No. 18-351

In The
Supreme Court of the United States

CITY OF PENSACOLA, FLORIDA, ET AL.,

Petitioners,

v.

AMANDA KONDRAT'YEV, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This Court has held that a government violates the Establishment Clause when it erects or maintains a religious display with a primarily religious purpose.

The City of Pensacola (the "City") owns, maintains, and prominently displays a 34-foot-tall Christian cross as one of only two monuments in a popular urban park for a purely religious purpose: to serve as a holy object for annual Easter worship services. Since its erection in 1969, the cross has consistently been used for that purpose.

The District Court found that the City's "Cross clearly has a primarily—*if not exclusively*—religious purpose," and thus violates the Establishment Clause. The Eleventh Circuit affirmed. The issue is: Does a city violate the Establishment Clause when it displays and maintains a towering standalone Christian cross in a popular city park for exclusively religious ends?

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INTRODUCTION

The District Court and Eleventh Circuit's conclusion that the City's prominently displayed Christian cross runs afoul of the Establishment Clause because of its "exclusively" religious purpose comports with the jurisprudence of this Court and every Circuit in the country.

It is "settled jurisprudence that 'the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such.'" *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8-9 (1989) (citations omitted) (citing litany of pre-*Lemon* cases involving religious-purpose inquiry). *See McCreary County v. ACLU*, 545 U.S. 844, 869 (2005) (Ten Commandments display unconstitutional because of its primary religious purpose).

Furthermore, irrespective of the *Lemon* test[1] and the religious purpose inquiry, this Court has specifically recognized that, under even the narrowest view of the Establishment Clause, a city cannot prominently display a large permanent standalone Latin cross. *See County of Allegheny v. ACLU*, 492 U.S. 573, 606-07, 615 n.61 (1989); *see also id.* at 661 (Kennedy J., concurring and dissenting in part) (citing *Rabun County Chamber of Commerce*, *Inc.*, 698 F.2d 1098, 1103-04 (11th Cir. 1983) (per curiam)); *Salazar v. Buono*, 559 U.S. 700,

[1] *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (enshrining essential Establishment Clause precepts based on a full sweep of this Court's prior cases).

715 (2010) (plurality) (adopting *Allegheny*, 492 U.S. at 661 (Kennedy, J.)).

Consequently, the Circuits have marched in virtual lockstep regarding cross displays. Of the thirty-three federal cross cases, not a single Circuit has upheld a standalone Latin cross, let alone one motivated by a purely religious purpose. That uniformity is proof that this Court's jurisprudence provides more than sufficient guidance to the lower courts to yield consistent results.

COUNTERSTATEMENT OF THE CASE[2]

Since 1969, the City has maintained and prominently displayed a standalone 34-foot-tall Latin cross (the "Cross" or "Bayview Cross") in its Bayview Park for an exclusively religious purpose: to serve as the holy object for annual Easter Sunrise Services,[3] which include Christian prayers, hymns, and sermons.[4]

The Cross is one of only two permanent displays in the entire 28-acre park; the other is a smaller unrelated memorial to a deceased resident.[5]

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[2] Record citations refer to the Docket Entry ("DE-") followed by the page number generated by CM/ECF, except for Plaintiffs-Respondents' paginated record of summary judgment exhibits (DE-31-1 through DE-31-18), which are cited as "R."

[3] Pet.App.83a-84a, 106a, 125a; R.3-13, 53, 206, 371-74, 397, 406-07, 416; DE-22, 8-9.

[4] R.57-249, 415-17; DE-22, 11.

[5] Pet.App.3a, 103a; R.374-75.

The City's Director of Parks referred to Bayview Park as "a regional park that serves just about our entire community," and even "the adjoining county."[6]

The Cross towers over the main parking lot and is adjacent to many of the park's amenities, including the amphitheater, boat ramps, jogging/bike path (along the shoreline), and tennis courts, and visible from the City's Community Center and Senior Citizens Center.[7] Its "central location" makes it impossible "to avoid the cross."[8]

Pensacola's first Easter Sunrise Service was held in 1941.[9] The theme was "The Risen Christ."[10] Just prior to the event, the National Youth Administration installed a temporary wooden cross in the park for the gathering.[11] The service included prayers and hymns, such as "Christ Arose," and "The Old Rugged Cross."[12]

In 1949, an amphitheater was built to serve as a permanent home for the worship services.[13] In 1951, the City resolved "that a plaque be furnished by the

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[6] Pensacola News Journal, *Bayview Community Center on track for 2019 completion, despite complaints over design* (Oct. 28, 2017), https://perma.cc/U27K-AXY5.

[7] Pet.App.122a, 124a; DE-30, 5-6; R.13, 407.

[8] DE-39-2, 2; Pet.App.122a.

[9] Pet.App.2a, 83a; R.57-69, 349; DE-22, 9.

[10] R.57-69, 415; DE-22, 2.

[11] Pet.App.2a; R.57-69, 415; DE-22, 2.

[12] R.57-69, 374, 415.

[13] Pet.App.2a, 84a, 124a; R.50, 130-31, 350, 374-75, 415; DE-30-1, 51; DE-22, 9.

City, with dedication services to be held on next Easter."[14] The plaque was affixed to the amphitheater and refers to "Easter Sunrise."[15]

At the February 1969 Parks and Recreation meeting, the City approved the erection of a 34-foot-tall permanent cross for these "Easter Sunrise Services," deeming it a "very worthwhile project."[16] Bayview Cross was dedicated that year at the 29th Easter Service.[17]

Since then, the Cross has consistently been used as the centerpiece for annual Christian services.[18] And the City has continued to spend taxpayer dollars on its lighting and maintenance, most recently spending $2,000 to refurbish it.[19]

In addition to providing the Cross and stage for the church services, the City was an official "co-sponsor" of the Easter services in 2008, 2009, and 2010,[20] and was actively involved in many earlier services.[21]

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[14] R.52, 145-47, 375; DE-30-1, 50.

[15] Pet.App.125a; R.350.

[16] Pet.App.2a-3a; R.53, 372-74.

[17] Pet.App.2a, 84a; R.206, 416; DE-22, 4.

[18] Pet.App.3a, 84a; R.57-249, 254-88, 398; DE-22, 10-11; DE-30-1, 50-51, 73, 111.

[19] Pet.App.84a; R.15-16, 315-44, 371, 397-98; DE-22, 9; Tab TR, at 55:21-25.

[20] R.258-67, 278, 284, 366, 380.

[21] R.60, 92, 103, 225, 227, 415; DE-22, 3.

