No. 15-2597

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Plaintiffs-Appellants,

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Defendant-Appellee,

&

THE AMERICAN LEGION, ET AL.,
Intervenors/Defendants-Appellees,

On Appeal from the United States District Court for the District of Maryland, Greenbelt Division, Deborah K. Chasanow, District Judge

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PETITION FOR REHEARING *EN BANC*

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INTRODUCTION AND FRAP 35(b)(1) STATEMENT

In 1918, a group of mothers whose sons died in World War I ("WWI") decided to build a memorial to honor their sons and the other men from Prince George's County, Maryland, who fell in the War. They chose a cross to mirror the cross-shaped gravemarkers in the foreign cemeteries where their sons were buried. As one of these mothers explained in 1920: "[T]he chief reason I feel so deeply in this matter, my son, Wm. F. Redman, lost his life in France and because of that I feel that our memorial cross is, in a way, his grave stone." JA2300. With help from the American Legion, the Bladensburg World War I Veterans Memorial (the "Memorial") was completed in 1925.

The Memorial stood on private land for the next 40 years, undisturbed. In the 1960s, growth of roadways around the Memorial led the State to determine private ownership of the land occupied by the Memorial was no longer safe, as it had become a traffic median. Accordingly, the Maryland-National Capital Park and Planning Commission (the "Commission") took ownership of the land and, incidentally, the Memorial. Another 50 years passed, during which the community used the Memorial exclusively for events to honor veterans and responded to the Memorial by surrounding it with other veterans memorials.

A panel of this Court has now determined – over a powerful dissent by Chief Judge Gregory – that the Commission's decision to leave the Memorial standing when it acquired the land was an unconstitutional establishment of religion. This Court's

order likely will lead to the Memorial's destruction or disfigurement – during oral argument, one member of the panel majority suggested cutting off the arms of the cross to remedy a violation[1] – merely because the fallen soldiers' mothers decided, decades before the government became involved, to build a memorial resembling the gravemarkers under which their sons were buried.

The panel's decision is completely at odds with precedent of the Supreme Court, this Court, and the other Circuits. It singles out and condemns the Memorial because it incorporates a cross-shape, expressing the very hostility to religion the Establishment Clause prohibits. *See Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in judgment). It pays lip-service to the well-informed, reasonable observer mandated by precedent, *see, e.g.*, *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (plurality opinion), *Lambeth v. Bd. of Comm'rs of Davidson Cnty., NC*, 407 F.3d 266, 271 (4th Cir. 2005), but then analyzes the Memorial from the perspective of a selectively informed, unreasonable passer-by, who minimizes history and context, and emphasizes the "inherent religious meaning" of a cross, Op. 18. The panel's analysis falls woefully short of the detailed, contextual examination required by precedent. *See, e.g., id.*; *Weinbaum v. Las Cruces*, 541 F.3d 1017, 1035 (10th Cir. 2008); *Am. Atheists, Inc. v. Port Auth. of New York & New Jersey*, 760 F.3d 227, 243 (2d Cir. 2014).

[1] *See* Oral Argument at 11:00-11:15, 22:00-22:17, *Am. Humanist Assoc. v. M-NCPPC*, No. 15-2597, http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments (Dec. 7, 2016).

The question in this case is also one of substantial importance because, under the panel's opinion, no cross-shaped veterans memorial of significant size will be permissible, no matter its age, its secular origins, its context, and its consistent use for commemorative purposes. The panel's reasoning portends the removal of longstanding monuments throughout the Circuit, as vividly shown by the panel's express reservation of a challenge to the two principal WWI memorials in Arlington National Cemetery. *See* Op. 27, n.16.

STATEMENT OF THE CASE

I. The Memorial Includes Secular, Military-Themed Elements and Stands with Similar Monuments in Veterans Memorial Park

The Memorial consists of a Celtic-styled cross standing on a pedestal. JA3092. The American Legion's symbol is displayed at the cross's center, and the words "VALOR," "ENDURANCE," "COURAGE," and "DEVOTION" are inscribed at its base. JA1856, JA1953. On the pedestal is a large plaque which declares the monument "DEDICATED TO THE HEROES/OF PRINCE GEORGE'S COUNTY, MARYLAND WHO LOST THEIR LIVES IN/THE GREAT WAR FOR THE LIBERTY OF THE WORLD." JA1963. The plaque lists the 49 local men who died in WWI, gives the dates of American involvement in the War, and concludes with a quote from President Wilson's address to Congress: "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts, to such a task we dedicate our lives." *Id.*

The Memorial sits in "Veterans Memorial Park," surrounded by other monuments to those who died in the nation's conflicts: (1) a World War II Honor Scroll; (2) a Pearl Harbor Memorial; (3) a Korea-Vietnam Veterans Memorial; (4) a September 11 Memorial Garden; (5) a large Battle of Bladensburg Memorial; and (6) two 38-foot-tall soldier statues, one British and one American, facing each other across a bridge. JA3092-93; JA1961-65. These monuments vary in size; some are as tall as the 32-foot Memorial, others are shorter but broader, and some are smaller than the Memorial.[2] JA3092-93.

