

No. 15-2597

In the United States Court of Appeals for the Fourth Circuit

AMERICAN HUMANIST ASSOCIATION; STEVEN LOWE; FRED
EDWARDS; BISHOP McNEILL,

Plaintiffs – Appellants,

v.

MARYLAND-NATIONAL CAPITAL PARK
AND PLANNING COMMISSION,

Defendant – Appellee.

THE AMERICAN LEGION; THE AMERICAN LEGION
DEPARTMENT OF MARYLAND; THE AMERICAN LEGION
COLMAR MANOR POST 131

Intervenors – Appellees.

On Appeal From The United States District Court
For The District of Maryland

**BRIEF *AMICI CURIAE* OF THE FREEDOM FROM RELIGION
FOUNDATION AND CENTER FOR INQUIRY IN SUPPORT OF
APPELLANTS AND REVERSAL**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 15-2597 Caption: American Humanist Association et al., v. Maryland-National Capital Par

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(name of party/amicus)

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If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Patrick C. Elliott

Date: 3/7/2016

Counsel for: Freedom From Religion Foundation

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I certify that on 3/7/2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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No. 15-2597 Caption: American Humanist Association et al., v. Maryland-National Capital Par

Pursuant to FRAP 26.1 and Local Rule 26.1,

Center for Inquiry
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

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Counsel for: Center for Inquiry

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Interests of the *Amici Curiae*

The *amici* are the Freedom from Religion Foundation (“Foundation”) and the Center for Inquiry (“CFI”). *Amici* are united in the view that the separation of church and state is an essential constitutional safeguard that protects the rights of all citizens, regardless of faith or nonbelief. *Amici* believe that the Bladensburg cross, a towering sectarian symbol, broadcasts an unambiguous government preference for religion in violation of the Establishment Clause.

The Foundation is a national nonprofit organization based in Madison, Wisconsin, and is the nation’s largest association of freethinkers, representing over 23,000 atheists and agnostics. The Foundation has members in every state, including more than 2,000 members under the jurisdiction of the Fourth Circuit Court of Appeals. The Foundation’s twin purposes are to educate the public about nontheism and to defend the constitutional separation between state and church.

The Foundation’s interest in this case arises from the Foundation’s position that religious displays on government property violate the Establishment Clause of the First Amendment of the United States Constitution. The Foundation’s members oppose government endorsements

of religion and the Foundation has filed more than twenty suits challenging religious displays on public property on behalf of its members.

The Foundation also staunchly opposes religious displays that give the appearance of religious endorsement by the United States military. Roughly one quarter of FFRF's members have served in the military, including veterans of World War II, the Korean War, the Vietnam War, the Gulf War and U.S. military operations in Iraq and Afghanistan. Many of the Foundation's founding members, when the group went national in 1978, were World War II veterans and some of its earliest members were World War I veterans. Federal, state, and local governments have consistently failed to recognize the contributions and sacrifices of "atheists in foxholes." The actions in this case continue to demonstrate government favoritism toward Christianity over all other faiths and religion over nonreligion.

CFI is a non-profit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

This brief has been filed with the consent of all parties.

Statement of Compliance with Rule 29(c)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici state that no party's counsel authored this brief in whole or in part and that no party, party's counsel, or person other than amici, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

Summary of the Argument

This case is about whether a forty-foot Latin cross, the instantly recognizable symbol of Christianity, appears to endorse religion as it looms prominent and alone at the intersection of Route 450 and U.S. 1. The district court, wrongfully minimizing the Christian message that the massive symbol conveys, erroneously concluded that the Bladensburg cross did not violate the Establishment Clause. Amici submit that the Bladensburg cross violates the second prong of the *Lemon* test and asks this Court to reverse based on the following:

First, Supreme Court precedent shows that religious displays with potent religious symbolism appear to endorse religion when prominently displayed. A holy symbol, conspicuously arranged, is much more capable of appearing to endorse religion than less-sacred icons immersed in sea of

secular meaning. While each display must be “judged in its unique circumstances,” *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J. concurring), intensely religious objects that dominate their settings leave less room for other elements to suggest alternate, secular, constitutional meanings.

Viewed through this lens, it is clear why the Supreme Court concluded that context did not secularize the crèche in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), that sat solitary and sacrosanct at the top of the courthouse stairs. Like the crèche in *Allegheny*, the Bladensburg cross does not compete with anything in its surroundings for attention and its Christian message is unmistakable.

