust of General Miranda, but no place to put it, so the park was divided to allow for the placement.		

43. GRANADA SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1001 E. Cervantes St.	1884	2.3
HISTORICAL/CULTURAL SIGNIFICANCE		
Granada Square is one of the city's oldest squares, appearing on a map from 1884.		

44. GRANADA SUBDIVISION PK.		
LOCATION	**DATE ESTABLISHED**	**ACRES**
103-105 Pineda Ave.		
HISTORICAL/CULTURAL SIGNIFICANCE		
Named for the subdivision in which it is located.		

45. GREENWOOD PARK(GARDEN CENTER)		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1850 N. 9th Ave.		1.7
HISTORICAL/CULTURAL SIGNIFICANCE		
This is a passive park located directly behind the Garden Center on 9th Avenue.		

MONUMENTS IN PARK AND SIGNIFICANCE		
*Stone plaque placed at the base of a tree planted in honor of Edna Golay Briggs, who was president of the Pensacola Federation of Garden Clubs from 1933-1936.		
46. GULL POINT COMM. CENTER		
LOCATION	**DATE ESTABLISHED**	**ACRES**
7140 Spanish Trail		5.1
HISTORICAL/CULTURAL SIGNIFICANCE		
Gull Point is named for the area in which it is located. The area sits on the bay at the foot of Creighton Road and has also been called Devil's Point. It dates back to the 1700s.		
47. H.K. MATTHEWS PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
3100 N. 12th Ave.	2006	2.5
HISTORICAL/CULTURAL SIGNIFICANCE		
This park was formerly known as Esperanza Park. Reverend Hawthorne Konrad (H.K.) Matthews is an African-American minister who was active during the Civil Rights Movement in the Pensacola area. Matthews became involved with the local NAACP and Southern Christian Leadership Conference chapters during the Civil Rights Movement. As president of the Pensacola Council of Ministers, Matthews led sit-in protests that		

successfully integrated Palafox Street lunch counters. He also helped the successful efforts to get blacks hired at such businesses as Sacred Heart Hospital, Southern Bell Telephone Company and West Pensacola Bank.

48. HIGHLAND TERR. PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
111 Berkley Ave.		2.7
HISTORICAL/CULTURAL SIGNIFICANCE		
Highland Terrace Park is located adjacent to the Woodland Heights Community Center.		

49. HITZMAN-OPTIMIST PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
3221 Langley Ave.	June 8, 1971	17.0
HISTORICAL/CULTURAL SIGNIFICANCE		
On June 8, 1971, the Pensacola City Council passed Resolution No. 26-71 changing the name of the Northeast Recreation Area to James W. Hitzman Park. Mr. Hitzman served for 25 years in the Recreation Department, devoting his life to "not only to improving the recreational opportunities of our citizens, but [also] unselfishly to removing clouds of adversity and yokes of despondency from the minds and hearts of all who knew him."		

In 1976, the Northeast Pensacola Optimist Club adopted the park and has contributed countless dollars and time to making it a fun and safe place for children of all ages.		
50. HOLLICE T. WILLIAMS PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1601 N. Hayne St.	2006	25.0
HISTORICAL/CULTURAL SIGNIFICANCE		
This park was formerly known as Central Park, and was renamed to honor Reverend Hollice T. Williams, who enjoyed a nearly 50-year career with the YMCA, and also was a 6 time City Councilman**.**		
51 .KIWANIS PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1801 W. Romana St.	c. 1994	2.3
HISTORICAL/CULTURAL SIGNIFICANCE		
The Kiwanis Club of Pensacola funded the development of this park.		

52. LAMANCHA SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1400 E. Cross St.		2.4
HISTORICAL/CULTURAL SIGNIFICANCE		
Lamancha Square is one of the city's oldest squares, having been laid out and appearing on maps from the 1800s.		
53. LAVALLET PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
3910 Montalvo Dr.		3.8
HISTORICAL/CULTURAL SIGNIFICANCE		
Lavallet Park is named for the neighborhood in which it is located.		
54. LEE SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
602 N. Palafox St.	June 7, 1891	1.8

HISTORICAL/CULTURAL SIGNIFICANCE		
Lee Square is a Civil War memorial park in downtown Pensacola. Situated atop Gage Hill on the former site of Fort George and Fort McClellan, it was known as Florida Square until renamed for Confederate General Robert E. Lee in 1889. In 1891, after years of fundraising and planning, a 30-foot monument to "our Confederate dead" was erected in the park, featuring a large granite sculpture of a Confederate soldier, modeled after a painting by John Adams Elder. The monument is dedicated to Jefferson Davis, Stephen R. Mallory, Edward Aylesworth Perry and "the Uncrowned Heroes of the Southern Confederacy.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Monument to "Uncrowned Heroes of the Southern Confederacy." *Cross in memory of Robert F. Meade. *Personal tributes to Robert F. Meade.		
55. LEGION FIELD		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1301 W. Gregory St.	May 17, 1928	7.6
HISTORICAL/CULTURAL SIGNIFICANCE		

Legion Field opened to great accolades in May 1928. The park was praised as one of the finest in the South and was at the time home to the Pensacola Fliers.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Monument to Charles Jefferson Marvray, I. He was a black baseball player with considerable skills who played in the Negro League and was one of Pensacola's first professional ballplayers. His hopes of playing in the Major Leagues were dashed when World War II broke out and he went into the Army. After returning to Pensacola, he paved the way for the integration of teams and ballparks.		
56. LIONS PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1201 E. LaRua St.	c. 1940	2.5
HISTORICAL/CULTURAL SIGNIFICANCE		
This park was developed and supported by the Lions Club .		
57. LONG HOLLOW PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1001 N. Guillemard St.	2003	0.81
HISTORICAL/CULTURAL SIGNIFICANCE		

This park is located in the Long Hollow neighborhood. It was developed by the collaborative efforts of the City, the neighborhood association and the Governor's Front Porch Revitalization Council of Pensacola.

