No. 17-13025

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMANDA KONDRAT'YEV, et al.,
Plaintiffs-Appellees,

v.

CITY OF PENSACOLA, FLORIDA, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida
Case No. 3:16-cv-00195-RV-CJK

BRIEF OF THE STATE OF ALABAMA, FLORIDA, GEORGIA, INDIANA, KANSAS, LOUISIANA, MISSOURI, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS CITY OF PENSACOLA, FLORIDA, ET AL.

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CERTIFICATE OF INTERESTED PERSONS

To the best of counsel's knowledge, except for the following, all parties, intervenors and amici appearing before the district court and in this Court are listed in the Brief for Appellant:

> The States of Alabama, Florida, Georgia, Indiana, Louisiana, Kansas, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, and Utah, as amici curiae.

Counsel for the Appellant further certify that no additional publicly traded company or corporation has an interest in the outcome of this appeal.

Respectfully submitted this 3rd day of October, 2017.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Interest of Amici Curiae

The amici curiae are the States of Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, and Utah, which have the right to file this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.

States, counties, and municipalities have historically included, or allowed private parties to include, religious texts and symbols on monuments and other displays on public property. The amici States have an interest in maintaining that practice, consistent with a proper understanding of the Establishment Clause. The district court's decision on review highlights the absence of clear and reasonable standards for evaluating the constitutionality of passive monuments on public property, especially monuments in the form of a Latin cross. In resolving this case, the Court should harmonize this Circuit's caselaw with intervening decisions of the United States Supreme Court and clarify that the mere presence of a Latin cross on public property does not violate the Establishment Clause, especially when the cross has stood for decades without any legal challenge or complaint.

Summary of Argument

The amici States submit that the district court erred in three respects. First, the district court erroneously concluded that a Latin cross presumptively expresses religious views, regardless of its history. Second, the district court failed to consider the presence or, in this case, absence of any direct or indirect coercion. Third, the district court erroneously read the Mayor's correct legal statement—that religion cannot be removed from the public square—as an admission that the cross served no secular purpose.

No matter how the Court ultimately applies the Establishment Clause on the unique facts of this case, it should not repeat the district court's three errors. Instead, the Court should make clear that a Latin cross on public property may serve a secular purpose, especially over time, and that the absence of any direct or indirect coercion is always a key consideration under the Establishment Clause.

Argument

Although the district court's opinion rightly criticized the Supreme Court's Establishment Clause jurisprudence as "historically unmoored, confusing, [and] inconsistent," Doc. 41 at 3, the district court nonetheless failed to meaningfully engage with that precedent. Whatever one thinks about the Supreme Court's "Lemon test" from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), it is clearly a context-sensitive doctrine that weighs the history of the challenged practice and the decree of any direct or indirect coercion involved. But, instead of evaluating the unique context and history of the Pensacola cross, the district court's decision comes down to a simple—and erroneous—syllogism: because a Latin cross is an inherently religious symbol, it serves no secular purpose. That is so, the district court maintained, regardless of the cross's location, historical pedigree, cultural significance, or the absence of coercive effect from its placement. In adopting this exceedingly simple, seemingly bright-line rule, the district court erred.

I. A Latin cross may serve a secular purpose, especially over time.

The Supreme Court's Establishment Clause precedents are no model of clarity. But they are clear on one thing: the secular purpose of a religious symbol must be judged based on the historical and other context in which it is displayed. *See Lynch v. Donnelly*, 465 U.S. 678–79 (1984) ("In each case, the inquiry calls for line-drawing; no fixed, per se rule can be framed."). "[T]he Establishment Clause does

not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment). *Accord McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 874 (2005) ("Nor do we have occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history.") This means that there are no bright-line rules. Some displays will pass constitutional muster and others, involving identical symbols, will potentially fail.