Second, the Latin cross is a uniquely potent symbol of Christianity that cannot easily assume a secondary, nonreligious meaning, especially where it is the dominant element of a display. The Latin cross undeniably symbolizes the legendary story of the death of Jesus. To Christians, this story represents the core narrative of their faith – redemption through Christ’s sacrifice. To those of other faiths and to nonbelievers, the ubiquitous symbol signals indisputable adherence to this Christian worldview, and its message that Christians believe that Jesus said, “I am the

way and the truth and the life. No one comes to the Father except through me.” John 14:6. If the crèche tells an important religious story, the cross symbolizes the climax of the “greatest story ever told” to Christians, and an inescapable and exclusionary religious narrative to everyone else. Since the Supreme Court ruled that a solitary crèche sent a clear message of religious endorsement to the reasonable observer in *Allegheny*, then the equally isolated Bladensburg cross undoubtedly does the same here. Indeed, its message of religious endorsement is even stronger.

Finally, the Bladensburg cross is a massive Latin cross whose prominent size and display on government property underscores its Christian message. Federal courts are in near unanimous agreement that government cross displays present constitutional problems in any context because of this religious meaning. In particular, other U.S. Circuit Courts of Appeal agree that prominent crosses – large crosses, overwhelming crosses, or conspicuous crosses displays – are particularly violative of the Establishment Clause. The Bladensburg cross is forty feet tall, visible from all angles, and the most readily identifiable display in its government-owned surroundings. It is without a doubt a religious symbol that cannot survive constitutional scrutiny.

Argument

- A. Allegheny shows the importance of three factors – potent religious meaning, prominent display, and location on government property – in performing the endorsement analysis*

The Supreme Court’s analytical framework in *Allegheny* provides the basis for determining whether the Bladensburg cross endorses religion in violation of the Establishment Clause. *See County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). In *Allegheny*, the Supreme Court held that a crèche on the Grand Staircase in the County Courthouse failed the second prong of the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), which asks whether a challenged display has the “effect of ‘endorsing religion.’” *See Lambeth v. Bd. of Commissioners of Davidson Cty., NC*, 407 F.3d 266, 269, (4th Cir. 2005) (“we have treated *County of Allegheny*’s ‘endorsement’ test as an ‘enhancement of *Lemon*’s second prong”); *see also Mellen v. Bunting*, 327 F.3 355, 370-1 (4th. Cir. 2003)). The Court explained that “the prohibition against governmental endorsement of religion ‘preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*.’” *Allegheny*, 492 U.S. at 593. The goal of the endorsement test is to ensure that the government does not “appear[] to take a position on questions of religious belief.” *Id.* at 594. The

Court ultimately held that the nativity scene at the top of the stairs was “indisputably religious,” and appeared to endorse Christianity. *Smith v. County of Albemarle, Va.*, 895 F.2d 953, 957 (4th Cir. 1990) (“the crèche’s setting, nature, and effect contributed unmistakably to a message of government endorsement of religion”).

The natural starting point of any religious display analysis is to determine what kind of religious meaning the challenged object conveys. Referring back to their assessment of the crèche’s religiosity in *Lynch*, the Court explained that the *Allegheny* crèche is “no doubt” capable of “communicating a religious message.” *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring) (crèche still had “religious and indeed sectarian significance). After establishing that the crèche is a well-known religious symbol, the Court then turned to what, if anything, in the crèche’s immediate area might have modified its Christian meaning and message. *Allegheny*, 492 U.S. at 598-602.

In addition to its innate symbolism, the Court found two factors present that added to the crèche’s capacity for religious endorsement: First, the Court explained the crèche’s *isolation* enhanced its religious message: unlike in *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring), where a crèche was a single religious display sharing space among “a series of figures and

objects”, *Allegheny* 492 U.S. at 598, this crèche “stands alone: it is the single element of display on the Grand Staircase.” *Id.* Second, the display’s *location* within the courthouse created a strong link between the crèche’s message and the government’s support: “No viewer could reasonably think that it occupies this location without the support and approval of the government.” *Id.*

Aside from its religious meaning, prominence, and location, the Court found that little mitigated the crèche’s religious message. The Court refused to consider other Christmas displays outside of the crèche’s immediate area since the presence of other decorations “fail[s] to negate the endorsement effect of the crèche. The record demonstrates clearly that the crèche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building.” *Id.* at 597.