58. MAGEE FIELD		
LOCATION	**DATE ESTABLISHED**	**ACRES**
2400 Dr. MLK, Jr. Blvd.	1951	4.2
HISTORICAL/CULTURAL SIGNIFICANCE		
Magee Field is located in the Eastside neighborhood. It contains facilities for football, baseball, and basketball, as well as playground equipment and a covered shelter. Dedicated in 1951, it is named after Dr. A. S. Magee. The property underwent an extensive renovation in 2006-2007.		

59. MALAGA SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1000 E. Blount St.		2.4
HISTORICAL/CULTURAL SIGNIFICANCE		
One of the oldest squares in Pensacola, Malaga Square dates back to the 1800s.		

60. MALCOLM YONGE GYM		
LOCATION	**DATE ESTABLISHED**	**ACRES**
917 E. Jackson St.	July 27, 1961	1.4
HISTORICAL/CULTURAL SIGNIFICANCE		
Malcolm Yonge Gym was named for Malcolm Yonge, who was an original member of the Recreation Board and served from 1943 until his death in 1951.The center was dedicated on July 27, 1961.		
61 .MALLORY HEIGHTS PK #1		
LOCATION	**DATE ESTABLISHED**	**ACRES**
3000 Rothchild Dr..		3.4
HISTORICAL/CULTURAL SIGNIFICANCE		
Mallory Heights Park is named for the neighborhood in which it sits.		
62. MALLORY HEIGHTS PK#2		
LOCATION	**DATE ESTABLISHED**	**ACRES**
3600 Goya Dr.		6.0
HISTORICAL/CULTURAL SIGNIFICANCE		
Mallory Heights Park is named for the neighborhood in which it sits.		

63. MALLORY HEIGHTS PK#3		
LOCATION	**DATE ESTABLISHED**	**ACRES**
2600 Scenic Hwy		15.0
HISTORICAL/CULTURAL SIGNIFICANCE		
Mallory Heights Park is named for the neighborhood in which it sits.		

64. MARITIME PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
HISTORICAL/CULTURAL SIGNIFICANCE		
The Vince Whibbs Community Maritime Park, often referred to as Maritime Park, is a public-private development that occupies city owned property once known as the Trillium Property. The concept for the park originated in 2000, when the City Council approved the purchase of the land and designs for the park began. While designs and purposes for the park changed over the coming years, the park as we know it today was dedicated in June 2012.		
MONUMENTS IN PARK AND SIGNIFICANCE		

*Bronze statue of Mayor Vince Whibbs, who served as Mayor of Pensacola from 1978-1991. *Appreciation plaque to the Pensacola Downtown Rotary Club for their leadership role in the design, fund raising, construction and opening of the Centennial Rotary Playground. *Dedication plaque – June 9, 2012. *Field dedication plaque to Vice Admiral Jack Fetterman. The Blue Wahoos baseball team named their field for the decorated Navy leader and community activist. *Plaque depicting the Blue Wahoos mission and vision statements. *Signage on Randal K. and Martha A. Hunter Amphitheater. *Concrete paver celebrating 100 years of Rotary by Bob and Cindy Hart. *Concrete paver in memory of Stacy Swartz – Jan. 10, 1961. *Concrete paver in honor of their grandchildren by Frank and Sylvia Beall. *Various other pavers. *Soon to be installed are plaques recognizing the members of the Maritime Park Board for their efforts in the construction and management of Maritime Park.

65. MARTIN LUTHER KING, JR. PLAZA		
LOCATION	**DATE ESTABLISHED**	**ACRES**
50 N. Palafox St	1992	1.3

HISTORICAL/CULTURAL SIGNIFICANCE
Dedicated to the revolutionary Civil Rights activist, this plaza serves as a reminder of the plight of one of the world's most enduring faces of freedom and equality.
MONUMENTS IN PARK AND SIGNIFICANCE
*Signage *Monument and bust of Dr. Martin Luther King, Jr. *Bronze sponsor plaques

66. MCNEALY PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
520 Woodlands Dr.		2.7
HISTORICAL/CULTURAL SIGNIFICANCE		
This park was formerly named Woodland Heights Park and on April 12, 2012, the Pensacola City Council voted to change the name to the Rev. William E. McNealy, Sr. Park. Rev. McNealy has long been the pastor at Bethel AME Church and very active in the Woodland Heights neighborhood.		

67. MIRAFLORES PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1601 E. LaRua St.		2.5
HISTORICAL/CULTURAL SIGNIFICANCE		
Ricardo Palma was an author and academic who resided in Miraflores, Spain. The bust was a gift to the city in 1965 from Mario Carrejos Quinnies, the Mayor of Miraflores.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Monument to Ricardo Palma. *Concrete plaque by Boy Scouts of America in memoriam of Eagle Scouts Jack Tilford and Jimmy Jerauld.		
68. MIRALLA PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
650 Connell Dr.	1961	4.3
HISTORICAL/CULTURAL SIGNIFICANCE		
Miralla Park was opened in 1961. It fell into disrepair over the years and eventually was closed. In 1991, members of the Miralla Park Improvement Board rallied interested residents, attended council meetings, and were successful in raising funds and sponsorships to make the much needed improvements to the park.		

