

Fascinating Lawsuit about the Bladensburg Memorial

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10.2—Other Supreme Court Case

American Humanist Association v. Maryland-National Capital Park & Planning Commission, 147 F. Supp. 3d 373 (D. Md. 2015), reversed and remanded 874 F.3d 195 (4th Cir. 2017), rehearing en banc denied 2018 U.S. App. LEXIS 5195 (4th Cir. March 1, 2018).

Facts of the Memorial

This is a fascinating lawsuit about the constitutionality of the “Bladensburg Memorial” (hereinafter “Memorial”), which is a 40-foot-high Latin Cross located in the median at the intersection of Maryland Route 450 and U.S. Route 1 in Bladensburg, Prince George’s County,

¹I invite the reader’s attention to <https://www.roa.org/page/LawCenter>. You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

Maryland, very close to our nation's capital.³ Readers who live in the National Capital Area have probably passed by the Memorial many times.

The base of the Memorial lists the names of the 49 men from Prince George's County who made the ultimate sacrifice in The Great War, as World War I was then known. The base includes these words: "This Memorial Cross Dedicated to the heroes of Prince George's County who lost their lives in the great war for the liberty of the world." The base also includes a quotation from President Woodrow Wilson and the words "valor endurance courage devotion." The American flag flies on one side of the cross.

The initial effort to finance and build the Memorial began in late 1918, immediately after the war ended on November 11. Citizens of Prince George's County organized the Prince George's County Memorial Committee (PG Committee) to raise funds to build a memorial to the county's war dead. The PG Committee's pledge sheets included the following statement:

We the citizens of Maryland, trusting in God, the supreme ruler of the universe, pledge faith in our brothers who gave their all in the World War to make the world safe for democracy. Their mortal bodies have turned to dust, but their spirit lives to guide us through life in the way of godliness, justice, and liberty.

With our motto, "one God, one country, and one flag," we contribute to this memorial cross commemorating the memory of those who have not died in vain.

The groundbreaking ceremony was held on September 28, 1919. Secretary of the Navy Josephus Daniels was the principal speaker. The Marine Band played and the "Star Spangled Banner" was sung.⁴

The initial fundraising effort by the PG Committee fell short, and the Snyder-Farmer Post of the American Legion stepped in to complete the task. The post completed the fundraising and construction and held a dedication ceremony on July 12, 1925. United States Representative Stephen Gambrill of Maryland's 5th Congressional District gave the keynote address, and his address included these words:

You men of Prince George's County fought for the sacred right of all to live in peace and security and by the token of this cross, symbolic of Calvary, let us keep fresh the memory of our boys who died for a righteous cause.

In 1935, due to increased traffic on the roads surrounding the Memorial, the Maryland state legislature "authorized and directed" the State Roads Commission "to investigate the ownership and possessory rights" of the area surrounding the Memorial and to acquire the land "by purchase or condemnation." Plaintiffs contend that the tract of land in question was

³The facts stated in this article come directly from the district court opinion. Am. Humanist Ass'n v. Md.-Nat'l Cap. Park, 147 F.Supp.3d 373 (D. Md. 2015).

⁴The "Star Spangled Banner" did not become the National Anthem until almost 12 years later, on March 3, 1931.

adjacent to the Memorial but did not include the Memorial itself - they maintain that the Memorial has always been owned by a government entity.

Defendants assert that the Snyder-Farmer Post owned the Memorial and the land on which it sat. The record is not entirely clear as to exactly what land was transferred and when.

Ultimately, the State Roads Commission obtained title to the tract mentioned in the state statute and conveyed it to the Commission by deed in 1960. On March 1, 1961, to resolve any ambiguities, the Snyder-Farmer Post transferred and assigned to the Commission all its right, title and interest in the Memorial and the land on which it sits.

The Commission assumed the obligation of maintaining, repairing and otherwise caring for the Memorial, but the Snyder-Farmer Post reserved the right to hold memorial services to departed veterans and other ceremonies upon the parcel on appropriate dates and occasions. The Commission continues to own the Memorial and the land on which it sits.

The Memorial now sits amidst additional monuments as part of Veterans Memorial Park. The National Park Service placed among the memorials a "Star-Spangled Banner National Historic Trail Marker" highlighting the Memorial and the other monuments in the park. In 1944, local American Legion posts dedicated a World War II memorial across the street from the Memorial honoring the men and women of Prince George's County who died in that war. Nearby, a plaque and tree commemorate the lives lost at Pearl Harbor. Following a joint public-private effort, a memorial to veterans of Korea and Vietnam was dedicated on July 4, 1983. In 2006, an arcing stone walkway bordered by a granite ledge and a garden was built in the park to remember lives lost on September 11th.