Neither did the crèche’s use by Christmas carolers modify its meaning to a more constitutionally acceptable one. That the nativity was the “setting for the county’s annual Christmas-carol program” dedicated to “world peace and families of prisoners of war” had minimal effect on the crèche’s Christian message because few of the crèche’s viewers would see the carolers or appreciate their presence as part of the display. *Id.* at 581, 597. A sign indicating the display’s ownership by a Catholic organization also

failed to limit the crèche’s religious meaning. *Id.* at 600 (sign indicates that “the government is endorsing the religious message of that organization,” which the Establishment Clause prohibits). Finally, the Court dismissed outright idea that the religious crèche was an appropriate means to celebrate the “cultural phenomenon” of Christmas. *Id.* at 601, n. 48.

In ultimately holding that the crèche failed the endorsement test by appearing to support Christianity, it did not give equal weight to every factor it considered: The crèche’s religious meaning was not substantially modified by how it was decorated, how other groups used it, what organization claimed ownership of it, or whether it might plausibly be asserted to be part of a larger cultural tradition. No other artifacts, decorations, or displays within the courthouse factored into the Court’s analysis. In the end, the crèche appeared to endorse religion because of what it was, the “central religious symbol of the Christmas holiday;” where it stood, “at the Allegheny County Courthouse;” and how prominently it was displayed there: “this crèche stands alone . . .” *Id.* at 627, (O’Connor, J., concurring). These minor secondary factors did not sidetrack the Supreme Court from its core analysis of the fundamentally Christian nature of a nativity scene.

The importance of these three concurrent factors is shown not just in the *Allegheny* Court's holding that the crèche did endorse religion, thus violating the Establishment Clause, but also why the display of a menorah, also challenged in *Allegheny*, did not, and was permitted by the Constitution. The menorah did not have the ultimate effect of religious endorsement because its religious meaning was diffused by the secular meanings of an even larger Christmas tree, and a sign saluting "liberty". *Id.* at 617-619.

The [Christmas] tree, moreover, is clearly the predominant element in the city's display. The 45-foot tree occupies the central position beneath the middle archway in front of the Grant Street entrance to the City-County Building; the 18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than vice versa. *Id.* at 617-618. [...] The [liberty] sign further diminishes the possibility that the tree and the menorah will be interpreted as a[n] [endorsement of religion.] *Id.* at 619.

In this shared setting, the menorah's religious message was dispersed by its surroundings and became an inoffensive part of a larger "secular celebration of Christmas." *Id.* at 616.

These three factors, -- potent religious meaning, prominent display, and placement on government property -- controlled the Supreme Court's analysis in *Allegheny* and must control this Court's analysis of the Bladensburg cross.

B. The Bladensburg cross is a Latin cross – a potent Christian symbol that evokes the core story of the faith and conveys a universally-understood religious meaning

It is undisputed that the Latin cross is more than just a religious symbol: it is *the* symbol of Christianity. Numerous lower federal courts have concluded that the Latin cross is an important Christian symbol. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1110 (9th Cir. 2011); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1102 (10th Cir. 2010)(cross memorials “use the preeminent symbol of Christianity”); *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002) *aff’d*, 371 F.3d 543 (9th Cir. 2004)(the Latin cross “is the preeminent symbol of Christianity. It is exclusively a Christian symbol”); *Carpenter v. City & Cty. Of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996) (cross “represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ”); *Murray v. City of Austin, Tex.*, 947 F.2d 147, 166 (5th Cir. 1991) (Goldberg, J., dissenting)(“The cross is the paradigmatically Christian symbol”); *Doe ex rel. Doe v. Elmbrook School Dist.*, 687 F.3d 840, 852 (7th Cir. 2012). The Supreme Court has documented the Latin cross’s premiere status as a religious symbol. *See Salazar v. Buono*, 559 U.S. 700, 725 (2010) (quoting *Buono v. Norton*, 212 F. Supp. 2d at 1205); *Utah Highway Patrol Ass’n. v. Am. Atheists, Inc.*, 132 S. Ct. 12, 19 (2011)(Thomas, J., dissent from denial

of certiorari)(quoting *Buono v. Norton*, 371 F.3d 543(9th Cir. 2004); *Mt. Soledad Mem'l Ass'n. v. Trunk*, 132 S.Ct. 2535, 2536 (2012) (Alito, J., dissent from denial of certiorari) (quoting *Salazar v. Buono*). In short, the Latin cross should not be undervalued; it is no mere *primus inter pares* – the cross is the “preeminent” symbol of the Christian faith.