II. The Memorial's Private Designers Used a Cross to Mirror the Gravemarkers in Overseas American WWI Cemeteries

The Memorial was constructed between 1918 and 1925 by WWI survivors and a committee of mothers whose sons died in the War. JA1962. The choice of a cross-shaped memorial reflects the fact that, in the aftermath of WWI, crosses became a strong cultural image of the losses of the War. This is not seriously disputed here. The AHA's own expert has explained that during the War, "the Cross became the principal grave marker" in overseas WWI cemeteries, JA2239; that, after the War, "cross gravestones replaced the widely used wooden crosses that served as temporary grave markers and quickly emerged as a cultural image of the battlefield," JA2256; and that because of this, crosses "developed into a central symbol of the American overseas cemetery," JA2270. Indeed, as Congress observed when replacing the

[2] A map of Veterans Memorial Park is included at page 32 of the panel opinion.

temporary wooden gravemarkers with permanent cross and Star of David headstones, the markers had become "wooden symbols . . . emblematic of the great sacrifices which [the] war entailed," and were "peculiarly and inseparably associated" with the fallen due to widespread imagery in art and poetry. JA2280 (H.R. Res. 15, 68th Cong. at 1 (1924)); *see also* Legion/M-NCPPC Br. 6-11.

Accordingly, after the War, communities throughout America erected cross-shaped memorials to commemorate those lost in WWI. For example, the Bladensburg Memorial is within 40 miles of four other cross-shaped WWI memorials: the Wayside Cross in Towson, the Victory Cross in Baltimore, and the two best-known WWI memorials in Arlington National Cemetery – the Argonne Cross and the Canadian Cross of Sacrifice. JA923; JA1905-06; JA2660; JA2675.

III. The Commission Owns The Memorial Due Only To Traffic Safety Concerns

The Memorial was originally built at the end of the National Defense Highway (another WWI memorial). However, in the following decades, the roads grew busier and the Memorial ended up in the median of an intersection. JA2510-11; JA2513. After the State determined that it was unsafe for the Legion to continue to own the median, the Legion agreed in 1961 to deed the land to the Commission. JA2526-30. Since then, the Commission has owned the Memorial and provided routine groundskeeping, power for lighting, and occasional repairs. JA2129-30; JA2132-34.

IV. The Community's Use of and Response to the Memorial Have Been Exclusively Secular

During the 90 years since the Memorial's construction, the Bladensburg community has used the Memorial exclusively for commemorative purposes. Each year, for example, the American Legion has hosted Veterans Day and Memorial Day events at the Memorial and its surrounding area. JA2027-30; JA2534; JA2956-57. Similarly, during that time, the Bladensburg community has responded to the Memorial by adding several other monuments around the Memorial that reflect its commemorative message.

In stark contrast, the record mentions only one religious event ever planned to occur at the Memorial: A single *Washington Post* article from 1931 notes an out-of-town preacher planned to hold a series of three "Sunday services" at the Memorial. JA2570. Nothing in the record indicates these services actually occurred, nor is there mention of any member of the Bladensburg community using the Memorial for anything other than commemorative purposes. The record also is devoid of any religious use of the Memorial in the 50-plus years since the Commission took ownership, any religious monuments added to the area around the Memorial, or any indication the community regarded the Memorial's message to be religious endorsement.

V. This Lawsuit and Prior Proceedings

In 2014, the AHA and three individuals filed the first and only lawsuit contending the Memorial violates the Establishment Clause. JA23. After briefing and without argument, the District Court (Judge Deborah Chasanow) granted summary judgment to the Commission and the Legion. The plaintiffs appealed, and, on October 18, 2017, a panel of this Court found the Memorial unconstitutional, over a strong dissent by Chief Judge Gregory.