There is no purpose for the Cross other than to serve as the holy object for Christian worship services.[22] The City admitted that the Cross was always intended to be a "permanent marker" for Easter Sunrise services,[23] and remains "primarily associated with the Easter Sunrise Service."[24] City officials refer to the Cross site as the "Sunrise Service Area."[25]

"Despite briefly implying that the Bayview Cross is a war memorial in its motion," the City did not "tender any evidence to suggest that the cross was dedicated as a war memorial or intended to be one." (Pet.App.102a). Yet the City continues to insinuate that the Cross is a war memorial by referencing the timing of its erection (at some point during the decades-long Vietnam War) and referring to the Jaycees' having allegedly used the area "around the cross" on "Veterans Day and Memorial Day" (Pet.5-6) over ten years ago.[26] As the District Court correctly found, such evidence, even if true, does not "alter the fact that the Bayview Cross obviously had—and still has—a primarily religious purpose." (Pet.App.103a).

The City admitted before the District Court that the Cross is not in a museum-like setting. (DE-22, 8). After retaining the Becket Fund on appeal, however,

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[22] Pet.App.95a-96a, 102a; R.366-73; Tab TR, at 53:6-9; DE-22, 2-4.

[23] DE-22, 2; DE-30, 13; R.372-73.

[24] Tab TR, at 53:6-10.

[25] R.401.

[26] R.366-70.

the City argued that its Cross is part of a broader effort to highlight "the area's history and culture" through "170 expressive displays" purportedly dispersed throughout the City. (Appellants' Br. at 50) (Pet.7-8, 19).[27] Without obtaining leave to supplement the record under Appellate Rule 10(e), the Becket Fund appended over 50 pages of new material to the City's appellate brief, including twenty-five pages relating to these other displays. The Eleventh Circuit rightfully found these unconnected displays "scattered throughout" the entire metropolitan area irrelevant. (Pet.App.3a, 9a). *See McCreary*, 545 U.S. at 869 n.16 (Although "the courthouses contained other displays besides the Ten Commandments," it was not "integrated to form a secular display."); *Allegheny*, 492 U.S. at 581 (the crèche "was distinct and not connected with any exhibit in the gallery.").

While the City asserts that Bayview Cross has stood for "75" years (Pet.1, 24), it has actually stood for 48 years. A temporary wooden cross was erected on an annual basis for some, but not all, services prior to 1969.[28] The City admitted, for instance, that in "1944, the cross was again erected."[29] The 1951, 1953, and 1955 services used cross-shaped flower

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[27] There is no mention of "history and culture" or the "170" displays in the City's summary judgment memorandum. (DE-30).

[28] R.78, 83, 93, 146, 167, 174, 188-91, 197, 415.

[29] DE-22, 3.

arrangements.[30] No cross was mentioned for the services in 1952, 1954, 1957, and 1962.[31]

Nor has the Cross stood "without controversy" since 1969. (Pet.1).[32] In the 1990s, a local resident voiced his "objection to the cross" to the "Director of Leisure Services," who "acknowledged the legal issues with the display."[33] And in 2015, the City received complaints from both the American Humanist Association and the Freedom From Religion Foundation, ultimately leading to this lawsuit.[34]

REASONS FOR DENYING THE WRIT

Certiorari is unwarranted because the petition is premature, there is no Circuit split or conflict with this Court's jurisprudence, and the Eleventh Circuit's highly fact-specific ruling does not mark the death knell for any other religious display. *See* Sup. Ct. R. 10.

I. Certiorari is premature.

The City's petition for en banc review is pending before the Eleventh Circuit. The disposition of that petition could obviate the need for this Court to be involved at all. Certiorari is thus premature. *See Mount*

[30] R.146, 167, 174.

[31] R.151-55, 168-71, 182, 185-95, 200-05, 415-16.

[32] Pet.App.32a; DE-39-2; DE-22, 12; R.25-40, 247-52.

[33] Pet.App.32a; DE-39-2.

[34] R.25-40; DE-22, 12.

Soledad Memorial Association v. Trunk, 134 S. Ct. 2658, 2658-59 (2014) (Alito, J., concurring in the denial of certiorari) (certiorari was properly denied because the government was attempting to "bypass" normal appellate review). The City provided no persuasive reason for this Court to circumvent its normal procedure of letting the lower courts conclude their work before stepping in.

II. The Eleventh Circuit's standing decision does not conflict with the decisions of this Court or of other Circuits.

The District Court and the Eleventh Circuit held that Andre Ryland has standing to challenge the Cross because he lives nearby, "uses Bayview Park 'many times throughout the year,'" and unavoidably encounters the Cross during his normal activities.[35] That conclusion is consistent with the rulings of the Court and all of the Circuits.

A. There is no conflict with *Valley Forge* or *Allen*.

The City argues that the ruling "cannot be reconciled with *Valley Forge*" (Pet.12), which according to the City, requires a plaintiff to show they were "'forced to assume special burdens to avoid'" a display. (Pet.11). But *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464,

[35] Pet.App.7a, 85a; R.421-23.

487 n.22 (1982) held that plaintiffs have standing if they were *either* "subjected to unwelcome religious exercises *or* were forced to assume special burdens to avoid them." (emphasis added). Neither "Supreme Court precedent nor Article III imposes such a change-in-behavior requirement." *Suhre v. Haywood County*, 131 F.3d 1083, 1086-89 (4th Cir. 1997).

Indeed, *Valley Forge* reaffirmed that *direct* unwelcome contact with government-sponsored religious symbolism "surely suffice[s] to give the parties standing." 454 U.S. at 486 n.22 (quoting *Abington School District v. Schempp*, 374 U.S. 203, 224 n.9 (1963)). The plaintiffs were found to lack standing because they lived in another state and had no contact whatsoever with the challenged activity. *Id.* at 487.

As the City admits, this Court has repeatedly exercised its judicial authority in display cases that did not involve such a showing. (Pet.12). The Court should not "'disregard the implications of an exercise of judicial authority assumed to be proper' in previous cases." *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (citation omitted).

Nor is there any conflict with *Allen v. Wright*, 468 U.S. 737, 755 (1984), which involved the Equal Protection Clause. (Pet.13-14). Standing "turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). "Equal Protection and Establishment Clause cases call for different injury-in-fact analyses [because] the injuries protected against under the Clauses are different." *Moore v. Bryant*, 853 F.3d 245,

249-50 (5th Cir. 2017). *Moore* found *Allen* inapposite and confirmed that "direct and unwelcome exposure to a religious display" is sufficient for Establishment Clause standing, *id.*, making the City's reliance on *Moore* (Pet.14) confounding.

B. There is no Circuit split on Establishment Clause standing.

The Circuits are in unanimous agreement that direct unwelcome contact with a display in one's community is sufficient for Establishment Clause standing. *See Freedom from Religion Foundation Inc. v. New Kensington Arnold School District*, 832 F.3d 469, 476-78, 479 n.8 (3d Cir. 2016) (collecting cases).