To Christians, the Latin cross represents the legendary crucifixion of Jesus Christ at Calvary: the story of Jesus suffering and dying on the cross, and then miraculously rising again so that the sins of humanity may be forgiven. *Carpenter*, 93 F.3d at 630 (“the Latin cross ‘[...] represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ’”). The crucifixion lies at the very heart of Christian belief. *Id.* (crucifixion is “a doctrine at the heart of Christianity”). Its self-sacrificial story is used as an example of how Christians are supposed to act in life, in submission to the will of God, even at great cost, and provides a theological explanation for what happens after death – salvation for the faithful, and something unpleasant for the unforgiven. 1 John 3:16, (“Jesus Christ laid down his life for us. And we ought to lay down our lives for our brothers and sisters.”); John 11: 25, (“Jesus said to her, ‘I am the resurrection and the life. The one who believes in me will live,

even though they die.”; Matthew 25:46 (“Then they will go away to eternal punishment, but the righteous to eternal life.”)

Americans who do not believe in the divinity of Jesus are no less familiar with the meaning of the cross. The sight of the cross is ordinary even to Americans who have never opened a Bible: with 300,000 Christian churches across the nation, and more than 70% of Americans identifying themselves as Christians, even non-Christians are familiar with the symbols and underlying beliefs of the Christian faith. The Hartford Institute for Religion Research, Fast Facts About Religion, (Accessed March 1, 2016), http://hrr.hartsem.edu/research/fastfacts/fast_facts.html; The Pew Research Center, America’s Changing Religious Landscape, (Accessed March 1, 2016), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/>. A non-Christian understands no less clearly than the believer that the Latin cross is a deeply religious, and a **deeply Christian**, symbol.

The lower court’s conclusion that the Bladensburg cross had shed this overwhelming sectarian symbolism is palpably wrong. The district court disregarded expert testimony explaining that there is no substantial history of crosses being used as secular, generic war memorials in the United States, and instead erroneously relied on Supreme Court dicta from *Salazar v. Buono*, 559 U.S. at 700 (2010), suggesting the sight of the Bladensburg

cross would evoke “thousands of small crosses in foreign fields [. . .]”
American Humanist Ass’n. v. Maryland National Capital Park Assoc., ---
F.Supp.3 ---, 9 (W.D. Maryland 2015), (quoting *Salazar v. Buono*, 559 U.S.
700, 721 (2010), (Kennedy, J., concurring)). Justice Kennedy’s comment in
Salazar has not been considered persuasive by subsequent U.S. Courts of
Appeal in deciding cases concerning the meaning of the Latin cross as a
secular memorial. *See Trunk*, 629 F.3d at 1116, n.18 (“We note that the
Court in *Buono* was not addressing the merits of the Establishment Clause
challenge to the cross at issue in that case. Nonetheless, we have thoroughly
considered Justice Kennedy’s opinion.”); *Davenport*, 637 F.3d at 1113, n.5
 (“The Supreme Court, thus, did not address the merits of
the Establishment Clause claim, but instead addressed a later procedural
development . . .”).

The Latin cross represents Christianity’s central story and its Christian
meaning is apparent to all Americans. No contemporary symbol conveys a
religious message with such clarity and power, and it is unusual that Amici
are forced to be “masters of the obvious”, *Gonzales v. N. Twp. of Lake Cty.*,
Ind., 4 F.3d 1412, 1418 (7th Cir. 1993) (“we know that the crucifix is a
Christian symbol. We reached a similar conclusion about the Latin cross”),
and state what is undoubtedly plain to this Court – Latin crosses are “the

preeminent symbol of Christianity.” *Buono*, 371 F.3d at 545, (citation and quotation omitted), and [their display] can only be allowed if their context or history avoid the conveyance of a message of governmental endorsement of religion.” *Davenport*, 637 at 1120-1. As the next section demonstrates, the Bladensburg cross’s dominating presence forecloses the possibility that it conveys a nonreligious meaning.