69. MIRANDA SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
005 N. Palafox St.		0.74
HISTORICAL/CULTURAL SIGNIFICANCE		
General Francisco De Miranda was a Venezuelan who was a passionate advocate of freedom. He participated in the French, Latin and North American Revolutions and fought alongside Gálvez in the Spanish victory at Pensacola in 1781.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Monument and bust of General Francisco De Miranda. *Granite plaque to General Francisco De Miranda.		
70. MORRIS COURT PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1401 W. Lloyd St.		2.4
HISTORICAL/CULTURAL SIGNIFICANCE		
Morris Court Park is located at the Morris Court Housing Project.		
71. OPERTO SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**

1600 E. Blount St.	1884	2.4
HISTORICAL/CULTURAL SIGNIFICANCE		
Operto Square is one of the city's oldest squares, appearing on a map from 1884.		
72. OSCEOLA GOLF COURSE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
300 Tonawanda Dr.	1926	131.0
HISTORICAL/CULTURAL SIGNIFICANCE		
Osceola Golf Course has a long and storied history in Pensacola. It was the first golf course locally to allow African Americans to play golf. The clubhouse is named in honor of William Noonan, who served on the Recreation Board for over 50 years.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Wooden sign in memory of Jerry Miller 1937 – 2010. *Bronze marker in memory of Doretha Hunter 1939 – 2015 for her hole-in-one on Jan. 17, 2012.		
73. PARKER CIRCLE PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
601 Parker Circle	1926	6.2

HISTORICAL/CULTURAL SIGNIFICANCE		
Parker Circle Park is named for the neighborhood in which it is located.		
74. PINEGLADES PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
301 Euclid St.		1.5
HISTORICAL/CULTURAL SIGNIFICANCE		
Pineglades Park is named for the neighborhood in which it is located.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Bronze plaque to Margie Connor, a friend to all in the Pineglades neighborhood. *Bench plaque dedicated to Marvin K. Bastion.		
75. PINTADO PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1830 Hallmark Dr.		3.7
HISTORICAL/CULTURAL SIGNIFICANCE		
Likely named for DeVincent Sebastian Pintado (or his descendants), who was in 1822 the Surveyor General for West Florida, although this information is not verified.		

76. PLAZA de LUNA		
LOCATION	**DATE ESTABLISHED**	**ACRES**
900 S. Palafox St .	2007	2.4
HISTORICAL/CULTURAL SIGNIFICANCE		
Plaza de Luna is a waterfront park overlooking Pensacola Bay. It is located at the southern terminus of Palafox Street by the Palafox Pier development on the site of the former Bayfront Auditorium, which was demolished in July 2005 following damage from Hurricane Ivan. In June 2006, the City of Pensacola voted to name the new park for Tristan de Luna y Arellano, whose 1559 expedition near Pensacola was America's first European settlement.		
MONUMENTS IN PARK AND SIGNIFICANCE		

*Bronze statue of Don Tristan De Luna.
*Pavers listing all who have been honored as Don Tristan De Luna during the annual Fiesta of Five Flags celebrations.
*Plaque signifying the Spanish reign over Pensacola
*Plaque signifying the French reign over Pensacola.
*Plaque signifying Great Britain's reign over Pensacola.
*Plaque signifying the Confederate States's reign over Pensacola.
*Plaque signifying the United States's reign over Pensacola.
*Concrete "Celebrate Pensacola" paver.
*City of Pensacola paver.
*Paver depicting that on that spot in 1942, Dick asked Patsy to marry him and she said "yes"
*Plaque signifying that the first Presbyterian Church in Pensacola Florida was established in 1845.
*Numerous other pavers.
*Bronze Plaza De Luna dedication plaque – 2007.
*Bronze dedication plaque from the Municipal Auditorium that previously sat on the site of Plaza De Luna. The auditorium was built in 1955 and destroyed by Hurricane Ivan in 2004.
*Historic marker honoring the United States Coast Guard Cutter Sebago.

77. PLAZA FERDINAND VII		
LOCATION	**DATE ESTABLISHED**	**ACRES**
300 S. Palafox St.	1815	1.6
HISTORICAL/CULTURAL SIGNIFICANCE		
Plaza Ferdinand VII is an outdoor garden and park in the Pensacola historic district. It is located on Palafox Street between Government and Zaragossa Streets. It is named after King Ferdinand VII of Spain. The park is dominated by three main features: a fountain, an obelisk dedicated to William Dudley Chipley and a bust of Andrew Jackson. The cession of Florida to the United States from Spain occurred at the Plaza on July 17, 1821. General Andrew Jackson made a public speech to townspeople, informing them that the land was now the Florida Territory, and that Pensacola would be its capital. General Jackson was later sworn in as the first Territorial Governor in the plaza. The first time the Star Spangled Banner was played on Florida soil, it was played at Plaza Ferdinand VII.		
MONUMENTS IN PARK AND SIGNIFICANCE		

*Bust of Andrew Jackson, who raised the United States flag for the first time in Florida in Plaza Ferdinand. *Bronze plaque depicting the transfer of West Florida from Spain to the United States on July 17, 1821. *Dedication plaque – General Andrew Jackson – dedicated May 19, 1984 by the Pensacola Historic Preservation Society. *Plaza Ferdinand Renovation monument. *Fountain. *City signage. *Obelisk with bust of William Dudley Chipley, who in addition to being a decorated officer in the Confederate Army, was the creator and builder of the Pensacola and Atlantic Railroad, President of the Board of Trustees of the Confederate Memorial Institute, Vice-President of the Board of Trustees of the Florida State Agricultural College, a member of the board of Trustees of Stetson University and Tallahassee Seminary, Chairman of the State Democratic Executive Committee of Florida, Mayor of Pensacola, and State Senator from Escambia County. *Historic cannons.