The City relies on an old Seventh Circuit decision—*Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463 (7th Cir. 1988) (Pet.16-17)—that has since been disavowed on the point. *See ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d 1020, 1029 n.7 (8th Cir. 2004) (citing *Books v. City of Elkhart*, 235 F.3d 292, 299-300 (7th Cir. 2000), and *Doe v. Montgomery*, 41 F.3d 1156, 1160-61 (7th Cir. 1994), to conclude that "the Seventh Circuit has [since] disowned the 'altered behavior' test").

III. The Eleventh Circuit's Establishment Clause holding neither creates nor perpetuates a Circuit split.

A. The Circuits unanimously agree that the government violates the Establishment Clause when it displays a standalone cross or a cross for religious purposes.

The Circuit decisions involving government cross displays reflect remarkable uniformity. The lower courts have decided thirty-three cross cases. Of those, thirty held the cross display unconstitutional (see list, *infra*).

On the one hand, *every* Circuit that has determined the constitutionality of a standalone cross or a cross intended for plainly religious ends held the government's cross display unconstitutional. This includes decisions by the Third, Seventh, Ninth, Tenth, and Eleventh Circuits:

1. *Kondrat'Yev v. City of Pensacola*, 903 F.3d 1169 (11th Cir. 2018) (standalone cross for Easter purpose)

2. *American Humanist Association v. Maryland-National Capital Park & Planning Commission*, 874 F. 3d 195 (4th Cir. 2017), *cert. granted*, 17-1717 and 18-18 (40-foot-tall cross on traffic island)

3. *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011), *cert. denied*, 567 U.S. 944 (2012) (prominent cross towering over highway)

4. *American Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010), *cert. denied*, 565 U.S.

994 (2011) (12-foot-tall standalone crosses on highway)

5. *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (standalone cross in desert)

6. *Carpenter v. San Francisco*, 93 F.3d 627 (9th Cir. 1996) (standalone cross in public park)

7. *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (standalone cross in park)

8. *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995) (cross in city seal)

9. *Ellis v. La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (36-foot cross in public park)

10. *Gonzales v. North Township Lake County*, 4 F.3d 1412 (7th Cir. 1993) (standalone cross in public park for Easter worship)

11. *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991) (cross on seal represented specific church)

12. *ACLU v. City of St. Charles*, 794 F.2d 265, 273 (7th Cir. 1986) (prominent illuminated cross on government building for Christmas)

13. *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985) (en banc) (standalone cross on seal)

14. *Rabun*, 698 F.2d at 1101 (standalone cross in public park for Easter)

15. *Gilfillan v. Philadelphia*, 637 F.2d 924, 929 (3d Cir. 1980) (cross for Pope's mass)

16. *Lions Club of Albany v. City of Albany*, 323 F. Supp. 3d 1104 (N.D. Cal. 2018) (illuminated 20-foot-tall steel cross for Easter)

17. *Freedom from Religion Foundation v. County of Lehigh*, 2017 U.S. Dist. LEXIS 160234 (E.D. Pa. Sep. 28, 2017), *appeal pending* No. 17-3581 (cross on seal)

18. *Davies v. County of Los Angeles*, 177 F. Supp. 3d 1194 (C.D. Cal. 2016) (prominent cross on government seal)

19. *American Humanist Association v. Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014) (prominent cross motif on war memorial)

20. *Cabral v. City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013), *dismissed on other grounds*, 759 F.3d 639 (7th Cir. 2014) (temporary crosses in public park)

21. *Summers v. Adams*, 669 F. Supp. 2d 637 (D.S.C. 2009) (government-supported license plates featuring cross motif)

22. *American Atheists, Inc. v. City of Starke*, 2007 U.S. Dist. LEXIS 19512 (M.D. Fla. 2007) (cross on water tower)

23. *ACLU v. City of Stow*, 29 F. Supp. 2d 845 (N.D. Ohio 1998) (cross on city seal)

24. *Granzeier v. Middleton*, 955 F. Supp. 741 (E.D. Ky. 1997), *aff'd*, 173 F.3d 568 (6th Cir. 1999) (sign featuring cross on building for Good Friday)

25. *Joki v. Board of Education*, 745 F. Supp. 823 (N.D. N.Y 1990) (prominent cross in artwork)

26. *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989) (cross on water tower)

27. *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988) (large standalone cross on military base)

28. *ACLU v. Mississippi State General Services Administration*, 652 F. Supp. 380 (S.D. Miss. 1987) (illuminated cross on government building for Christmas)

29. *Libin v. Greenwich*, 625 F. Supp. 393 (D. Conn. 1985) (illuminated cross on government building for Christmas)

30. *Greater Houston Chapter ACLU v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984), *reh'g denied*, 763 F.2d 180 (5th Cir. 1985) (prominent cross in public park)

On the other hand, the Circuits have uniformly recognized that a cross integrated into a display that does not directly or indirectly accomplish a religious agenda may be permissible. (Pet.32-33).

Thus, in *American Atheists, Inc. v. Port Authority*, 760 F.3d 227, 232, 234-36 (2d Cir. 2014) the Second Circuit upheld "a particular artifact recovered from World Trade Center debris, a column and cross-beam" donated along with "more than 10,000 artifacts" and displayed in a privately operated September 11 museum. The court found that the display's purpose "has always been secular: to recount the history of the terrorist

attacks" and "their aftermath." *Id.* at 238. This was evident from correspondence dating to "eight years before the Museum opened," and from "the display design" itself, which included a panel documenting "the facts of discovery" making "no mention of the Christian iconography." *Id.* at 239-40. The court relied on the *Lynch v. Donnelly*, 465 U.S. 668, 671, 683 (1984) analogy to an " 'exhibition of literally hundreds of religious paintings in governmentally supported museums.' " *Id.* at 243-44.

Similarly, in *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), and *Murray v. Austin*, 947 F.2d 147 (5th Cir. 1991), the courts upheld government seals that included a cross in the design because they possessed unique "secular meanings." *Trunk*, 629 F.3d at 1111 (distinguishing *Weinbaum* and *Murray* from standalone cross display). *See Weinbaum*, 541 F.3d at 1033-35 (there was "no evidence" city's "purpose was to advance religion" rather than to reflect "the name of the City" representing "a series of secular events"); *Murray*, 947 F.2d at 149, 153-55 (Austin's seal incorporated "the family coat of arms of Stephen F. Austin" and plaintiff "conced[ed]" it had primary secular purpose). The Fifth Circuit in *Murray* distinguished the Austin seal from seals struck down by the Seventh and Tenth Circuits that had singled out the cross for prominent display. *Id.* at 156-57 & n.11. The Tenth Circuit likewise had little trouble distinguishing *Weinbaum* when it subsequently struck down prominent standalone cross displays in *Duncan*, 616 F.3d at 1152-62.

The City thus grossly over-simplifies things when it claims that these three decisions are in tension with the decision below or with the decisions of the other Circuits. (Pet.32-33).[36] In fact, *Port Authority*, *Weinbaum*, and *Murray* are entirely consistent with the broader jurisprudence. To be sure, the *outcome* in these cases was different; but the *rationale* was not.