REASONS FOR GRANTING THE PETITION

I. The Panel's Holding Is Inconsistent with the Purpose of the Establishment Clause

No other Court of Appeals has held that a longstanding veterans memorial, created to be a veterans memorial, and consistently used and regarded by the community as a veterans memorial, violates the Establishment Clause.[3] The reason is clear: The Establishment Clause "does not oblige government to avoid any public acknowledgement of religion's role in society," nor does it "require eradication of all religious symbols in the public realm." *Buono*, 559 U.S. at 718-19. The Clause has been implemented "not through a regime of total separation between church and State, but through a policy of benevolent neutrality that recognizes a wide range of

[3] In *Trunk v. San Diego*, 629 F.3d 1099, 1101 (9th Cir. 2011), the Ninth Circuit found the Mt. Soledad memorial unconstitutional but expressly distinguished a "historical, longstanding veterans memorial" with a consistent history of use and reception as a memorial. The facts of *Trunk* are very different from this case. *See* Legion/M-NCPPC Br. 20-22.

permissible state accommodation for religion." *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 608 (4th Cir. 2012) (citations and quotation marks omitted).

The panel's decision blatantly violates these principles. It condemns the Memorial merely because the Memorial's private builders chose a shape that has religious symbolism, decades before the government became involved. It reached this conclusion despite the well-established fact that the builders used a cross to mirror the gravemarkers in WWI cemeteries, not for religious motivations. According to the panel, the Constitution required the Commission to level a 40-year old WWI memorial when it acquired the land for traffic safety reasons, merely because the shape has religious symbolism in addition to its secular symbolism.

Whether any particular test yields this conclusion – and none do – this cannot be a faithful application of the Establishment Clause. The panel's conclusion here, which mandates removal or disfigurement of the Memorial "based primarily on the religious nature of [its cross-shape] would . . . lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions." *Van Orden*, 545 U.S. at 704 (Breyer, J.). It "encourage[s] disputes concerning the removal of longstanding [cross-shaped memorials] across the Nation," and "thereby create[s] the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.*

II. The Panel's Decision Cannot Be Reconciled with *Van Orden*

This appeal should have been a straightforward application of *Van Orden*. *See* Legion/M-NCPPC Br. 25-29. As in *Van Orden*, the "circumstances surrounding the display's placement on [public land] and its physical setting" show the Commission intended the cross's secular message – namely, commemoration of the 49 men lost in WWI – to "predominate." *Van Orden*, 545 U.S. at 701 (Breyer, J.). First, the Memorial contains several secular symbols that communicate a message of commemoration, including the Legion's emblem, military-themed words, Celtic arches, and a plaque explaining its purpose. Second, the Memorial's setting in a traffic median in Veterans Memorial Park, surrounded by similar monuments, "does not readily lend itself to meditation or any other religious activity," and "suggests little or nothing of the sacred," but instead "provide[s] a context of history" and commemoration. *Id.* at 702. Third, the Memorial's history and reception by the community over 90 years suggests "more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the [Memorial] as . . . a government effort" to endorse religion. *Id.*

The panel attempts to distinguish *Van Orden* by asserting "a Latin cross differs from other religious monuments, such as the Ten Commandments or the motto 'In God We Trust,'" because "[t]hose symbols are well known as being tied to our Nation's history and government, and courts have thus upheld their public display." Op. 20. But nothing in *Van Orden* suggests its reasoning does not apply equally to a

longstanding cross-shaped veterans memorial. To the contrary, the point of *Van Orden* is to determine whether a symbol with "undeniabl[e]" religious symbolism nonetheless communicates a predominantly "secular message." *Van Orden*, 545 U.S. at 701 (Breyer, J.). The well-recognized historical use of cross-shaped memorials to commemorate the fallen of WWI clearly is the type of "secular message" *Van Orden* seeks to preserve. *Id.*

The panel also attempts to distinguish *Van Orden* on the supposed "small size and scattered locations of the surrounding monuments" in Veterans Memorial Park, Op. 23, but this conclusion is contrary to the record. Even a glance at a map of Veterans Memorial Park shows that anyone traveling through the area would pass at least two, and likely more, of the monuments. *See* Op. 32. Moreover, two of the monuments (the soldier statutes) are the same height as the Memorial, and two others (the Battle of Bladensburg Memorial and the September 11 Garden) are shorter but broader than the Memorial. JA3092-93. Finally, while in *Van Orden* the 17 monuments on the Texas State Capitol grounds were spread out over 22 acres, *Van Orden*, 545 U.S. at 681, here, the 6 other monuments in Veterans Memorial Park are all clustered within approximately 500 feet of the Memorial, *see* Op. 32, making the Memorial's commemorative context impossible to miss.