78. ROGER SCOTT ATHLETIC COMPLEX		
LOCATION	**DATE ESTABLISHED**	**ACRES**

2130 Summit Blvd.		47.0

HISTORICAL/CULTURAL SIGNIFICANCE

Roger Scott Athletic Complex is named for Roger Scott, who was on the Recreation Board for more than 20 years, serving as chairman during that time. He served the Pensacola community on many boards and organizations and was devoted to the promotion of tennis. In the spring of 1964, the tennis center was named for Mr. Scott. Unfortunately, he unexpectedly passed away in October of that year.

MONUMENTS IN PARK AND SIGNIFICANCE

*Dedication plaque.
*Pell-i-can – dedicated in honor of Margo Pell.
*Bronze plaque dedicated in honor of Margo Pell.
*Fence banner dedicated to Terry Kellen, co-founder and first president of the Greater Pensacola Ladies' Tennis League.
*Tennis Center signage.
*Bronze plaque in memory of Deborah Larsen.
*Bench and bench plaque in honor of Vicki Fuller.
*Bench plaque in memory of Johnie and Carroll Crane.
*Trail medallion sponsor pavers.

79. SANDERS BEACH PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
913 S. "I" St.	1908	7.4
HISTORICAL/CULTURAL SIGNIFICANCE		
In 1908, Pensacola Mayor Calvin C. Goodman requested and received a donation of two blocks of waterfront from the Maxent Land Company. The parcel was developed as a public park and was eventually named for Frank Dent Sanders, a former Pensacola fireman, police chief, commissioner and mayor. According to minutes from a Recreation Board Meeting, Sanders Beach opened to the public and began being operated by the city in 1947. Prior to that, it had been leased to individuals to maintain and run. The formal opening was 2-27-48.		
80. SCENIC HEIGHTS PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
3800 Langley Ave.		3.7
HISTORICAL/CULTURAL SIGNIFICANCE		
Scenic Heights Park is named for the neighborhood in which it is located.		
81. SEMMES PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**

1380 E. Texar Dr.		1.9
HISTORICAL/CULTURAL SIGNIFICANCE		
This park is named for Oliver J. Semmes, Jr., who with an impressive background of training and experience in the field of civil engineering, was in 1947 appointed as city manager for the City of Pensacola.		
82. SEVILLE SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
311 E. Government St.	1763	1.7
HISTORICAL/CULTURAL SIGNIFICANCE		
The first attempt to settle Pensacola in 1559 was made somewhere in the vicinity of Ft. Barrancas. In 1721, a second Spanish settlement was begun on Santa Rosa Island and by 1754, it had begun to thrive. On the mainland, in the area which is now Seville Square, there stood only a wooden stockade called Ft. San Miguel. That same year a hurricane virtually destroyed the island settlement and most of the survivors fled to San Miguel, thus beginning the third and finally successful settlement of the city on its present site. The British came in 1763 and built a stockade, and Seville Square was a cleared area outside its east walls. As the area within the old stockade developed, the cleared area on the east became known as Seville Square.		
MONUMENTS IN PARK AND SIGNIFICANCE		

*Gazebo.
*Carved tree support.
*Memorial marker to Firefighter Vista S. Lowe, who lost his life in the line of duty in 1962.
*1973 – Freedom tree and plaque dedicated to American prisoners of war and to those missing in action in Foreign Wars and to the sons and daughters of Pensacola who have fought in the cause of freedom.
*May 9, 1981 – Bronze plaque dedicated to the memory of Mary Turner Rule Reed – Pioneer and inspiration for Pensacola's historical preservation movement.
*1990 - Granite monument to the Seville Square Childhood Reunion Group – dedicated to all those who spent their youth in and around Seville Square. Founded by Leo M. Flynn and Tony Manning in 1979.
*City signage.
*Granite plaque in memory of Timothy Paul Chapman.
*The Fleming Fountain and plaque. Presented to the city by James Monroe Fleming and Ernestine Smith Fleming.

83. SPRINGDALE PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
600 E. Brent Lane		5.0

HISTORICAL/CULTURAL SIGNIFICANCE		
Springdale Park is named for the neighborhood in which it is located.		
84. TERRY WAYNE EAST PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1620 W. Jackson St.		2.1
HISTORICAL/CULTURAL SIGNIFICANCE		
Originally known as the Exchange Little League Baseball Field, the name was officially changed on May 10, 1973 by resolution of the City Council to Terry Wayne East Park. Terry Wayne East was a young man who was dedicated to the game of baseball, becoming a member of the All-Star Team and voted unanimously as the most valuable player of the Little League. Sadly, he passed away from leukemia at the age of 13.		
85. TIERRA VERDE PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
5850 Reynosa Dr.		1.2
HISTORICAL/CULTURAL SIGNIFICANCE		
Tierra Verde Park is named for the neighborhood in which it is located..		