B. The City distorts the Eleventh, Ninth, and Fourth Circuits' opinions to forge a purported "split."

The City claims that the conflict in the rationale lies in the Eleventh, Ninth, and Fourth Circuits' finding crosses "*per se* unconstitutional" (Pet.30), but no Circuit has announced such a *per se* rule.

The City asserts that the Eleventh Circuit in *Rabun* found a religious purpose *only* "because 'the latin cross is universally regarded as a symbol of Christianity.' " (Pet.30). But that was just one factor in the court's analysis. 698 F.2d at 1109-11. Far more paramount was the "decision to dedicate the cross at Easter Sunrise Services," which evidenced a distinctly "religious purpose." *Id.*

Here too, neither the Eleventh Circuit nor the District Court relied solely on the "overtly religious" nature of a cross. (Pet.1). Rather, the District Court reasoned: "based on the undisputed facts (i.e., the

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[36] *Briggs v. Mississippi*, 331 F.3d 499 (5th Cir. 2003) (cited at Pet.32), involved the Confederate flag.

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." (Pet.App.95a,106a) (first emphasis added). Having served as the Jaycees' president shortly after the Cross was erected, Judge Vinson confessed he was acutely familiar with this Cross and was certain it remains "primarily associated with the Easter Sunrise Service."[37]

The Eleventh Circuit likewise emphasized that the Cross was "'specifically scheduled to coincide with the annual Easter Sunrise Service,'" was "dedicated at the 29th annual Easter sunrise service," *and* "has continued to serve as the location for an annual Easter sunrise program." (Pet.App.3a-4a, 9a). Consequently, the City is simply wrong when it says the Eleventh Circuit struck "down the cross not because Pensacola sought to use it to advance a religious purpose, but merely because the cross is 'similar[]' to the 'cross at issue in *Rabun*.'" (Pet.30).

Far from applying a *per se* rule, the Ninth Circuit's most recent cross decision acknowledged that the "principle that the cross represents Christianity is not an absolute one." *Trunk*, 629 F.3d at 1111. The court understood that "[s]ecular elements, coupled with the history and physical setting of a monument or display, can—but do not always—transform sectarian symbols" into overriding secular displays. *Id.* at 1117. It then conducted an extensive analysis, looking to the

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[37] Tab TR, at 3:9-16, 53:6-9; DE-30-1, 3, 65-72.

"fine-grained, factually specific features of the Memorial," its "history, its secularizing elements, its physical setting, and the way the Memorial is used." *Id.* at 1110 (citations omitted).

The Fourth Circuit in no way relied solely on the Latin cross's "exclusively" Christian meaning either. (Pet.31). Instead, it "carefully considered" the "entire context and history of the [Bladensburg] Cross," which entailed a "detailed factual analysis" of "its meaning, history, and secularizing elements." *American Humanist*, 874 F.3d at 206, 210.

C. The Circuits are not divided on the test to apply in cross cases.

The City asserts that the Circuits are "split over the correct test to apply" in religious-display cases. (Pet.25). Its argument, however, relies on Ten Commandments cases following *Van Orden v. Perry*, 545 U.S. 677 (2005), and a case upholding the national motto under *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). (Pet.25-27).

In upholding the national motto, for instance, the Eighth Circuit cautioned that *Galloway* would *not* govern every case. *Doe v. United States*, 901 F.3d 1015, 1021 (8th Cir. 2018) (Pet.25). Rather, it deemed *Galloway* the most factually "analogous Supreme Court decision" because both legislative prayer and the motto are "acknowledgments of religion that 'strive for the idea that people of *many faiths* may be united.'" *Id.* (quoting 134 S. Ct. at 1823) (emphasis added). That

cannot be said of a cross. Indeed, this Court found that there is an "obvious distinction between crèche displays and references to God in the motto." *Allegheny*, 492 U.S. at 602-03; *see also McCreary*, 545 U.S. at 893-97 (Scalia, J., dissenting) (recognizing distinction between a reference to "God" versus "Jesus Christ"); *American Humanist*, 874 F.3d at 208 (The "Latin cross differs from . . . the motto 'In God We Trust.' ").

In *cross* cases, federal courts have uniformly applied the same test (*Lemon*), including in the thirteen cases decided after *Van Orden* (from the Second, Fourth, Ninth, Tenth, and Eleventh Circuits), and the six cases decided after *Galloway.* (*See* cases in III-A, *supra*).

IV. The Eleventh Circuit's decision is faithful to this Court's Establishment Clause jurisprudence.

The District Court ruled, and the Eleventh Circuit affirmed, that "the Bayview Cross clearly has a primarily—*if not exclusively*—religious purpose," and "thus, runs afoul of the First Amendment." (Pet.App.9a-10a, 106a, 109a). Not only is this holding faithful to this Court's decisions, but a reversal would require the Court to upend over fifty years of settled Supreme Court precedent and hundreds of lower court cases applying the secular purpose requirement.

A. The Eleventh Circuit's purpose analysis is consistent with this Court's longstanding jurisprudence.

The Court has long recognized that "'[i]t is not a trivial matter'" to require "a secular purpose" because that "'requirement is precisely tailored to the Establishment Clause's purpose.'" *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) (citation omitted); *see McCreary*, 545 U.S. at 874 ("purpose needs to be taken seriously under the Establishment Clause"). Manifesting "a purpose to favor one faith over another, or adherence to religion generally, clashes with the 'understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens.'" *Id.* at 860 (citation omitted).

Thus, when the government places "'an instrument of religion'" on its property, its purpose can "presumptively be understood as meant to advance religion." *Id.* at 867 (citation omitted). The government can overcome this presumption by proving a secular purpose, which must be the "pre-eminent" and "primary" force and "not merely secondary to a religious objective." *Id.* at 864 (citations omitted).

In *McCreary*—which involved a display that originated with a solitary Ten Commandments plaque that had been dedicated in a ceremony in which a pastor "testified to the certainty of the existence of God" (*id.* at 869, 881)—the government failed to rebut that presumption. The Court concluded that "[w]hen the

government initiates an effort to place [a religious] statement *alone* in public view, a religious object is unmistakable." *Id.* at 869 (emphasis added).

The Eleventh Circuit's reliance on the religious purpose analysis was thus entirely congruent with this Court's jurisprudence. Indeed, the religious purpose is even more "unmistakable" here than it was in *McCreary* because the 34-foot-tall Bayview Cross not only stands alone, but its sole purpose is to serve as a holy object for worship services. (R.387).

The real reason the City seeks certiorari is not because there is a Circuit split or a conflict with this Court's precedents, but because it seeks a cataclysmic shift in Establishment Clause jurisprudence—one that calls for overruling *Lemon*'s secular purpose requirement in its entirety.