In 2010, the Town of Bladensburg and the Anacostia Trails Heritage Area, Inc. convened a task force to explore ideas for monuments and events to commemorate the 200th anniversary of the War of 1812 and the Battle of Bladensburg. Currently, there is a War of 1812 memorial just north of the Memorial, and the Commission is in the process of installing two thirty-eight-foot-tall statues of soldiers representing the British Army and the defending American forces of the Battle of Bladensburg. Finally, Veterans Memorial Park includes a flag display of the American flag, the Maryland flag, and the Prince George's County flag.

Numerous events and gatherings have been held at the Memorial and Veterans Memorial Park, mostly in commemoration of Memorial Day or Veterans Day. An invocation and benediction are often included. Local posts of the American Legion have hosted many of the Memorial Day and Veterans Day programs at the Memorial and in the surrounding park, which often feature local government officials and representatives of other veterans' organizations. The Town, through organizations such as the Bladensburg Patriotic Committee and the Bladensburg Promotional Committee, also has held events in conjunction with Memorial Day, Veterans Day, the Fourth of July, and in remembrance of September 11th at the Memorial or in the surrounding park.

The events generally follow the same format and include a presentation of colors, the national anthem, an invocation, a keynote speaker (typically a veteran, military, local government, or

American Legion official), songs or readings, the laying of a wreath or flowers, a benediction, and a reception. Local American Legion posts, the Town, the Commission, and other government entities have also hosted rededications and other patriotic ceremonies at the Memorial. Although Defendants and the American Legion contend that no religious services have been held at the Memorial, Plaintiffs point to a *Washington Post* column indicating that there were at least three Sunday religious services held at the Memorial in 1931.

While the Memorial was built with private donations, the Commission has devoted resources over the years to maintain and illuminate it. Bladensburg Rotarians funded the installation of lights to illuminate the cross in 1965. The Commission funds routine maintenance and lighting of the Memorial and has spent at least \$117,000 on the Memorial, including \$100,000 on significant renovations in 1985. In 2008, the Commission budgeted an additional \$100,000 for further repairs to the Memorial that has not yet been entirely spent.

Initiation of this lawsuit

The plaintiffs in this lawsuit are Steven Lowe, Fred Edwards, Bishop McNeill, and the American Humanist Association (AHA).⁵ They filed this lawsuit on February 25, 2014, in the United States District Court for the District of Maryland. They contend that the use of public property and funds for the Memorial violates the “Establishment Clause” of the First Amendment. The First Amendment reads as follows:

Congress shall make no law respecting an *establishment of religion*, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.⁶

The plaintiffs named the Maryland-National Capital Park and Planning Commission (hereinafter “the Commission”) as the sole defendant. On its website, the Commission identifies itself as follows:

The Maryland-National Capital Park and Planning Commission (M-NCPPC) is a bi-county agency empowered by the State of Maryland in 1927 to acquire, develop, maintain and administer a regional system of parks within Montgomery and Prince George’s Counties, and to provide land use planning for the physical development of Prince George’s and

⁵On its website, <https://americanhumanist.org>, the AHA states its mission as: “We work tirelessly in the courts, legislatures, and communities to defend civil liberties, secular governance, and scientific integrity.” AHA is a national organization with its headquarters in Washington, DC.

⁶United States Constitution, Amendment 1 (emphasis supplied). The First Amendment was among the first ten amendments that were ratified on December 15, 1791, very quickly after the Federal Government was established under the Constitution. These ten amendments are referred to collectively as the “Bill of Rights.” As originally understood, the Bill of Rights only applied to the Federal Government, not the states. The ratification of the 14th Amendment on July 9, 1868 applied most of the terms of the Bill of Rights, including the First Amendment, to the states.

Montgomery Counties. In addition, the agency gained responsibility for the public recreation program in Prince George's County in 1970.⁷

In their complaint, the plaintiffs sought a declaratory judgment, an injunction, nominal damages, attorney fees, and costs. It is unclear what the injunction might provide, if the plaintiffs prevail. The concern is that it might require that the Memorial be destroyed.

The American Legion, the American Legion Department of Maryland, and the American Legion Colmar Manor Post 131 intervened in the lawsuit as defendants, seeking to preserve the Memorial. The Colmar Manor Post is apparently the successor to the Snyder-Farmer post that took over the fundraising and completed the Memorial.

Decision by the District Court

This case was assigned to Judge Deborah K. Chasanow. After a brief period of discovery, she decided the case on cross motions for summary judgment.⁸ In a scholarly opinion, Judge Chasanow granted the defendants' motion for summary judgment and denied the plaintiffs' motion. She explained her decision as follows:

The First Amendment provides that "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I, and the Supreme Court of the United States has applied this principle against the states and their subdivisions through the Fourteenth Amendment. *See Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 608 (4th Cir. 2012) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 15, 67 S. Ct. 504, 91 L. Ed. 711 (1947)).