86. TIPPIN PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
6600 Tippin Ave.		3.0
HISTORICAL/CULTURAL SIGNIFICANCE		
Tippin Park is named for the street on which it is located.		
MONUMENTS IN PARK AND SIGNIFICANCE		
*Marker signifying tree planted in memory of Sean Thomas Cannon – April 8, 1992 – July 11, 1996.		
87. TOLEDO SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1700 E. Gonzalez St.	1884	2.4
HISTORICAL/CULTURAL SIGNIFICANCE		
Toledo Square is one of the city's oldest squares, appearing on a map from 1884.		
88. VETERANS MEMORIAL PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
211 E. Main St.	1992	2.2
HISTORICAL/CULTURAL SIGNIFICANCE		

Veterans Park is the home of Wall South, the first permanent replica of the National Vietnam War Memorial. Since its founding, the park has grown to include a WWI Memorial; WWII Memorial; a Korean War Memorial; a Revolutionary War Memorial; a Purple Heart Memorial; a monument to the submarine lifeguards who rescued so many Navy pilots in WWII, including President George H.W. Bush; a Marine Corps Aviation Bell Tower; and a Memorial to those who lost their lives in the fighting the Global War on Terror.
There are also numerous plaques to honor local heroes as well.
This park is dedicated to the memories of those who sacrificed their lives in the defense of this nation.

MONUMENTS IN PARK AND SIGNIFICANCE

*Monument to the Korean War.
*Bronze statues of American servicemen fighting in Korean War.
*Plaques signifying service in the Korean War.
*Pensacola's Korean War Memorial dedication plaque – May 26, 2007.
*Bronze sponsor plaque.
*Statue of Revolutionary War serviceman.
*Revolutionary War Veteran's Minuteman Memorial – 1775 – 1783.
*Donor pavers.

*Bronze plaque in memory of fallen heroes who died during the Global War on Terrorism.
*Bronze plaques depicting the names of fallen heroes who died in the Global War on Terrorism.
*Flowers and flags that have been left in remembrance of fallen servicemen and women.
*"Children's Homecoming"
Memorial.
*Bronze plaque presented
by the Children of America's Twentieth Century Heroes,
2000.
*Bronze plaque signifying the importance of the AH-1 Cobra Helicopter during the Vietnam War.
*AH-1 Cobra Helicopter.
*Marine Aviation Memorial Tower.
*Memorial pavers.
*Bronze plaque explaining the United States Marine Corps Aviation Centennial history – the first 100 years.
*Bronze plaque dedicated to Anthony J. "Ted" Ciano, veteran, patriot, and community leader. The plaque also recognizes major donors for the project.
*Bronze plaque explaining the meaning of the tower.

*Monument to recipients of the Purple Heart, erected by Chapter #566 of the Military Order of the Purple Heart.
*Granite bench with plaque in remembrance of George Lockwood, USN, Feb 8, 1924 – Aug. 9, 1942.
*Blue Star Memorial – a tribute to the Armed Forces that have defended the United States of America. Marker was erected by the Pensacola Federation of Garden Clubs.
*Monument to Pensacola Bay Area Impact 100 for donations made to arts and culture, education, environment, family, health and wellness.
*Numerous Vietnam War pavers and memorials.
**The Sanctuary* statue located at Hawkshaw Lagoon. This is a memorial to missing children.
*Tribute to the Men of Escambia County Who Served the United State of America and the Allies in the World War 1914-1918.
*Bronze donor plaque recognizing the people and organizations that made the WWII Memorial possible.
*Statues of WWII Servicemen.
*Inspirational signage.
*Bench dedicated to POW-MIA.
*Commemorative bench – United States Navy.
*Commemorative bench – United States Civilians

*Commemorative bench – United States Air Force.
*Replica of Vietnam Veterans Memorial Wall.
*Monument to Submarine Lifeguard League which was tasked with saving the lives of Airmen from 1943 – 1945.
*Bronze Veterans Memorial Park Information plaque.

89. VICTORY PARK # 1		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1801 N. Reus St.		0.15

90. VICTORY PARK # 2		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1301 N. Devilliers St.		0.43

91. WAYSIDE PARK EAST		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1401 E. Gregory St.	1943	18.0

HISTORICAL/CULTURAL SIGNIFICANCE

This park is dedicated to Mrs. Dora Bayless; it was sponsored by the Junior Chamber of Commerce, Lions Club, Rotary Club, Angler's Club and was erected by the State Road Department and the City of Pensacola.

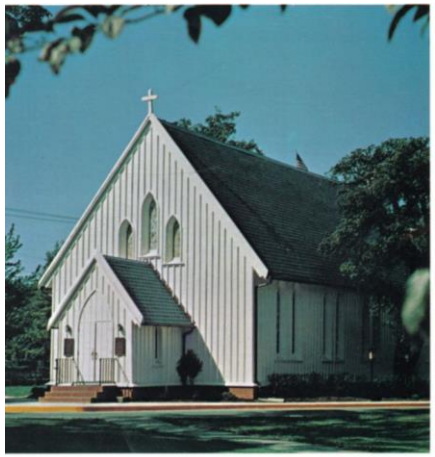
MONUMENTS IN PARK AND SIGNIFICANCE		
*Bronze plaque dedicated to Mrs. Dora C. Bayless erected in 1943. *Bronze plaque signifying Military Appreciation Rose Garden – 2004. *Marker signifying Emanuel Point Shipwrecks which occurred shortly after colonists arrived in Pensacola with Don Tristan De Luna in 1559. He brought 11 ships and 1000 colonists to establish the colony, but a month later a powerful hurricane struck and most of the ships were lost.		
93. WOODCLIFF PARK		
LOCATION	**DATE ESTABLISHED**	**ACRES**
4701 Balmoral Dr.		4.6
HISTORICAL/CULTURAL SIGNIFICANCE		
Woodcliff Park is named for the neighborhood in which it is located.		
94. WYER PARK (Henry T.)		
LOCATION	**DATE ESTABLISHED**	**ACRES**
320 W. Belmont St.	c. 1993	0.67
HISTORICAL/CULTURAL SIGNIFICANCE		
Henry T. Wyer was a longtime advocate for the Belmont-Devilliers area. On August 2, 1991, the City Manager, Rod Kendig appointed him to the recently reestablished		

Belmont Devilliers Redevelopment Board. Prior to this appointment, Wyer had served on the Neighborhood Council. He took his Oath of Office on October 30, 1991, and became an official member of the Board and served on the Belmont-Devillliers Cultural Committee. On December 15, 1992 the main item on the Belmont-Devilliers Redevelopment Board's agenda was the discussion of a proposed layout for the neighborhood park that the Board had been planning. The park had yet to be named. It was later stated that the park was named after Henry T. Wyer because of his constant support of the neighborhood.