But the secular purpose requirement exists independent of *Lemon*. It is part of this Court's "settled" jurisprudence and long predates *Lemon*. *Texas Monthly*, 489 U.S. at 8-9 (citing, *inter alia*, *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Schempp*, 374 U.S. 203; *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Everson v. Board of Education*, 330 U.S. 1 (1947)). Years before *Lemon*, the Court announced in *Schempp*: "[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." 374 U.S. at 222. *Lemon* simply "encapsulate[s] the essential precepts of the

Establishment Clause," including the purpose requirement. *Allegheny*, 492 U.S. at 590-91. *See also Wallace*, 472 U.S. at 55-56.

Before and since *Lemon*, the absence of a primary secular purpose for challenged government displays and practices has been dispositive in many of this Court's cases. *See, e.g.*, *McCreary*, 545 U.S. at 859-60; *Wallace*, 472 U.S. 38; *Edwards*, 482 U.S. at 586-93; *Stone v. Graham*, 449 U.S. 39, 41-43 (1980) (per curiam); *Torcaso*, 367 U.S. at 489-90; *Epperson*, 393 U.S. at 107-08.

Furthermore, despite some "criticism" (Pet.19),[38] this Court has repeatedly applied the *Lemon* test in display cases—a course of action that has yielded consistent results that the Circuit courts have had no trouble applying. Religious displays that dominated their surroundings or were motivated by primarily religious purposes (or both) have been struck down, while religious items integrated into larger displays with primarily secular purposes and meanings have been upheld. *Compare McCreary*, 545 U.S. at 881 (Ten Commandments initially alone with primary religious purpose); *Allegheny*, 492 U.S. at 598-99 (standalone courthouse crèche); *Stone*, 449 U.S. at 41-43 (conspicuous Ten Commandments with primary religious

[38] Most "criticism" of "*Lemon*" has actually been directed at Justice O'Connor's "reasonable observer/endorsement test." *E.g.*, *Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring and dissenting in part); *American Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1110 (10th Cir. 2010) (Gorsuch, J., dissenting from denial of rehearing en banc).

purpose); *with Van Orden*, 545 U.S. at 691 n.11 (plurality) (Ten Commandments in museum-like context did not have a "primarily religious purpose"); *id.* at 703-04 (Breyer, J., concurring) ("this monument conveys a predominantly secular message"); *Lynch*, 465 U.S. at 671, 681 (crèche was small component of integrated secular display with primary "secular purpose").

As in *McCreary*, despite the longstanding and "intuitive importance of official purpose to the realization of Establishment Clause values," the City seeks to have this Court "abandon *Lemon*'s purpose test." 545 U.S. at 861. As it was then, this argument is as "seismic" as it is "unconvincing." *Id.*

B. The Eleventh Circuit's decision is consistent with this Court's cases recognizing the sectarian potency of the Latin cross.

This Court has repeatedly acknowledged that the Latin "cross is an especially potent sectarian symbol." *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring); *accord id.* at 792 (Souter, J., concurring); *Buono*, 559 U.S. at 725 (Alito, J., concurring).

Significantly, in *Allegheny*, both the majority opinion and Justice Kennedy's concurrence specified that the Establishment Clause would unquestionably prohibit a city from placing its imprimatur on a large permanent cross. 492 U.S. at 599, 606-07, 615 n.61 & 661 (Kennedy, J., concurring in part and dissenting in part).

The *Allegheny* majority held unconstitutional a courthouse holiday display of a crèche surrounded by poinsettias. *Id.* at 602. In rejecting the county's argument that the floral decoration secularized the display, the Court reasoned:

> It is as if the county had allowed the Holy Name Society to display *a cross* on the Grand Staircase *at Easter*, and the county had surrounded *the cross* with Easter lilies.

Id. at 599 (emphasis added). The flowers assuredly could not "negate the endorsement of Christianity conveyed by the cross." *Id.*

Although Justice Kennedy would have upheld the temporary holiday display, he went out of his way to explain that a conspicuous permanent cross would not meet the same fate and that this was so irrespective of whether *Lemon* applied:

> I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a *large Latin cross* on the roof of city hall. This is . . . because such an obtrusive year-round religious display would place the government's weight behind an *obvious* effort to proselytize on behalf of a particular religion.

Id. at 661 (emphasis added) (concurring in part and dissenting in part). In support of this "extreme" example, he cited *Rabun*, 698 F.2d 1098, noting that it involved a "cross erected in public park." *Id.*

In *Buono*, this Court adopted Justice Kennedy's permanent-large-cross admonition, and thus, *Rabun*

by implication. 559 U.S. at 715 (plurality) (quoting *Allegheny*, 492 U.S. at 661 (Kennedy, J.)). *Buono* declared that the "[p]lacement of [a] cross on Government-owned land" is unconstitutional where, as here, it carries "the imprimatur of the state." *Id.*

C. There is no tension between the decision below and *Buono*, *Van Orden*, or *Galloway*.

There is no merit to the City's argument that the Eleventh Circuit's decision conflicts with *Buono*, *Van Orden*, and *Galloway*. (Pet.20-22).

1. *Buono*

The City contends that the *Buono* plurality "went out of its way to criticize 'the so-called *Lemon* test,' suggesting that it is no longer 'the appropriate framework' to apply." (Pet.21) (citing 559 U.S. at 720-21). But "*Lemon*" is not even mentioned in the cited section; it is only mentioned in the Court's recounting of the procedural history (at 708). The plurality simply questioned whether the "'*reasonable observer*' standard continued to be the appropriate framework" since the display had been transferred to private property and courts typically "do not inquire into 'reasonable observer' perceptions with respect to objects on *private land*." *Id.* at 720-21 (emphasis added).

Critically, the *Buono* plurality endorsed Justice Kennedy's *Allegheny* decree that, independent of

Lemon, "'the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall'" because "'such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize'" Christianity. *Id.* at 715. The plurality contrasted this extreme example with the small remote cross at issue, opining that the desert cross was "not an attempt to set the *imprimatur* of the state on a particular creed." *Id.* at 707, 715.

Justice Alito's concurrence placed similar emphasis on the lack of governmental imprimatur. *Id.* at 724-25 (Alito, J., concurring). He explained that private citizens placed "their monument on that spot, *apparently without obtaining approval* from any federal officials, and this use of federal land seems to have gone largely unnoticed for many years in all likelihood due to the spot's remote and rugged location." *Id.* (emphasis added). He stressed that it would be different if the cross had been constructed "on the National Mall." *Id.* at 728.

By sharp contrast, Bayview Cross *was* emplaced by and with the enthusiastic support of the City for an exclusively Christian purpose. And whereas the 8-foot-tall desert cross "was seen by more rattlesnakes than humans," *id.* at 725, Bayview Cross towers 34-feet-tall in an urban park that is used by "[t]ens of thousands of Pensacolians." (Appellants' Br. at 23).