Despite the straightforward simplicity of the clause, "[t]here is 'no single mechanical formula that can accurately draw the constitutional line'" in every Establishment Clause case. *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005) (quoting *Van Orden v. Perry*, 545 U.S. 677, 699, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005) (Breyer, J., concurring)). Indeed, Establishment Clause jurisprudence is a law professor's dream, and a trial judge's nightmare. In the words of Justice Clarence Thomas, *entangle church and State.*" *Moss*, 683 F.3d at 608 (emphases in original) (citing *Lemon*, 403 U.S. at 612-13).

In 2005, a plurality of the Supreme Court recognized that, although commonly used, the *Lemon* test has not been uniformly applied to Establishment Clause cases. *Van Orden*, 545 U.S. at 684-86 (plurality opinion). In determining the constitutionality of a display of the Ten Commandments outside the Texas State Capitol, the plurality noted that the *Lemon* test "is not useful in dealing with [such] passive monument[s]." *Id.* at 686. Instead the plurality's "analysis [was] driven [**20] both by the nature of the monument and by our Nation's history." *Id.* Justice Breyer, in a controlling opinion concurring in the judgment, *see Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (recognizing that "Justice Breyer's concurrence provides the controlling opinion"); *Myers*, 418 F.3d at 402 (treating Justice Breyer's opinion as controlling), noted that in "borderline cases" there is "no test-related substitute for the exercise of legal judgment." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring). Such judgment "must

⁷See www.mncppc.org/27/About-us.

⁸This case is an example of a "pure question of law" case. The underlying facts were never seriously in dispute. The dispute has always been about the meaning of the First Amendment as applied to those facts.

reflect and remain faithful to the underlying purposes of the [Establishment and Free Exercise] Clauses, and it must take account of context and consequences measured in light of those purposes." *Id.*

Not surprisingly, the parties disagree whether *Lemon* or *Van Orden* controls this case. (ECF Nos. 83- 1, at 38; 90, at 36; 92 at 16). Courts deciding Establishment Clause cases post-*Van Orden* also disagree. The Fourth Circuit, immediately after *Van Orden*, applied Justice Breyer's "legal judgment" test from *Van Orden* to the exclusion of the *Lemon* test, in upholding a statute providing for daily, voluntary recitation of the Pledge of Allegiance in Virginia's public schools. *Myers*, 418 F.3d at 402. *Myers* is, however, the only Fourth Circuit case to cite to *Van Orden*. In recent years, the Fourth Circuit has continued [**21] to apply the *Lemon* test with no mention of *Van Orden*. *Moss*, 683 F.3d at 608; *Glassman*, 628 F.3d at 146; *see also Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1030 n.14 (10th Cir. 2008) ("Supreme Court Justices have harshly criticized *Lemon*.)

Nevertheless, the *Lemon* test clings to life because the Supreme Court, in the series of splintered Establishment Clause cases since *Lemon* has never explicitly overruled the case."). Other courts have applied some hybrid form of the two tests. *See Salazar v. Buono*, 559 U.S. 700, 130 S. Ct. 1803, 176 L. Ed. 2d 634 (2010) (plurality opinion); *Trunk*, 629 F.3d at 1107. Ultimately, here, it is not necessary to resolve the legal conundrum. Both tests "require the [c]ourt to inquire into the nature, context, and history" of the Monument and lead to the same result. *See Hewett*, 29 F.Supp.3d at 611 (citing *Trunk*, 629 F.3d at 1107). Even if Justice Breyer's opinion in *Van Orden* controls, the *Lemon* test remains a "useful guidepost[]" for the court's analysis. *Van Orden*, 545 U.S. at 7 [*383] 00 (Breyer, J., concurring).

"Establishment Clause jurisprudence [is] in shambles." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S.Ct. 12, 13, 181 L. Ed. 2d 379 (2011) (Thomas, J., dissenting from the denial of [**19] certiorari.)

Courts, including the United States Court of Appeals for the Fourth Circuit, often use the three-part test articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), to assess alleged violations of the Establishment Clause. *See, e.g., Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227, 238 (2d Cir. 2014); *Moss*, 683 F.3d [*382] at 608; *Glassman v. Arlington Cnty.*, 628 F.3d 140, 146 (4th Cir. 2010) (determining *Lemon* to be the "appropriate test"); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1117 (10th Cir. 2010) (noting that "the touchstone for Establishment Clause analysis remains the tripartite test set out in *Lemon*") (citations and internal quotation marks omitted); *Hewett v. City of King*, 29 F.Supp.3d 584, 611 (M.D.N.C. 2014)(deciding the case "[u]nder the *Lemon* framework").

Most recently, the Fourth Circuit has articulated the *Lemon* test as requiring that, to pass constitutional muster, "government conduct (1) must be driven in part by a *secular purpose*; (2) must have a *primary effect* that neither advances nor inhibits religion; and (3) must not *excessively* **B. Lemon Test**

As noted above, "[t]o pass muster under the Establishment Clause, government conduct must be driven in part by a *secular purpose*; (2) must have a *primary effect* that neither advances nor inhibits religion; and (3) must not *excessively entangle* church and State." *Moss*, 683 F.3d at 608 (emphases in original) (citing *Lemon*, 403 U.S. at 612-13). Additionally, as part of *Lemon*'s second prong, the Fourth Circuit examines "whether the governmental use of an object with religious meaning . . . ha[s] the effect of 'endorsing' religion." [**22] *Lambeth v. Bd. of Comm'rs of Davidson Cnty.*, 407 F.3d 266, 269 (4th Cir. 2005) (citing *Cnty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 593-94, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989)).