95. ZAMORA SQUARE		
LOCATION	**DATE ESTABLISHED**	**ACRES**
1800 E. Bobe St.		2.4
HISTORICAL/CULTURAL SIGNIFICANCE		
Zamora Square is one of the city's oldest squares, having been laid out and appearing on maps from the 1800's.		

Cross Displays on Public Property

Cross Mountain Cross		
Placed on Public Land:	1849 (replaced 1946)	**Picture**
Location:	Cross Mountain Park, Fredericksburg, TX	
Citation:	*Cross Mountain*, The Historical Marker Database, http://tinyurl.com/yd2zywkp (last modified June 16, 2016); *see also Cross Mountain Park*, The City of Fredericksburg, Tex., http://tinyurl.com/y9344ym4 (last visited Sept. 25, 2017).	

Chapel of the Centurion		
Placed on Public Land:	1858 (transferred to private ownership 2011)	**Picture**
Location:	Fort Monroe, Hampton, VA	
Citation:	*Chapel of the Centurion*, Order of the Centurion, http://tinyurl.com/y9zr89hn (last visited Sept. 25, 2017).	

San Buenaventura Mission Cross		
Placed on Public Land:	1782 (Spanish), replaced in 1860s and 1912 (transferred to private ownership 2003)	**Picture**
Location:	Grant Park, Ventura, CA	
Citation:	*San Buenaventura Mission Cross*, The Historical Marker Database, http://tinyurl.com/ya7a5ywe (last modified June 16, 2016).	

Confederate Soldiers Monument		
Placed on Public Land:	1868	**Picture**
Location:	Cross Creek Cemetery, Fayetteville, NC	
Citation:	*Confederate Monument at Cross Creek Cemetery*, Fayetteville Area Convention and Visitors Bureau, http://tinyurl.com/ydze5bzw (last visited Sept. 25, 2017); *see also* N.C. Dep't of Cultural Res., *Fayetteville*, N.C. Civil War Monuments, http://tinyurl.com/yd9mfmbj (last visited Sept. 25, 2017).	

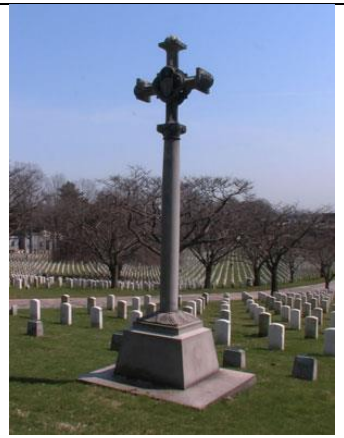
Monument to Co. D., 30th Ohio Volunteer Regiment		
Placed on Public Land:	1876	**Picture**
Location:	Monument Square Park, New Lexington, OH	
Citation:	*Monument Square Park*, Perry Cty., Ohio, http://tinyurl.com/y6wug43k (last visited Sept. 25, 2017).	

Irish Brigade Monument		
Placed on Public Land:	1888	**Picture**
Location:	Gettysburg National Military Park, Gettysburg, PA	
Citation:	*Irish Brigade Monument at Gettysburg*, Stone Sentinels, http://tinyurl.com/yalqysfa (last visited Sept. 25, 2017).	

Jeannette Monument		
Placed on Public Land:	1890	**Picture**
Location:	United States Naval Academy Cemetery, Annapolis, MD	
Citation:	*Jeannette Arctic Expedition Memorial at the U.S. Naval Academy in Maryland*, DCMemorials.com, http://tinyurl.com/ybv2axl4 (last modified Apr. 20, 2013); *see also Jeannette Monument*, Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys., //tinyurl.com/yb382yxm (last visited Sept. 25, 2017).	

Horse Fountain Cross		
Placed on Public Land:	1898	**Picture**
Location:	Lancaster, PA	
Citation:	*Ho! Every One That Thirsteth*, Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys., http://tinyurl.com/ybmv75cn (last visited Sept. 25, 2017).	

Father Serra Celtic Cross		
Placed on Public Land:	1908	**Picture**
Location:	Monterey, CA	
Citation:	*Serra Landing*, Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys., http://tinyurl.com/ya9jbkph (last visited Sept. 25, 2017).	

French Cross		
Placed on Public Land:	After 1918	**Picture**
Location:	Cypress Hills National Cemetery, Brooklyn, NY	
Citation:	*Cypress Hills National Cemetery*, Nat'l Park Serv., http://ti-nyurl.com/y88zdbqr (last visisted Sept. 25, 2017).	

American Overseas Commemorative Cemeteries and Memorials		
Placed on Public Land:	Beginning 1923	**Picture**
Location:	25 U.S.-owned sites throughout the world, including in France, the U.K., and the Philippines	
Citation:	American Battle Monuments Commission, *Commemorative Sites Booklet*, ABMC.gov, http://ti-nyurl.com/y83mfuna (Jan. 2017).	