C. The Christian message of the Bladensburg cross is underscored by its prominent size and display

The Bladensburg cross is a forty-foot Latin cross that stands prominent and alone at the median of one of the county’s busiest intersections. This imposing religious symbol is a conspicuous part of the daily commute for each driver that uses the interchange. Despite its massive size and Christian character, the lower court concluded that the cross was not symbolically distinct from less obvious military memorial nearby added years after the erection of the Bladensburg cross.

While Latin crosses of any stature can violate the Establishment Clause, *see Buono v. Norton*, 212 F. Supp. 2d 1202, 1216 (C.D. Cal. 2002) *aff’d*, 371 F.3d 543 (9th Cir. 2004) (“the size of a cross and the number of people who view it are not important[...] It is sufficient that Plaintiffs have been [...] harmed by the [...] cross.”), prominent crosses that command

attention, like the Bladensburg cross, have outsized potential to communicate a religious message to a reasonable observer and are especially likely to fail the endorsement test.

In *City of St. Charles*, the Seventh Circuit upheld an injunction against the display of a lit twelve-foot Latin cross on top of a three-story fire station as part of a city Christmas display, *Am. Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986). The city argued that the distinctive cross was like the crèche in *Lynch*, one piece of a larger display, and there was “no difference between including the Nativity scene in a Christmas display and including the cross.” *Id.* at 271. The court rejected the argument conflating one Christian symbol for another, and held that the “St. Charles cross unmistakably signifies Christianity.” *Id.* at 272.

In *Davenport*, the Tenth Circuit held that twelve-foot Latin crosses erected to commemorate fallen state troopers appeared to endorse religion, in part, due to their size. *Davenport*, 637 F.3d at 1123. The court, assuming for the sake of argument that the roadside Latin cross could be an appropriate secular memorial,¹ pointed out that this meaning did not apply to the crosses at issue because of their heft: “The massive size of the crosses

¹ The court explained that a roadside cross could be a symbol of death, but not a secular one: “it is a *Christian* symbol of death that signifies [. . .] the death of a *Christian*.” *Id.* at 1122, (emphasis in original).

displayed on Utah's rights-of-way [...] unmistakably conveys a message of endorsement, proselytization, and aggrandizement of religion that is far different from the more humble spirit of small roadside crosses." *Id.* at 1123.

In *Trunk*, the Ninth Circuit refused to consider a forty-three-foot Latin cross as merely another aspect of a larger secular veteran's memorial. *Trunk*, 629 F.3d at 1123. Despite the numerous "secular elements," including plaques, paving stones, and posts surrounding the cross, the Court found that "the Cross's central position within the Memorial gives it a symbolic value that intensifies the Memorial's sectarian message." *Id.* at 1124.

Importantly, the Court of Appeals also rejected the district court's finding that that Latin cross has a "broadly-understood ancillary meaning as a symbol of military service...", *Id.* at 1111, concluding after a lengthy discussion that, in general: "[t]he Latin cross can, as in Flanders fields, serve as a powerful symbol of death and memorialization, but it remains a sectarian, Christian symbol." *Id.* at 1116. But here, "The size and prominence of the Cross evokes a message of aggrandizement and universalization of religion, and not the message of individual

memorialization and remembrance that is presented by a field of gravestones.” *Id.*, n.18.

St. Charles, Davenport, and Trunk demonstrate that cross displays that are purported to be secular still appear to endorse religion because crosses do not easily assume alternate secular meanings. That is especially the case when (a) a cross has not historically been included in such a setting, and (b) the cross has a distinctive prominence all its own. The *St. Charles* court refused to treat the firehouse cross like the nativity display in *Lynch* because crosses are not part of Christmas, “as far as any member of [that] panel [was] aware or the record shows,” 794 F.2d at 273, and because it was big enough to be its own center of attention. Similarly, the court in *Davenport* refused to treat memorial crosses as secular because the court was not convinced of their non-Christian use, and also because the challenged displays were so much bigger than typical roadside crosses that they conveyed a “far different” meaning. *Davenport*, 637 F.3d at 1123.