1. Secular Purpose

The secular purpose prong of the *Lemon* test "presents a 'fairly low hurdle, which may be cleared by finding a plausible secular purpose.'" *Glassman*, 628 F.3d at 146 (quoting *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 288 (4th Cir. 2000)). The government's purpose need not be "exclusively secular," *Jenkins v. Kurtinitis*, No. ELH-14-1346, 2015 U.S. Dist. LEXIS 34772, 2015 WL 1285355, at *28 (D.Md. Mar. 20, 2015) (citing *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001)), as long as the government action is not "entirely motivated by a purpose to advance religion." *Hewett*, 29 F.Supp.3d at 611 (citing *Lambeth*, 407 F.3d at 270). "Under applicable Supreme Court precedent, a 'legitimate secular purpose' supporting a challenged governmental action will suffice to satisfy the *Lemon* test's first prong . . . unless the alleged secular purpose is in fact pretextual." *Lambeth*, 407 F.3d at 270 (citing *Santa Fe Ind. Sch. Dist. V. Doe*, 530 U.S. 290, 308-09, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000); *Lynch v. Donnelly*, 465 U.S. 668, 681, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984)). Courts should "not lightly attribute unconstitutional motives to the government, particularly where [it] can discern a plausible secular purpose." *Hewett*, 29 F.Supp.3d at 612 (quoting *Davenport*, 637 F.3d at 1118) (internal quotation marks omitted).

Plaintiffs argue that displaying the Monument has a religious purpose. First, they argue that a Latin cross, which the Monument is, is "patently religious." (ECF No. 80-1, at 29-30). Plaintiffs also argue that the history of the cross "underscores its religious purpose." (*Id.* at 30-32). They also contend that the use of a religious symbol to achieve a secular goal is impermissible [**23] when a non- religious means will suffice. Defendants assert that the Commission's sole purpose for acquiring the land in the 1960s was not religious because it acquired the land for "highway expansion, traffic safety, protection of the Legion's residual property interests, [and] historic preservation" reasons. (ECF No. 83-1, at 46). Defendants also argue that, even if the intent of the Monument's builders is relevant, the record shows that their intent was "commemorative rather than religious." (*Id.* at 47- 52).

Although the Latin cross is undeniably a religious symbol, "[t]he fact that the monument conveys some religious meaning does not cast doubt on the [government's] valid secular purposes for its display." *Hewett*, 29 F.Supp.3d at 612 (citing *City of Elkhart v. Books*, 532 U.S. 1058, 1062, 121 S. Ct. 2209, 149 L. Ed. 2d 1036 (2001)); *see also Buono*, 559 U.S. at 715 (plurality opinion) ("Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message."); *Mellen v. Bunting*, [*384] 327 F.3d 355, 374 (4th Cir. 2003) (assuming a secular purpose even though school-sponsored prayer "is plainly religious in nature"). Other courts have recognized that displaying a cross to honor fallen soldiers is a legitimately secular purpose, and does not always promote a religious message. *See Buono*, 559 U.S. at 715 (plurality opinion) (noting that "those who erected the cross intended simply [**24] to honor our Nation's fallen soldiers"); *Davenport*, 637 F.3d at 1118 (determining that the intent to use crosses for fallen state trooper memorials was not religious, partly because it was inspired by crosses in military cemeteries).

The focus of the first *Lemon* prong is "on the government's purpose, not that of a private actor." *Davenport*, 637 F.3d at 1118. The alleged government conduct challenged in the complaint is the "ownership, maintenance and prominent display on public property" of the Monument. (ECF No. 1 ¶ 55). The Commission's actions are clearly driven by a plausible, legitimate secular purpose. The Commission owns the Monument and surrounding land because it sits in the median of a busy highway interchange. The government determined that private ownership of the median would "create a serious menace to traffic" in light of increased use of the surrounding roads. (ECF No. 83- 40, at 2). It is the government's secular responsibility to maintain the land on which the Monument sits just as it would

any other highway median. In addition, the Commission's maintenance and display of the Monument independent of traffic concerns is also driven by a secular purpose,

maintaining and displaying a "historically significant war memorial" [**25] that has honored fallen soldiers for almost a century. *See Trunk*, 629 F.3d at 1108 (holding that the government, in acquiring a memorial in the shape of a cross, articulated a plausible, legitimate secular purpose of "preserv[ing] a historically significant war memorial"). Nothing in the record indicates that the Commission's maintenance and display of the Monument is driven by a religious purpose whatsoever. The evidence of the Commission's secular purpose is uncontested.