A Latin cross is no different. A Latin cross "is unequivocally a symbol of the Christian faith." *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1035 (10th Cir. 2008). But, as Justice Kennedy recognized in his plurality opinion in *Salazar v. Buono*, the Latin cross also "has complex meaning beyond the expression of religious views." *Salazar v. Buono*, 559 U.S. 700, 717 (2010) (plurality opinion). A "Latin cross is not merely a reaffirmation of Christian beliefs" but is "often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Id.* at 1820. For this reason, courts have held the display of a Latin cross to serve a secular purpose in certain circumstances and to have a solely religious purpose in others. *Compare Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (Latin cross on side of interstate unconstitutional) *with Weinbaum*, 541 F.3d at 1035

(rejecting per se rule that Latin cross is unconstitutional). *See also Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1107 (10th Cir. 2010) (Gorsuch, J., dissenting) (discussing the proper application of Establishment Clause to displays of the Latin cross).

The district court's decision here, however, adopts a practically per se rule against the display of a Latin cross on public land. Indeed, the district court's reasoning closely tracks Justice Stevens' dissenting opinion in *Salazar*, which concluded that, because a "solitary cross conveys an inescapably sectarian message," a "plain unadorned Latin cross" may not be maintained on public land no matter its broader significance. 559 U.S. at 747 (Stevens, J., dissenting). Echoing Justice Stevens, the district court here reasoned that the Pensacola cross serves no secular purpose merely because "it is a Latin cross that was completed by, and dedicated at, an Easter Sunrise Service." Doc. 41 at 11.

Although the district court recognized that the "Bayview Cross is part of the rich history of Pensacola and of Bayview Park in particular," Doc. 41 at 2, the district court missed the relevance of those facts. As Pensacola's brief explains, the City maintains 93 public parks and open spaces and over 140 monuments and memorials. *See* City Br. at 9. The Bayview cross has been one of those monuments for approximately 75 years. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 477 (2009) ("The 'message' conveyed by a monument may change over time.").

That 75 years have "passed in which the monument's presence, legally speaking, went unchallenged . . . suggest[s] that the public" appreciates the cross's "broader moral and historical message reflective of a cultural heritage." *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in the judgment). But the district court expressly refused to consider the historical significance the monument or its broader cultural relevance to the City of Pensacola as part of its inquiry under the Establishment Clause. *See* Doc. 41 at 12 n.2. The district court also ignored the fact that a civic group, not a religious group or the City, provided funding to build the cross in the first place. *See Pleasant Grove,* 555 U.S. at 476-77 ("By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument."). Ultimately, the district court's analysis rests entirely on its conclusion that, regardless of context, "a solitary Latin cross . . . would not appear to have [a] dual" religious and secular purpose. Doc. 41 at 16.

Because the purpose inquiry does not stop with the conclusion that a monument contains a religious symbol, the district court should have considered the cross's broader significance. For example, in *Freedom From Religion Foundation v. Weber*, 628 Fed. Appx. 952 (9th Cir. August 31, 2015), the Ninth Circuit held that the federal government's "continued authorization of a [Jesus] statue on federal land does not violate the Establishment Clause." There, as here, the monument was

obviously religious in nature: it was a twelve-foot tall statue of Jesus Christ. But the Ninth Circuit explained "[t]hat the statue is of a religious figure, and that some of the initial impetus for the statue's placement was religiously motivated, does not end the matter." *Id.* Instead, the government identified secular rationales for "its continued authorization includ[ing] the statue's cultural and historical significance." *Id.* at 954. The Pensacola cross, which has "hosted tens of thousands of people, and has stood on public property in one form or another for approximately 75 years," Doc. 41 at 2, clearly exists for similar secular purposes.

Ultimately, if it were accepted by this Court, the district court's reasoning would threaten countless monuments across the Circuit. As detailed in the City's appendix, state and local parks, squares, and government buildings boast veterans' memorials that contain religious imagery, including crosses, citations to scripture, and the like. Similarly, many a roadway is marked by a makeshift memorial in the form of a Latin cross, which "need not be taken as a statement of governmental support for sectarian beliefs." *Salazar, 559 U.S.* at 1818. The mere fact that these monuments consist of crosses and other religious symbols does not negate their secular purpose or their historical and cultural significance.