Finally, the Ninth Circuit in *Trunk* understood the importance of prominence both as a straight-forward indicator of relative importance, i.e. ‘Which is more eye-catching, the religious display or its surroundings?’, and as a factor in testing whether a display sensibly remained within the confines of the ancillary secular role suggested by the City. Because the cross’s size

suggested religious “aggrandizement” and not secular “remembrance”, the court found the government’s suggested alternate “commemorative” role ill-fitting. *Trunk*, 629 F.3d at 1116, n.18.

Other courts have found that identifiable crosses endorse religion regardless of whether the cross appears among other elements. *See Robinson v. City of Edmond*, 68 F. 3d 1226, 1232 (10th Cir. 1995) (cross on city seal unconstitutional); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1526 (9th Cir. 1993)(finding that cross on city seal stood out and religious symbolism of the cross “further amplified by its sheer size and visibility”); *Friedman v. Bd. Of Cty. Comm’rs of Bernalillo Cty.*, 781 F. 2d 777, 792 (10th Cir. 1985) (cross on city seal unconstitutional); *Am. Civil Liberties Union of Mississippi v. Mississippi State Gen. Servs. Admin.*, 652 F.Supp. 380, 384 (S.D. Miss. 1987) (granting preliminary injunction against cross created in office building by shuttering windows at night).

Prominence is surely relevant in determining whether the Bladensburg cross appears to endorse Christianity. The Court should not accept the lower court’s conclusion that the cross is an equal component of the Veterans Memorial Park because, as shown in *St. Charles* and *Trunk*, a cross that is prominent enough to make itself a distinct source of focus is not properly analyzed as a nondescript part of a larger government exhibition. The cross

is just as unlikely to evoke an ancillary nonreligious meaning when analyzed as a stand-alone display. *Davenport* cautions against the broad proposition that a secular explanation for a small lone cross should also apply to a large one. Finally, even if the Bladensburg cross is deemed to be part of a larger commemorative setting, *Trunk* “provides a helpful approach to assessing the effect” of the cross: if there is a secular way for the government to use the Latin cross for secular remembrance, it is emphatically not found in the form of a “towering forty-three-foot structure....” *Trunk*, 629 F.3d at 1101.

D. The Bladensburg cross’s location on a highway median emphasizes the support and approval it receives from its display from the government

The Bladensburg cross stands on government property. Both the cross itself and the traffic island on which it is displayed are owned by the government. The cross is the only display on the island. Because placing a sign, memorial, or other property within state highway right-of-ways is prohibited by the Maryland State Highway Administration, *see* 23 CFR § 710.403(a), passersby are unlikely to think the cross was erected without the government’s express approval.

The cross’s location is important because “[A]n unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands.”) *Capitol Square Review & Advisory*

Bd. v. Pinette, 515 U.S. 753, 786 (1995) (Souter, J., concurring). Permanent monuments on government property are no doubt government speech. As the Supreme Court has said, “Just as government-commissioned and government-financed monuments speak for the government so do privately financed and donated monuments that the government accepts and displays to the public on government land.” *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 470-71 (2009). Such displays “must comport with the Establishment Clause.” *Id.* at 468.

It is enough that a challenged display stands on government property to create the potential appearance of religious endorsement. This Court described as “most significant” the fact that the lower court in *Smith* identified the challenged crèche’s location as being “displayed in the context of a government site.” *Smith*, 895 F.2d at 955-6 (characterizing lower court’s identification of crèche’s setting, display duration, and location as “employ[ing] the same analysis and identify[ing] the same factors endorsed” in *Allegheny*, decided later).

While endorsement analyses conducted by the Supreme Court tend to deal with displays in and around government buildings, a challenged display does not need to sit at the seat of government to be unconstitutional. *See Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004) (cross on rock

outcropping in national park desert held unconstitutional; “That the [cross] is not near a government building is insignificant [...]”). The Bladensburg cross’s undisputed location on a government traffic circle is sufficient that “[n]o viewer could reasonably think that it occupies this location without the support and approval of the government.” *Allegheny*, 492 U.S. 573 at 599-600.

CONCLUSION

The decision of the district court should be reversed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Rule 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 4,726 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in Microsoft Word 2011, using Times New Roman, a proportionally spaced typeface, in 14-point font.

Dated: March 7, 2016

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CERTIFICATE OF SERVICE

I certify that on March 7, 2016, the foregoing brief was served on all parties or their counsel of record through the CM/ECF system. All parties are appellate CM/ECF filing users and will receive service via the appellate CM/ECF system.

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