Even the purpose of the private citizens who were behind the Monument's construction 90 years ago was a predominantly secular one. Plaintiffs refer to remarks made throughout the existence of the Monument in an attempt to illustrate its religious nature. (ECF Nos. 80-1, at 30-32; 90, at 52- 55). Notably, a fundraising pledge sheet that was circulated contained expressly religious language (ECF No. 80-32, at 3 ("We, the citizens of Maryland, trusting in God, the supreme ruler of the universe, pledge faith in our brothers.")); the Monument was sometimes described in religious terms such as "Cross of Calvary" and "Sacrifice Cross" (ECF No. 80-26); and many events at the Monument contain some religious components (ECF Nos. 80-51; 83-68). Even if

these [**26] statements or events carry some religious meaning, they do not show an "entirely religious purpose" for the Monument, and, in fact, there is overwhelming evidence in the record showing that the predominant purpose of the Monument was for secular commemoration. The Monument's groundbreaking was a predominantly secular affair that also included the groundbreaking of the National Defense Highway. (ECF No. 83-25, at 2-3). Additionally, although the construction of a cross can be for a religious purpose, in the period immediately following World War I, it could also be motivated by "the sea of crosses" marking graves of American servicemen who died overseas. (ECF No. 83-5, at 14); *cf. Davenport*, 637 F.3d at 1118. The Monument's secular commemorative purpose is reinforced by the plaque, the American Legion's seal, and the words "valor," "endurance," [*385] "courage," and "devotion" written on it. None of these features contains any religious reference. In short, the record amply demonstrates that the construction and maintenance of the Monument "was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers." *Buono*, 559 U.S. at 715 (plurality [**27] opinion).

The ownership, maintenance, and display of the Monument by the Commission thus easily satisfies the purpose prong of the *Lemon* test.

2. Primary Effect

Lemon's second prong requires the court to determine if the challenged display's "principal or primary effect is to advance or inhibit religion." *Lambeth*, 407 F.3d at 270. The primary question is "whether an informed, reasonable observer would view the display as an endorsement of religion." *Id.* at 272. "[T]he reasonable observer is aware of the *purpose, context, and history* of the symbol at issue." *Hewett*, 29 F.Supp.3d at 613 (emphasis in original)(quoting *Davenport*, 637 F.3d at 1119). "The inquiry is not 'whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the government] endorses religion.'" *Id.* at 613 (emphases in original) (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring in part and concurring in the judgment)). The Ninth Circuit noted that in determining the effect of symbols such as

the Monument, courts "must consider fine-grained, factually specific features of the Memorial, including the meaning or meanings of the Latin cross[,] . . . the Memorial's history, its secularizing elements, its physical setting, and the way [**28] the Memorial is used." *Trunk*, 629 F.3d at 1110. "Secular elements, coupled with the history and physical setting of a monument or display, can — but do not always — transform sectarian symbols

that otherwise would convey a message of government endorsement of a particular religion." *Id.* at 1117. The Ninth Circuit's framework provides a helpful approach to assessing the effect of the Monument, which is similar, but not identical, to the memorial at issue in *Trunk*.

Plaintiffs argue that the Monument endorses religion because, "as a Christian cross, it is inherently religious." (ECF No. 90, at 56). Additionally, Plaintiffs assert that the prominence of the Monument on the traffic island and relative isolation from the other memorials in Veterans Memorial Park enhance its endorsement of religion. Finally, Plaintiffs argue that the history and use of the Monument "deepens its religious message." (ECF No. 80-1, at 43). Defendants counter that the Monument contains numerous secular commemorative aspects that would indicate to the reasonable observer that its [**29] purpose is commemorative rather than religious. (ECF No. 83-1, at 55). Defendants also contend that the location of the Monument within Veterans Memorial Park further supports its secular effect. (*Id.* at 56-57). Defendants also argue that the historical use of the Monument for veterans' commemorative events strengthens its secular effect.

Plaintiffs cite multiple cases addressing a cross memorial on public land to support the proposition that "courts have been virtually unanimous in concluding that the government's display of a cross on public property unconstitutionally endorses and advances Christianity." (ECF No. 80-1, at 37). This assertion ignores the key factual distinctions between the cases Plaintiffs cite and the Monument.

In *Trunk*, for example, the history and setting of the cross memorial were overtly religious. The cross in *Trunk* sat from 1913 until the 1990s as an unadorned cross without "any physical indication that it was a memorial." *Trunk*, 629 F.3d at 1102. Rather than hosting annual commemorative events on Memorial Day and Veterans Day, the *Trunk* cross hosted religious Easter services and only a "few scattered [veterans] memorial services before the 1990s." *Id.* Throughout its history, the *Trunk* cross "functioned as a holy object, symbol of Christianity, and a place of religious observance." *Id.* at 1120. The Ninth Circuit suggested that the *Trunk* cross was repurposed primarily as a war memorial partly in response to litigation. *Id.* at 1102. The cross memorials at issue in other cases were similarly imbued with long-standing and explicit religious histories. See, e.g., *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (cross was initially erected for religious purposes but later deemed to be a "memorial of veterans to all wars"); *Gonzales v. North Tp. Of Lake Cnty., Ind.*, 4 F.3d 1412 (7th Cir. 1993) (lone crucifix with no secular effect other than "landmark status"); *Am. Civil Liberties Union of Ga. v. Rabun Cnty.*, 698 F.2d 1098 (11th Cir. 1983) (cross was dedicated on Easter and only secular purpose was tourism).