2. *Van Orden*

The City claims that the Eleventh Circuit's decision "conflicts with *Van Orden*," because "Justice Breyer did not apply the *Lemon* test" and the noncontrolling "plurality said that the *Lemon* test was 'not useful.' " (Pet.20, 24).

In fact, the plurality *did* apply *Lemon*'s secular purpose inquiry, finding "no evidence of such" a "primarily religious purpose in this case." 545 U.S. at 691 n.11. The plurality merely said that the full "test" was "not useful" for "the sort" of display *Texas erected*, which was a six-foot-tall nondenominational Ten Commandments monument that was integrated into a unified-museum-like setting depicting "the state's political and legal history." *Id.* at 681, 686, 688-90. Central to the plurality's reasoning was that the "Commandments have an undeniable historical meaning" tied to our foundations of lawmaking. *Id*. The plurality thus found that the mere "inclusion" of this "Ten Commandments monument *in this group* has a *dual significance*." *Id*. at 690-91 (emphasis added).

Justice Breyer's controlling concurrence expressly stated that *Lemon* would continue to be "useful," even in dual-significance cases. *Id*. at 700. Like the plurality, Justice Breyer adhered to, and applied, *Lemon*'s purpose inquiry, concluding that the display served a "primarily nonreligious purpose." *Id.* at 703. He noted that the group's "consultation with a committee composed of members of several faiths in order to find a nonsectarian text underscore[d] the group's ethics-based

motives." *Id.* 701-02. Justice Breyer ultimately applied the entire *Lemon* test, concluding that the display neither advanced religion nor created "an 'excessive government entanglement.'" *Id*. at 703-04.

Notably, on the very same day, the majority in *McCreary* relied on the secular-purpose requirement to strike down a standalone Ten Commandments display. 545 U.S. at 859-64. Justice Breyer joined that majority and went out of his way in *Van Orden* to express disagreement with Justice Scalia's advocacy of abandoning *Lemon*. 545 U.S. at 704.

Justice Breyer simply believed that in difficult "borderline cases," there is "no test-related substitute for the exercise of legal judgment." *Id.* at 700. Unlike the *McCreary* display, which initially stood alone, Justice Breyer deemed the Texas Ten Commandments display to present a "borderline" case because it was part of a broader display consisting of "17 monuments and 21 historical markers" in a museum-like context such that the "nonreligious [legal] aspects of the tablets' message [] predominate[d]." *Id.* at 700-02.

While a dual-meaning Ten Commandments may present a "borderline case" when placed in a legal museum setting, a solitary Latin cross used and maintained for exclusively religious purposes, does not.

Even if this case were treated as a "borderline case," and subjected to the *Van Orden* "factors," the result would not change. *Cf. American Humanist*, 874 F.3d at 212 ("The Commission's display of the Cross fails the second and third prongs of *Lemon*, and the

Van Orden factors"); *Trunk*, 629 F.3d at 1107 ("both cases guide us to the same result.").

First, as the District Court found, "a solitary Latin cross" has no "dual significance." (Pet.App.102a). This Court in *Allegheny* distinguished "a specifically Christian symbol" such as a cross from "more general religious references" found in our nation's history. 492 U.S. at 603, 606-07. *See also McCreary*, 545 U.S. at 893-94 (Scalia, J., dissenting); *American Humanist*, 874 F.3d at 208 ("the Latin cross lacks any connection to our Nation's history"); *Duncan*, 616 F.3d at 1162 (cross lacks a dual "secular meaning"); *Trunk*, 629 F.3d at 1106, 1120 (distinguishing cross from Ten Commandments); *King v. Richmond County*, 331 F.3d 1271, 1285 (11th Cir. 2003) (distinguishing "exclusively religious symbols, such as a cross" from inconspicuous Ten Commandments display).

Second, this imposing 34-foot-tall Christian cross stands alone, dominating its surroundings. Even if a solitary Easter cross could somehow convey *a* secular meaning, under *Van Orden*, the secular meaning must *predominate*. 545 U.S. at 701. *Cf. McCreary*, 545 U.S. at 869. *See also Pinette*, 515 U.S. at 792 (Souter, J., concurring) ("display of the cross *alone* could not reasonably be taken to have any secular point") (emphasis added). There is only one other monument in the entire park, and as the District Court found, "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." (Pet.App.103a).

Third, beyond its exclusively religious purpose, Bayview Cross has consistently been *used* for religious activity. In *Van Orden*, Justice Breyer emphasized: "to determine the message the text conveys, we must examine how the text is *used*." 545 U.S. at 701-02. He deemed it critical that the display was not used for "religious activity." *Id.* (emphasis added). *Cf. McCreary*, 545 U.S. at 869 (relying on religious activity at dedication); *Allegheny*, 492 U.S. at 599 (crèche's use in annual Christmas-carol program only served to "augment the religious quality of the scene").

Of course, Justice Breyer also deemed it significant in that difficult "borderline case" that the Texas display went "without legal challenge" for forty years. (Pet.25). But, as the City itself acknowledged, the "absence" of "any religious use" of the Texas display during those forty years was a pivotal factor in his reasoning. (DE-30, 30). Equally central to Justice Breyer's longevity reasoning was the absence of any evidence that the lack of a challenge was "due to a climate of intimidation." 545 U.S. at 702. *See American Humanist*, 874 F.3d at 208 n.11 (distinguishing *Van Orden* where "a person who dared bring a challenge to the Cross for much of those 90 years would have faced possible rebuke."); *Trunk*, 629 F.3d at 1122 ("La Jolla's anti-Semitic history" explained the "lack of complaint" to the longstanding cross).

That cannot be said here. In 1970, the year immediately following the Cross's dedication, the theme of the Easter Sunrise service was to convert "doubters" into "believers" and the sermon attributed a decline in

morality to secularism.[39] The service was attended by 800 Pensacolians.[40]

In 2015, Christians organized a rally to "save" the Cross, proclaiming that the gathering was "about Christians coming together, outside the church walls, making a stand for Christ and their faith. Our nation is in need of a revival."[41]

The climate of intimidation persists today, as evidenced by a mere sample of the threats and vitriol directed at plaintiffs' counsel for litigating this case. *See* David Gonzales, *Pensacola Man's Facebook Post Targets AHA Lawyer In Cross Case, Ignites Firestorm*, ABC3 WEARTV.com (June 22, 2017), https://perma.cc/5XSW-SPMY ("Some attack Miller with derogatory names and gun emojis. One comment even asks for violence wishing her death."); Hemant Mehta, *Christians Are Harassing the Atheist Lawyer Who Won the Pensacola Cross Case*, Patheos (June 21, 2017), https://perma.cc/6KD6-LLYR (sampling threats from locals trying to "run her out of town").