Wayside Cross		
Placed on Public Land:	1923	**Picture**
Location:	New Canaan, CT	
Citation:	Dave Pelland, *Wayside Cross, New Canaan*, CTMonuments.net (July 8, 2011), http://tinyurl.com/y7sd8ssv.	

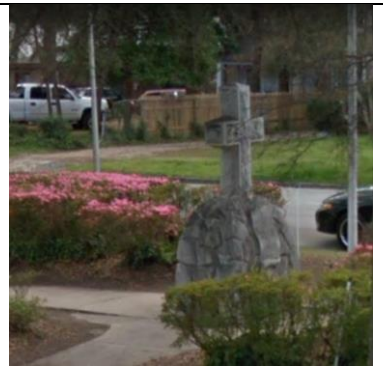
Argonne Cross Memorial		
Placed on Public Land:	1923	**Picture**
Location:	Arlington National Cemetery, Arlington, VA	
Citation:	*Argonne Cross (WWI)*, Arlington National Cemetery (Oct. 7, 2015), http://tinyurl.com/ycxelus6; *see also The Argonne Cross Memorial*, The Am. Legion (Feb. 3, 2017), http://tinyurl.com/yd95lrjh.	

Memorial Peace Cross		
Placed on Public Land:	1925	**Picture**
Location:	Bladensburg, MD	
Citation:	*Peace Cross: "This Memorial Cross"*, The Historical Marker Database, http://tinyurl.com/yabjo735 (last modified June 16, 2016); *see also Memorial Peace Cross*, Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys., http://tinyurl.com/y8rh9d7u (last visited Sept. 25, 2017).	

Father Millet Cross		
Placed on Public Land:	1926	**Picture**
Location:	Old Fort Niagara State Park, NY	
Citation:	Bob Janiskee, *Pruning the Parks: Father Millet Cross National Monument, 1925-1949, Was the Smallest National Monument Ever Established*, National Parks Traveler (Sept. 4, 2009), http://tinyurl.com/ycxocthh.	

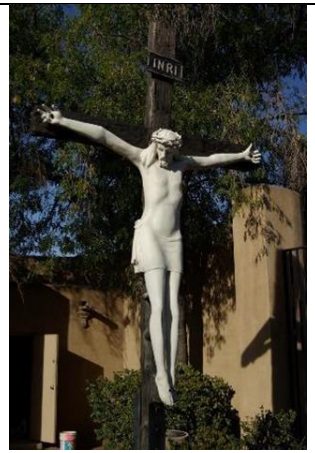
Canadian Cross of Sacrifice		
Placed on Public Land:	1927	**Picture**
Location:	Arlington National Cemetery, Arlington, VA	
Citation:	*Canadian Cross of Sacrifice (WWI/WWII/Korea)*, Arlington National Cemetery, http://tinyurl.com/zkvrpyy (last visited Sept. 25, 2017).	

War Memorial, Cross of Gray		
Placed on Public Land:	1929	**Picture**
Location:	Town Hall, Weymouth, MA	
Citation:	*The War Memorial*, Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys., http://tinyurl.com/y9aq52l6 (last visited Sept. 25, 2017).	

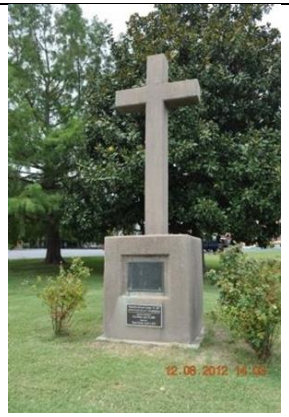
The Rustic Cross		
Placed on Public Land:	1929	**Picture**
Location:	In the median on Greene Street, Augusta, GA	
Citation:	*The Rustic Cross*, Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys., http://tinyurl.com/ybdzl547 (last visited Sept. 25, 2017).	

Canby's Cross		
Placed on Public Land:	Before 1933	**Picture**
Location:	The Lava Beds National Monument, Tulelake, CA	
Citation:	*Canby's Cross*, The Historical Marker Database, http://tinyurl.com/yb29qa6f (last modified June 16, 2016); *see also* Office of Historic Preservation, *Canby's Cross-1873*, Cal. State Parks, http://ohp.parks.ca.gov/ListedResources/Detail/110 (last visited Sept. 25, 2017).	

Celtic Cross, Monument to Oglethorpe		
Placed on Public Land:	1933	**Picture**
Location:	Queen Square, Brunswick, GA	
Citation:	*Monument to James Edward Oglethorpe*, Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys., http://tinyurl.com/y9pm38jp (last visited Sept. 25, 2017).	

Garden of Gethsemane: Crucifix (one of five religious statues)		
Placed on Public Land:	1948	**Picture**
Location:	Felix Lucero Park, Tucson, AZ	
Citation:	*Garden of Gethsemane: Crucifix*, Art Inventories Catalog, Smithsonian American Art Museum, Smithsonian Inst. Research Info. Sys., http://tinyurl.com/y8ct67nq (last visited Sept. 25, 2017).	

Kauhako Crater Cross		
Placed on Public Land:	1947	**Picture**
Location:	Kalaupapa National Historical Park, HI	
Citation:	*Kauhako Crater Cross*, Nat'l Park Serv. (May 29, 2014), http://tinyurl.com/y7fz83sw.	

Cape La Croix Cross		
Placed on Public Land:	1947	**Picture**
Location:	Cape Girardeau, MO	
Citation:	*Cape La Croix Creek Marker*, Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys., http://tinyurl.com/ycfuylxx (last visited Sept. 25, 2017).	