Conversely, the Monument contains secular elements on its face (the plaque; the American Legion Seal; the words "valor," "endurance," "courage," "devotion"), has functioned expressly and overtly as a war memorial for its entire history, and sits amidst other secular memorials in Veterans Memorial Park. Although the record indicates that there were three isolated religious services held at the Monument, the predominant and nearly exclusive use of the Monument has been for annual commemorative events held on Memorial Day and Veterans Day. (See ECF Nos. 80-51; 83-60, at 18). In light of this [**31] history and context, of which a reasonable observer would be aware, the Monument "evokes far more

than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." *Buono*, 559 U.S. at 721 (plurality opinion). The evocation of foreign graves is particularly relevant here because, unlike crosses challenged in other cases, the Monument explicitly memorializes forty-nine servicemen who died in Europe during World War I, and the "cross developed into a central symbol of the American overseas cemetery" during and following World War I. (See ECF Nos. 83-5, at 16-17; 83-21).

Controlling Fourth Circuit precedent also supports Defendants' assertion that the Monument does not have the effect of endorsing religion. The Fourth Circuit has addressed other passive displays of alleged religious significance in *Lambeth and Smith v. Cnty. of Albemarle, Va.*, 895 F.2d 953 (4th Cir. 1990). In *Lambeth*, the Fourth Circuit held that [**32] the inscription of the motto "In God We Trust" on the county [*387] government center did not violate the Establishment Clause because a reasonable observer would not "fairly understand the purpose of the message 'in its particular physical setting' to impermissibly advance or endorse religion." *Lambeth*, 407 F.3d at 272 (quoting *Cnty. Of Allegheny*, 492 U.S. at 598-600). In *Smith*, the Fourth Circuit held that a crèche scene on the front lawn of the county office building did violate the Establishment Clause because it "was not associated with any secular symbols or artifacts" other than a small disclaimer that the display was not sponsored by the government, but rather by the Charlottesville Jaycees." *Smith*, 895 F.2d at 958.

Here, the Monument is surrounded by secular symbols of commemoration throughout Veterans Memorial Park. (ECF No. 83-3). The cross itself is adorned with prominent secular symbols. (ECF No. 83-2). In addition, rather than being placed prominently in front of a governmental building, the Monument is on a highway median as part of a larger park that has become the "focus of the County's remembrance of its veterans and war dead." (ECF No. 83-8, at 2). Within the context of its long history and the setting of Veterans Memorial Park, a reasonable observer would not view the Monument as having the [**33] effect of impermissibly endorsing religion.

3. Excessive Entanglement

Lemon's third prong requires courts to assess whether "the challenged display has created an 'excessive entanglement' between government and religion." *Lambeth*, 407 F.3d at 272-73. The Fourth Circuit has noted that "[t]he kind of excessive entanglement of government and religion precluded by *Lemon* is characterized by 'comprehensive, discriminating, and continuing state surveillance' of religious exercise." *Id.* at 273 (quoting *Lemon*, 403 U.S. at 619). Considering the inscription of "In God We Trust" in the county government center, the Fourth Circuit held that it was not excessive entanglement because the display did "not require pervasive monitoring or other maintenance by public authorities." *Id.* Here, Plaintiffs argue that the Commission's "expenditure of funds to maintain and light" the Monument excessively entangles government and religion. (ECF No. 80-1, at 53). However, "entanglement between church and state becomes constitutionally excessive only when it has the effect of advancing or inhibiting religion." *Hewett*, 29 F.Supp.3d at 618 (citations and internal quotation marks omitted). Accordingly, courts often view *Lemon*'s third prong "as an aspect of the second." *Id.* Here, for reasons discussed in [**34] the preceding section, the Commission's display and maintenance of the Monument is not an endorsement of religion.

The Monument and Veterans Memorial Park are secular war memorials that host numerous commemorative events. The Monument is located on a median of a busy highway interchange. The fact that the Commission has spent money on maintenance and upkeep of the Monument and surrounding park does not represent unconstitutional entanglement because the Monument itself is not a

governmental endorsement of religion. The provision of maintenance and repairs for the Monument and the median does not constitute "continued and repeated government involvement with religion." *Lambeth*, [*388] 407 F.3d at 273 (emphasis added). Rather, as discussed in relation to *Lemon*'s purpose prong, the Commission undertakes maintenance of the Monument and surrounding land for traffic safety and commemorative purposes. In short, the Commission's maintenance of a war memorial on a highway median does not implicate any of the evils against which *Lemon*'s third prong protects.