III. The Panel Misapplied *Lemon*'s Reasonable Observer Standard

The Supreme Court has explained that evaluating a display under *Lemon*'s "effect" prong "requires the hypothetical construct of an objective observer who

knows all of the pertinent facts and circumstances surrounding the symbol and its placement." *Buono*, 559 at 721. Because *Lemon's* "effect" test is a "collective standard to gauge the objective meaning of the government's statement in the community," the reasonable observer is not "limited to the information gleaned simply from viewing the challenged display." *Capitol Square Review & Adv. Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in judgment). Rather, the reasonable observer also considers the "purpose, context, and history of the symbol" at issue. *Weinbaum*, 541 F.3d at 1031. Although the panel pays lip-service to this informed, reasonable observer, the panel's observer is in reality a selectively informed, unreasonable passer-by. The panel's observer makes several profound errors, all contrary to precedent.

First, the panel's observer essentially began and ended his analysis with the conclusion that "[a] Latin cross is the preeminent symbol of Christianity," that a cross has an "inherent religious meaning," and that he "simply cannot ignore the fact that for thousands of years the Latin cross has represented Christianity." Op. 18-19. But it is well-established that courts evaluating a challenged display cannot focus solely on the display's religious attributes, because to focus "exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984); *see also Lambeth*, 407 F.3d at 271 (same). Contrary to the panel's myopic focus, the "religious meaning" of a challenged symbol is what *triggers* the Establishment Clause analysis; it does not preordain finding a violation.

Second, the panel's observer failed even to acknowledge that, in addition to their religious significance, crosses were and are a well-recognized secular symbol of the lives lost in WWI. The record leaves no doubt about this point. *See supra* at 4-5; Legion/M-NCPPC Br. 7-11; Op. at 42 (Gregory, C.J., dissenting). This failure was a critical error because courts have made clear that "[e]ven a purely religious symbol may acquire independent historical significance by virtue of its being associated with significant non-religious events." *Ellis v. La Mesa*, 990 F.2d 1518, 1526 (9th Cir. 1993); *see also Lambeth*, 407 F.3d at 272.

Accordingly, courts repeatedly have recognized that crosses, in particular, can acquire a secular meaning in addition to their religious significance. *See, e.g.*, *Weinbaum*, 541 F.3d at 1035 (10th Cir.) (upholding cross in city seal because it reflected "city's unique history," namely, city's founding at site where wooden crosses marked graves of settlers killed in Apache attack); *Port Authority*, 760 F.3d at 243 (2d Cir.) (display of cross from rubble of World Trade Center in September 11 Museum permissible where it reflected ways people sought meaning after terrorist attack); *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991) (upholding cross in city's seal derived from Stephen Austin's coat of arms). Moreover, the Supreme Court has observed: "[A] Latin cross is not merely a reaffirmation of Christian beliefs . . . [and] 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. The panel's failure to consider the

Memorial's "independent historical significance" borne of its association with WWI directly conflicts with *Weinbaum*, *Port Authority*, and *Murray*.

Third, the panel's observer also failed to consider the 90-year history of the community's use and reception of the Memorial, which provides the clearest objective evidence of its message. *Van Orden*, 545 U.S. at 702 (Breyer, J.); *see also Pinette*, 515 U.S. at 779 (O'Connor, J.) (endorsement test is a "collective standard to gauge the objective meaning of the government's statement in the community") (quotation marks and alteration omitted). That history shows that, from the beginning, the community has used the Memorial consistently for events to honor veterans; the only religious event associated with the Memorial occurred in 1931, involved an out-of-town preacher who would not know the Memorial's history, and predated the Commission's involvement by 30 years; and the community has responded to the Memorial not by surrounding it with religious monuments, but by adding additional commemorative monuments which reflect its commemorative message. That over the course of 90 years, the community has used and responded to the Memorial in exclusively commemorative ways should have resolved this case.

Fourth, when the panel's observer did consider the Memorial's history, he focused on out-of-context soundbites, snippets from private sponsors' fundraising efforts, and vague references (without citations) to "Sunday worship services and group prayer at invocations and benedictions." Op. 20. Other Circuits, however, plainly reject this approach: "We do not look to the sound bites proffered by both

sides but instead to the extensive factual background provided in the hundreds of pages of historical documents, declarations, expert testimony, and public records." *Trunk*, 629 F.3d at 1102; *see also, e.g., Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1157 (10th Cir. 2010) (courts must "examine carefully the particular context and history of these displays before concluding what effect they would likely have on [a] reasonable observer"). The panel's historical analysis, spanning less than a page of double-spaced text, *see* Op. at 20-21, looks nothing like the detailed analysis these Circuits require.