Father Padilla's Cross		
Placed on Public Land:	1950	**Picture**
Location:	Cape Girardeau, MO	
Citation:	*Father Padilla's Cross*, Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys., http://tinyurl.com/y8cdgakx.	

Cannon County War Memorial		
Placed on Public Land:	1950	**Picture**
Location:	Main St., Woodbury, TN	
Citation:	*War Memorial Cannon County*, Traces of War, http://tinyurl.com/y9bhc7l2 (last visited Sept. 25, 2017).	

Portola Crespi Cross		
Placed on Public Land:	1953 (blew down and re-erected in 1983)	**Picture**
Location:	Carmel Beach State Park, Monterey, CA	
Citation:	*Portola Crespi Cross*, The Historical Marker Database, http://tinyurl.com/yazqok94 (last modified June 16, 2016).	

Camp Pendleton Cross ("La Christianita")		
Placed on Public Land:	c. 1957	**Picture**
Location:	Camp Pendleton, San Diego, CA	
Citation:	Lance Cpl. Mike Atchue, *California's First Baptism Held at Pendleton*, Marines: The Official Website of the U.S. Marine Corps (Feb. 5, 2010), http://tinyurl.com/ya9bdexm.	

Pensacola Beach Cross		
Placed on Public Land:	c. 1959	**Picture**
Location:	Pensacola Beach, FL	
Citation:	Drew Buchanan, *Settlement of Pensacola Marked the "Beginning of Christianity" in America*, The Pulse (Apr. 24, 2016), https://tinyurl.com/ydhyy474.	

Seaman's / Aransas Pass Memorial Tower with crucifix		
Placed on Public Land:	1970	**Picture**
Location:	Conn Brown Harbor Park, Aransas Pass, TX	
Citation:	*Aransas Pass Memorial Tower*, Collections Search Center, Smithsonian Inst., http://tinyurl.com/y9bk4dly (last visited Sept. 25, 2017).	

Pioneer Family with Cross		
Placed on Public Land:	1976	**Picture**
Location:	Victoria, KS	
Citation:	*Pioneer Family*, Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys., http://tinyurl.com/ydg9pamg (last visited Sept. 25, 2017).	

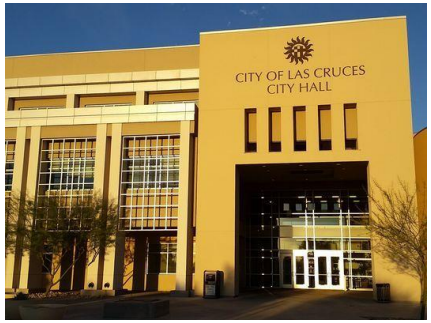
Cross of the Martyrs		
Placed on Public Land:	1977	**Picture**
Location:	Hillside Park, Santa Fe, NM	
Citation:	Amy Behm, Sa*nta Fe Travel—Historic Sites: The Cross of the Martyrs*, Pueblo Bonito Bed & Breakfast Inn (Apr. 30, 2015), http://tinyurl.com/y9abjy9k; *see also* Camille Flores, *Santa Fe Icons: 50 Symbols of the City Different* 84 (2010).	

The Irish Monument		
Placed on Public Land:	Dedicated 1984	**Picture**
Location:	Emmet Park, Savannah, GA	
Citation:	*The Irish Monument*, Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys., http://tinyurl.com/ydfjnskp (last visited Sept. 25, 2017).	

Irish Cross		
Placed on Public Land:	Before 1994	**Picture**
Location:	Jordan Park, International Peace Gardens, Salt Lake City, UT	
Citation:	*Irish Cross*, Art Inventories Catalog, Smithsonian Am. Art Museum, Smithsonian Inst. Research Info. Sys., http://tinyurl.com/ybp3kwg4 (last visited Sept. 25, 2017).	

Confederate Soldiers Monument		
Placed on Public Land:	2001	**Picture**
Location:	Middletown, NC	
Citation:	N.C. Dep't of Cultural Res., *Confederate Soldiers Monument*, N.C. Civil War Monuments, http://tinyurl.com/yb5d6gn5 (last visited Sept. 25, 2017); *see also* UNC Univ. Libraries, *Confederate Soldiers Monument, Middletown*, Commemorative Landscapes, http://tinyurl.com/y7jpkaq4 (last visited Sept. 25, 2017).	

Woodbridge Avenue Memorial		
Placed on Public Land:	Updated with cross in 2002	**Picture**
Location:	Ansonia, CT	
Citation:	*Ansonia, CT Veterans' Memorials*, Ansonia Civil War Soldiers' Monument (May 11, 2010), http://tinyurl.com/yavnqrus.	

Las Cruces City Symbol (three crosses within a sun)		
Placed on Public Land:	2003	**Picture**
Location:	City Hall, Las Cruces, NM	
Citation:	City of Las Cruces, http://www.las-cruces.org/ (last visited Sept. 25, 2017).	

Veteran Memorial Plaza		
Placed on Public Land:	2006	**Picture**
Location:	David Webb Riverfront Park, Harriman, TN	
Citation:	*Veterans Memorial Plaza Harriman*, Traces of War, http://tinyurl.com/yaog2odm (last visited Sept. 25, 2017).	

Jefferson County Veterans Memorial		
Placed on Public Land:	2011	**Picture**
Location:	Courthouse lawn, Mount Vernon, IL	
Citation:	*Jefferson County Veterans Memorial—Mount Vernon, IL*, Waymarking.com, http://tinyurl.com/y9clrllw (last visited Sept. 25, 2017).	