C. *Van Orden*

Despite continued judicial use of the *Lemon* test to assess the constitutionality of such displays, a 2005 plurality of the Supreme Court determined that the *Lemon* test "is not useful in dealing with [such] passive monument[s]." *Van Orden*, 545 U.S. at 686 (plurality opinion). The Fourth Circuit applied the "legal judgment" test from Justice Breyer's *Van Orden* concurrence in holding that reciting the Pledge of Allegiance in public school did not violate the Establishment Clause. *Myers*, 418 F.3d at 402. The Ninth Circuit applied a hybrid of *Lemon* and *Van Orden* in determining that the cross in *Trunk* was unconstitutional. *Trunk*, 629 F.3d at 1107.

Here, for many of the same reasons discussed in the application of the *Lemon* [**36] test, the Monument does not violate the Establishment Clause under *Van Orden*'s legal judgment test. As in *Lemon*, it is essential to consider the context and history of the display to determine its constitutionality. See *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring). The Monument was constructed and financed by the American Legion and a private group of citizens whose purpose was to remember and honor Prince George's County's fallen soldiers. See *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) (noting the secular purpose of the display's founders). The American Legion's seal is "displayed on the [Monument], prominently acknowledging that the [American Legion] donated the display, a factor which, though not sufficient, thereby further distances" the Commission from any potential religious aspect of the Monument. *Id.* Furthermore, the Monument is located in Veterans Memorial Park and is surrounded by other war memorials and secular monuments. (ECF No. 83-3); see *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring) ("The physical setting of the monument, moreover, suggests little or nothing of the sacred."). Much like the Ten Commandments display in *Van Orden*, the location of the Monument "does not readily lend itself to meditation or any other religious activity." *Van Orden*, 545 U.S. at 702 (Breyer, J.,

concurring). [**37] Rather, the location among the other monuments of Veterans Memorial Park underscores its secular and commemorative nature. In addition, the Monument has gone unchallenged for decades. See *id.* at 702-03 (discussing how the fact that the monument existed for 40 years before a legal challenge shows that "few individuals . . . [were] likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort" to promote or endorse religion).

Finally, the Monument has been used almost exclusively as a site to commemorate veterans on secular patriotic holidays for its entire history. (ECF Nos. 80-41; 83-1, at 35-36; 83-9, at 6; 83-11, at 9-11; [*389] 83-60, at 18). As the Ninth Circuit acknowledged in *Trunk*, "[t]he Ten Commandments monuments at issue in [*Van Orden*] passed muster in part because were *not* used as religious objects — they simply adorned the grounds of their respective government buildings in the company of other monuments." *Trunk*, 629 F.3d at 1120. Conversely, the cross in *Trunk* had a long history of hosting religious Easter services and had "no physical indication of any secular purpose" for much of its history, "during which it served primarily as a site of religious observance." [**38] *Id.* at 1121.

For the foregoing reasons, the Monument satisfies both the *Lemon* test and the "legal judgment" test from *Van Orden*.⁹

Appeal to the 4th Circuit

The plaintiffs filed a timely appeal to the United States Court of Appeals for the 4th Circuit.¹⁰ As is always the case in federal appellate courts, the case was assigned to a panel of three judges. In this case, the three judges were Judge Roger L. Gregory (Chief Judge of the 4th Circuit), Judge James A. Wynn, Jr., and Judge Stephanie Thacker. Judge Thacker wrote the majority decision, joined by Judge Wynn, reversing and remanding the District Court decision. Judge Gregory wrote an eloquent dissent.

In the majority decision, Judge Thacker wrote:

In this case we are called upon to decide whether the Establishment Clause is violated when a local government displays and maintains on public property a 40-foot tall Latin cross, established in memory of soldiers who died in World War I. The district court determined that such government action does not run afoul of the Establishment Clause because the cross has a secular purpose, it neither advances nor inhibits religion, and it does not have the primary effect of endorsing religion.

We disagree. The monument here has the primary effect of endorsing religion and excessively entangles the government in religion. The Latin cross is the core symbol of Christianity. And here, it is 40 feet tall; prominently displayed in the center of one of the busiest intersections in Prince George's County, Maryland; and maintained with thousands of dollars in government funds. Therefore, we hold that the purported war memorial breaches the "wall of separation between Church and State." *Everson v. Bd. of Educ.*, 330 U.S. 1, 16, 67 S. Ct. 504, 91 L. Ed. 711 (1947) (internal quotation marks omitted). Accordingly, we reverse and remand.¹¹

In his vigorous and eloquent dissent, Judge Gregory wrote:

I agree with the majority's holding that Appellants have standing under 42 U.S.C. § 1983 to bring this action for a violation of the Establishment Clause. But I disagree with the majority's ultimate conclusion that the display and maintenance of the war memorial in this case violates the Establishment Clause. I therefore respectfully dissent in part.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. To properly understand and apply the Establishment Clause, it must be viewed "in the light of its history and the evils it was designed forever to suppress." *Everson v. Bd. of Educ.*, 330 U.S. 1, 14-15, 67 S. Ct. 504, 91 L. Ed. 711 (1947). The early colonization of America was a time marked with religious persecution. Immigrating settlers fled religious suppression in Europe only to be met with similar treatment in America. "[M]en and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God

⁹*American Humanist Association*, 147 F. Supp. 3d at 381-89.