Such backlash is hardly surprising given the potently sectarian nature of the Latin cross. After all, "nothing does a better job of roiling society" than "when the government weighs in on one side of religious debate." *McCreary*, 545 U.S. at 876. The Founders understood that governmental actions endorsing one religion

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[39] R.210-13, 416.

[40] R.213.

[41] R.45, 250-52.

over others "inevitabl[y]" fosters "the hatred, disrespect and even contempt of those who [hold] contrary beliefs." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

In sum, the Eleventh Circuit's decision is completely consistent with *Van Orden*.

3. *Galloway*

Lastly, the City argues that the Eleventh Circuit's adherence to the secular purpose requirement conflicts with *Galloway* because *Galloway* "declined to apply *Lemon*." (Pet.2).

But *Galloway* did not announce any "test" at all. Rather, it simply determined whether Greece's practice fit "within the tradition" of *Marsh v. Chambers*, 463 U.S. 783 (1983). 134 S. Ct. at 1819, 1825; *see also id.* at 1834 (Alito, J., concurring) ("All that the Court does today is to allow a town to follow a practice that we have previously held is permissible for Congress and state legislatures.").[42]

And this Court has already deemed *Marsh* inapposite to religious displays. *E.g.*, *McCreary*, 545 U.S. at 860 n.10; *Allegheny*, 492 U.S. at 604 n.53; *Lynch*, 465 U.S. at 683; *see also Edwards*, 482 U.S. at 583 n.4 (*Marsh* is "not useful" in other contexts). *Galloway* did not overrule *Lemon* any more than *Marsh* did.

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[42] The Court warned that the *sui generis Marsh* "inquiry remains a fact-sensitive one" that considers "both the setting in which the prayer arises and the audience to whom it is directed." *Id*. at 1823-25.

Indeed, *Galloway* expressly adopted Justice Kennedy's *Allegheny* concurrence, 134 S. Ct. at 1819, 1825, which both condemned a city-sponsored cross *and* expressed contentment to "remain within the *Lemon* framework." 492 U.S. at 661, 655 (Kennedy, J). Justice Kennedy subsequently joined the majority in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), which invalidated prayer under *Lemon*'s purpose and effect prongs. He indicated in *Galloway* that *Santa Fe* was not impacted by the decision. 134 S. Ct. at 1827.

The City seizes on Justice Kennedy's statement about "[a]ny test the Court adopts" (Pet.21), but that passage just reaffirmed that *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" was "accepted by the Framers" and has "withstood the critical scrutiny of time and political change." *Id.* at 1819. This Court has always viewed "actions taken by the First Congress a[s] presumptively consistent with the Bill of Rights." *Id.* at 1834 (Alito, J., concurring).

While the City argues that the Eleventh Circuit's decision cannot be "reconciled" with *Galloway* (Pet.21), this case presents "more than a factual wrinkle on *Town of Greece*. It is a conceptual world apart." *Lund v. Rowan County*, 863 F.3d 268, 277 (4th Cir. 2017) (en banc) (internal citation and quotations omitted), *cert. denied*, 138 S. Ct. 2564 (2018). That is so for three key reasons.

First, the Cross is not an "internal act" to "accommodate the spiritual needs of lawmakers." *Galloway*, 134 S. Ct. at 1825-26. Instead, its sole purpose is to promote "religious observance among the public" in a popular urban park. *Id.*

Second, there "is a complete lack of evidence that our founding fathers were aware of the practice of placing crosses" in public parks. *Eckels*, 589 F. Supp. at 237; *accord McCreary*, 545 U.S. at 897-98, 894 (Scalia, J., dissenting); *Glassroth v. Moore*, 335 F.3d 1282, 1298 (11th Cir. 2003) ("there is no evidence of an 'unambiguous and unbroken history' of displaying religious symbols in judicial buildings."). Certainly, no such practice has withstood "critical scrutiny." *Galloway*, 134 S. Ct. at 1819. *See supra* at III-A.

And even if the City could demonstrate an unbroken practice dating back to the First Congress,[43] *Galloway* made clear that its opinion "must *not* be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id.* (emphasis added). "Thus, *Galloway* itself does not support" the City's suggestion (Pet.28-29) "that history is now the single most

[43] Most of the crosses mentioned in Judge Newsom's concurrence (many of which originated on private property and are now maintained as artifacts in museum-like settings) were placed on *state* property long *after* the Establishment Clause was adopted yet long *before* this Court incorporated it to the states in *Everson* (1947). (Pet.2, citing Pet.App.21a-25a).

important criterion." *Doe*, 901 F.3d at 1028 (Kelly, J., concurring).

Historical acceptance alone has never been a sufficient basis to sustain challenged governmental action under the Establishment Clause. Even prior to *Lemon*, this Court was clear that "no one acquires a vested or protected right in violation of the [Establishment Clause] by long use, even when that span of time covers our entire national existence and indeed predates it." *Walz v. Tax Commission*, 397 U.S. 664, 678 (1970).

Third and critically, "the Framers considered legislative prayer a *benign* acknowledgment" of religion because "no faith" was "excluded" or "favored." *Galloway*, 134 S. Ct. at 1819. *Galloway* reaffirmed that a legislative prayer practice will violate the Establishment Clause if it reflects "an aversion or bias" against "minority faiths." *Id.* at 1824. The Court stressed the importance of "nondiscrimination" and upheld Greece's practice because even an "atheist" could "give the invocation." *Id.* at 1816, 1824. The Latin cross, of course, "is an especially potent sectarian symbol," *Pinette*, 515 U.S. at 776 (O'Connor, J., concurring), that "proselytize[s] on behalf of a particular religion." *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part).

The City nonetheless insists that its Cross is "constitutional" under the so-called "historical approach" of *Galloway* because the *Van Orden* plurality recognized "the role of religion in American life" (Pet.22) (citing 545 U.S. at 686), and it contends, the Cross poses "'no greater potential for an establishment of religion' than

these timeworn practices." (Pet.22) (quoting Justice Kennedy's concurrence in *Allegheny*, 492 U.S. at 670).

The *Van Orden* plurality, however, only discussed *benign* practices. 545 U.S. at 689 n.9. Even strict originalist Justice Scalia understood that "[h]istorical practices" demonstrate "a distance between the acknowledgment of a single Creator" and "Jesus Christ," the latter being an "establishment of a religion." *McCreary*, 545 U.S. at 894, 897-98 (dissenting).

Justice Scalia addressed the plurality's references and explained: "*All* of the actions of Washington and the First Congress," and "*all* the other examples of our Government's favoring religion that I have cited, have invoked God, but not Jesus Christ." *Id.* 897. Washington's Proclamation, Justice Scalia noted, "was scrupulously nondenominational." *Id.* at 893. Justice Scalia stressed that the reason *Marsh* upheld legislative prayer was precisely "because 'there [was] no indication that the prayer opportunity [was] exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" *Id.* at 894 (quoting *Marsh* at 794-95). While the Ten Commandments may not be "associated with a single religious belief," *id.* at 894, 909, the Christian cross is "the preeminent symbol of Christianity." *Buono*, 559 U.S. at 725 (Alito, J., concurring); *accord Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring).