II. Coercion is the touchstone of the Establishment Clause.

Just as the Supreme Court's overriding methodology has eschewed bright-line rules, its overriding concern has been governmental coercion. "It is an elemental

First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise." T*own of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (quotation and citation omitted). But, "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal." *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 659, 109 S. Ct. 3086, 3136, 106 L. Ed. 2d 472 (1989) (Kennedy J., concurring in part and dissenting in part). Passive monuments have the potential to violate the Establishment Clause only to the extent such "[s]ymbolic recognition . . . place[s] the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.*

It should be dispositive under the Establishment Clause that there is no coercion here. The monument is located in an out-of-the-way corner of a city park. No one has been compelled to observe or participate in any religious ceremony at the park. And it is undisputed that those who attend worship services in the park may continue to do so even if the cross is removed. Unlike cases in which the Supreme Court has held religious symbols and prayers unconstitutional, there is no real potential for indirect coercion here. "The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care." *See Van Orden*, 545 U.S. at 703 (Breyer, J., concurring). *See also Lee*, 505 U.S. at 592 ("[P]rayer exercises in public schools carry a particular

risk of indirect coercion."); *Engel*, 370 U.S. at 431 ("[T]he indirect coercive pressure upon religious minorities to conform" to prayers "is plain."). Nor is the cross in a courthouse or other government building where one would go to transact business. *See Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 664, (1989) (crèche unconstitutionally located in the Grand Staircase of the Allegheny County Courthouse, which is the "main," "most beautiful," and "most public" part of the courthouse).

For its part, the district court erroneously viewed an inquiry into coercion as a separate "test." *See* Doc. 41 at 8. But the *Lemon* test cannot be divorced from the Establishment Clause's fundamental anti-coercion principle. Instead, this Court has explained that, although "it is not entirely clear how the coercion inquiry interacts with the *Lemon* test," coercion should be part of the "analysis of the effects" of the challenged government action. *Bown v. Gwinnett Cty. Sch. Dist.*, 112 F.3d 1464, 1473 (11th Cir. 1997). Whether because of its purpose or its effect, the result under the *Lemon* test is the same: the cross simply does not raise the kind of concerns that have led the Supreme Court to require the removal of a passive monument or display.

III. The Mayor's comment does not undermine the monument's historical and cultural significance.

There is one final error in the district court's analysis. When Pensacola's mayor said that "I hope there is always a place for religion in the public square," the

district court construed the statement as "essentially an admission that the cross has been sustained for a religious purpose." Doc. 41 at 11.

There are at least two independent problems with the district court's reasoning on this point.

First, the Mayor's comment was a correct statement of the Establishment Clause's legal standard. The Supreme Court has recognized that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952). And Justice Breyer explained the legal standard using very similar language to the Mayor: "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment). Indeed, the very point of the Court's context-sensitive approach to the Establishment Clause is to "avoid[] drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens." *Allegheny*, 492 U.S. at 623 (O'Connor, J., concurring in part and concurring in the judgment). It is passing strange that the district court construed the Mayor's accurate legal statement—that the Constitution leaves a place for religion in the public square—as a concession of unconstitutional purpose.

Second, and more fundamentally, the district court's view of the Mayor's statement reveals the district court's fundamental misunderstanding of the proper

inquiry. There is no dispute here that the Latin cross is a religious symbol; the city of Pensacola is not obliged to hide that fact and the Mayor cannot be faulted for conceding it. But it is the beginning, not the end, of the analysis. The Supreme Court's decisions addressing crèches prove the point. *See Lynch*, 465 U.S. at 670 (upholding a crèche displayed in a public park). *Lynch* did not hold that statutes of Mary, Joseph, and Jesus had somehow morphed into secular symbols without any religious symbolism or meaning. *Id.* at 687. Instead, the Court held that these religious symbols did not violate the Establishment Clause because, regardless of their obvious and admitted religious connotations, they also served a secular purpose. *Id.* at 685; *see also id*. at 692 (O'Connor, J., concurring) (applying the endorsement test to conclude that, despite the "religious and indeed sectarian significance of the crèche," the display did not endorse religion). The district court should have looked beyond the cross's obvious religious significance and, instead, considered the cross's place in the "rich history of Pensacola and of Bayview Park in particular." Doc. 41 at 2.

Conclusion

The Court should **REVERSE** the district court.

Respectfully submitted,

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Dated: October 3, 2017

/s/ Andrew L. Brasher

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CERTIFICATE OF SERVICE

I certify that on October 3, 2017, I electronically filed this document using the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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