¹⁰The 4th Circuit is the federal appellate court that sits in Richmond, Virginia and hears appeals from district courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

¹¹*American Humanist Association*, 874 F.3d at 200.

only as their own consciences dictated." *Id.* at 10. Those regarded as nonconformists were required "to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters." *Id.*

The Establishment Clause was intended to combat the practice of "compel[ling] individuals to support and attend government favored churches." *Id.* at 8; *accord Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 402 (4th Cir. 2005). The Clause's historical setting reveals that "[i]ts first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962). The realization of its goal meant that the government must "'neither engage in nor compel religious practices,' that it must 'effect no favoritism among sects or between religion and nonreligion,' and that it must 'work deterrence of no religious belief.'" *Van Orden v. Perry*, 545 U.S. 677, 698, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005) (Breyer, J., concurring) (plurality opinion) (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 305, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (Goldberg, J., concurring)).

But the Clause does not require the government "to purge from the public sphere" any reference to religion. *Id.* at 699. "Such absolutism is not only inconsistent with our national traditions but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* (citations omitted). While neutrality may be the "touchstone" of the Establishment Clause, it more so serves as a "sense of direction" than a determinative test. *McCreary Cty. v. Am. Civil Liberties Union*, 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005). We cannot view neutrality as some sort of "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring). Thus, in reviewing the challenged war memorial, this Court must seek general rather than absolute neutrality. We do so by engaging in the three-factor analysis delineated in *Lemon v. Kurtzman* (the "*Lemon* test"), which requires that the memorial have a secular purpose; have a principal or primary effect that neither advances, inhibits, nor endorses religion; and not foster "an excessive government entanglement with religion." 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). The memorial "must satisfy each of the *Lemon* test's three criteria" to pass constitutional muster. *Lambeth v. Bd. of Comm'rs of Davidson Cty.*, 407 F.3d 266, 269 (4th Cir. 2005) (citing *Mellen v. Bunting*, 327 F.3d 355, 367 (4th Cir. 2003)).¹²

The defendants applied to the 4th Circuit for rehearing en banc. All the active judges of the circuit¹³ get to vote on a petition for rehearing en banc. If granted, rehearing en banc means that there will be new briefs and a new oral argument before all the active judges of the circuit. On March 1, 2018, the active judges of the 4th Circuit voted 5-3 to deny rehearing en banc.

This case is not over.

The next step for the defendants is to apply to the Supreme Court for certiorari (discretionary review). If four or more Justices vote for certiorari at a conference to consider certiorari petitions, it is granted, meaning that there will then be new briefs and oral argument at the Supreme Court. If three or fewer Justices vote for certiorari, the decision of the Court of Appeals is considered final and the case is listed as "certiorari denied."

¹²*American Humanist Association*, 874 F.3d at 215-16 (Judge Gregory, concurring in part and dissenting).

¹³The active judges are those who have not taken senior status.

Certiorari is denied in more than 99% of the cases where it is sought. I believe that it is likely that certiorari will be granted in this case because of the high-profile nature of the case, the dissents in the Court of Appeals, and the fact that the Supreme Court case law on the Establishment Clause is unsettled.

We will keep the readers informed of further developments in this interesting and important case.

UPDATE NOVEMBER 2018

The Supreme Court granted certiorari—agreed to hear this case. New briefs are being filed, and a new oral argument will be scheduled for the spring. The high court’s decision is expected by late June, at the end of the Court’s 2018-19 term.

The final appellate step in our federal court system is to file a petition for certiorari, after you have lost in the Circuit Court. At least four of the nine Justices must vote for certiorari, or the decision of the Circuit Court becomes final. Certiorari is denied in more than 99% of the cases where it is sought. Certiorari was granted in this case because of its importance and because the Supreme Court’s jurisprudence on the “Establishment of Religion” clause of the First Amendment is confusing and uncertain.

We will keep the readers informed of developments in this interesting and important case.

UPDATE MAY 2021

At the end of the 2018-19 term, on June 20, 2019, the Supreme Court released its decision. Seven of the nine Justices voted to reverse the Fourth Circuit thus saving the Bladensburg Memorial.¹⁴ For more details on the case see Law Review 19065.

¹⁴Am. Legion v. Am. Humanist Ass’n, 139 S.Ct. 2067 (2019).