D. The City's "historical approach" rests on a misrepresentation of this Court's treatment of Establishment Clause history.

The City submits that the Establishment Clause should prohibit only those actions that constituted a formal "establishment" at "the time of the founding." (Pet.23). The City seems to understand that not even *Galloway* supports its narrow view, so it relies on the portion of Justice Thomas's concurrence that even Justice Scalia refused to join. (Pet.23). Ultimately, the City wants the Court to adopt a categorical rule that permits all religious displays, regardless how large, new, conspicuous, sectarian, or religiously motivated. (Pet.22-23).

The City's approach reflects a fundamental misapprehension of the proper role of history in Establishment Clause interpretation. (Pet.18-19). The City relies on *Everson*'s majority and dissenting opinions (Pet.18-19), yet both recognized that our "history" calls for a "*broad* interpretation" of the Establishment Clause and provides "irrefutable confirmation of the Amendment's *sweeping content.*" 330 U.S. at 14-15 (majority); at 33-34 (Rutledge, J., dissenting) (emphasis added). "History" showed that the Clause "broadly forbids state support, financial or other, of religion in any guise," including "all use of public funds for religious purposes." *Id.* at 32-33, 41. Squarely refuting the City's argument, Justice Rutledge famously proclaimed:

> The [Clause's] purpose was *not* to . . . outlaw[] only a formal relation such as had prevailed in England and some of the colonies. . . . It was to create *a complete* and permanent separation of the spheres of religious activity and civil authority by *comprehensively* forbidding every form of public aid or support for religion.

Id. at 31-32 (emphasis added). The Court "strongly reaffirmed" what was said in *Everson*'s majority and dissenting opinions in *Schempp*, 374 U.S. at 217 and *Torcaso*, 367 U.S. at 493-94.

The City goes on to claim that "[f]or the next 24 years, the Court followed a historical approach," (Pet.18-19), citing *Walz* and *McGowan v. Maryland*, 366 U.S. 420 (1961). But neither case relied on "historical practices" alone; to the contrary, *Walz* applied both the effect and purpose enquiries and *rejected* the argument that history alone could save the practice. 397 U.S. at 669, 672-73, 678. The Court further declared that "the basic purpose" of the Establishment Clause "is to insure that *no religion be sponsored or favored*." *Id.* at 669 (emphasis added).

In *McGowan*, the Court reaffirmed that the Establishment Clause "afford[s] protection against religious establishment *far more extensive* than merely to forbid a national or state church." 366 U.S. at 441-42 (emphasis added). The Court upheld the Sunday laws because they had overriding secular purposes and "merely happen[ed] to coincide" with religious "tenets." *Id.* at 434-35, 450; *see also McCreary*, 545 U.S. at 873 n.22

(distinguishing the "secular and pragmatic justifications" in *McGowan*). Thus, the City's "conclusion that its narrower view was the original understanding stretches" the precedent "beyond tensile capacity." *Id*. at 879.

The City's approach would allow the government "to approve the core beliefs of a favored religion over the tenets of others, a view that should trouble anyone who prizes religious liberty." *Id.* at 880. The Founders "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval." *Engel*, 370 U.S. at 429. That same "history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith." *Id.* at 431.

Accordingly, this Court has repeatedly recognized—most recently earlier this year—that "'[t]he *clearest command* of the Establishment Clause is that one religious denomination cannot be officially preferred over another.'" *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018) (quoting *Larson v. Valente*, 456 U.S. 228 (1982)) (emphasis added). The touchstone for this Court's Establishment Clause jurisprudence has always been that the "First Amendment mandates government neutrality between religion and religion, and between religion and non-religion." *Epperson*, 393 U.S. at 104 (pre-*Lemon* case). The "principle of neutrality has provided a good sense of direction" to courts, and a necessary one, because it responds to "the major

concerns that prompted adoption of the Religion Clauses." *McCreary*, 545 U.S. at 860, 875-76.

Even Justice Scalia, an originalist and arguably *Lemon*'s harshest critic, had no doubt that "[t]he Establishment Clause would prohibit, for example, governmental endorsement of a particular version of the Decalogue as authoritative." *McCreary*, 545 U.S. at 894 n.4 (dissenting). Again, he understood that "[h]istorical practices" do not support governmental acknowledgments to "Jesus Christ" in contrast to a general deistic creator. *Id.* at 897-98, 894.

Any Establishment Clause rule or test "must reflect and remain faithful to the underlying purposes of the Clauses." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring). Unlike the City's rudderless "historical approach," the "secular purpose" requirement enshrined in *Lemon*, as noted, is "'precisely tailored to the Establishment Clause's purpose.'" *Edwards*, 482 U.S. at 586-87 (citation omitted).

"Historical evidence thus supports no solid argument for changing course," whereas "public discourse at the present time certainly raises no doubt about the value of the interpretative approach invoked for [73] years now." *McCreary*, 545 U.S. at 881. "At a time when we see around the world the violent consequences of the assumption of religious authority by government," the Court must ask, "[w]hy would we trade a system that has served us so well for one that has served others so poorly?" *Id.* at 882 (O'Connor, J., concurring).

V. Due to the narrow fact-dependent nature of the Eleventh Circuit's ruling, no other cross is threatened and consolidation with *American Humanist* is unwarranted.

There is no validity to the City's assertion that the decision below "will have far-reaching consequences." (Pet.2-3). Establishment Clause cases are inherently "fact-sensitive." *Lee v. Weisman*, 505 U.S. 577, 597 (1992). Each display is "judged in its unique circumstances." *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring); *accord McCreary*, 545 U.S. at 867-68; *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring).

Because of the "highly fact-specific nature of the inquiry," the Court's "jurisprudence in this area has refrained from making sweeping pronouncements and this case [like *Buono*] is ill suited for announcing categorical rules." *Buono*, 559 U.S. at 722. Accordingly, the Eleventh Circuit correctly moored its holding to the facts at hand: a large standalone Latin cross maintained in an urban park for an exclusively religious purpose. The City has not identified a single other cross display with these facts.

The need to evaluate each display on its own facts also underscores why this case should not be consolidated with *American Humanist* (17-1717 and 18-18). Below, even the City conceded that the Bladensburg Cross case is materially "distinguishable" from the present case. (Reply Br.29-30). Whereas this case turns on the long-settled secular purpose requirement, *American Humanist* turns on *Lemon*'s effect and

entanglement prongs. In light of this divergence, the grant in *American Humanist* provides scant support for a grant here.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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