These "facts" are also largely irrelevant. The private sponsors' statements – which were taken out of context, predate the Commission's involvement by 40 years, and reflect their times more than any desire to endorse religion – are exactly the sort of selective soundbites courts routinely reject. Moreover, the observer's "Sunday worship services" appear to reference the single, three-Sunday event from 1931 described above. Likewise, the "group prayer at invocations and benedictions" appears to reference the generic non-sectarian prayers recited at the Legion's Veterans Day and Memorial Day events, consistent with longstanding military tradition. *See, e.g.*, JA3407 (U.S. Army Command Policy on Public Prayers at Official Functions). The presence of traditional military prayers at events commemorating veterans does not transform those events into religious services or a religious use of the Memorial.

Finally, under the panel's approach, no cross-shaped veterans memorial of significant size will be permissible, as demonstrated by the panel's attempt to distinguish the two WWI memorial crosses in Arlington National Cemetery, which

closely resemble the Memorial. Despite the panel's suggestion, the size difference between the 24-foot Canadian Cross of Sacrifice, the 13-foot Argonne Cross, and the 32-foot Memorial is not a difference of constitutional significance. And the panel's reliance on Arlington's "diverse religious symbols, both as monuments and on individual headstones," *id.* at 27, has it precisely backwards: Surrounding a monument with other "religious symbols" suggests, if anything, that the monument sends a religious message. In contrast, that the community added exclusively commemorative symbols around the Bladensburg Memorial shows that its message is commemoration, *not* religious endorsement. There is no persuasive reason to distinguish the cross-shaped WWI memorials in Arlington, as even the panel tacitly acknowledged. *See id.* at 27, n.16 (clarifying that the panel was "not deciding or passing judgment on the constitutionality of Arlington National Cemetery's display of Latin crosses"). Disturbingly, the panel goes out of its way to leave Arlington's memorials open to challenge, which will come shortly given the panel's opinion here.

IV. The Panel's Entanglement Holding Is Obviously Wrong and Unworkable

This Court has held 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." *Lambeth*, 407 F.3d at 273 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)); *see also Glassman v. Arlington County*, 628 F.3d 140, 149 (4th Cir. 2010) (funding county-church joint venture to

build affordable housing not entanglement); *Mellen v. Bunting*, 327 F.3d 355, 375 (4th Cir. 2003) (finding entanglement in officially drafted prayers). The Supreme Court and the other Circuits are in accord. *See e.g.*, *Mueller v. Allen*, 463 U.S. 388, 403 (1983) (finding comprehensive surveillance necessary for challenged action to run afoul of *Lemon*'s third prong); *Vision Church v. Village of Long Grove*, 468 F.3d 975, 995 (7th Cir. 2006) (same); *Port Authority*, 760 F.3d at 245 (same).

Under this uniform precedent, the panel's holding that display and maintenance of the Memorial creates an entanglement problem is obviously wrong. The panel's central claim is that excessive entanglement exists because "[t]he Commission has spent at least $117,000 to maintain the Cross and has set aside an additional $100,000 for restoration." Op. 28. No case has held merely spending money to maintain a display amounts to entanglement. To the contrary, courts routinely have upheld the use of funds to support religious institutions, displays, and conduct. *See, e.g.*, *Am. Atheists, Inc. v. Detroit Downtown Dev. Auth.*, 567 F.3d 278, 288-89 (6th Cir. 2009) (historic preservation grants to churches not entanglement). For this reason, the panel's holding poses enormous problems for this Court's jurisprudence. If the Commission's expenditure of, on average, less than $4,000 per year for routine maintenance is unconstitutional, it is difficult to see how a government could ever spend any money to accommodate religion.

CONCLUSION

For the reasons above, the Court should grant rehearing *en banc*.

Dated: November 1, 2017

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 15-2597 **Caption:** *American Humanist Association, et al. v. Maryland-National Capital Park and Planning Commission, et al.*

CERTIFICATE OF COMPLIANCE WITH FRAP 35(b)(2)

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2). This brief is written in Garamond, a proportionally spaced font, has a typeface of 14 points, and contains 3,896 words (as counted by Microsoft Word 2016), excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

/s/ Christopher DiPompeo
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CERTIFICATE OF SERVICE

I certify that on November 1, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Christopher DiPompeo
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