

## **2019 M. Gene Blackburn Award presented to Jackson O'Brien**

This annual cash award, funded by the Cedar Rapids, Iowa law firm of Simmons Perrine Moyer & Bergmann, is presented to the student who submits the best brief for the Supreme Court Celebration Moot Court Competition. The recipient is chosen on the basis of superior writing skills that communicate an issue position based upon an innovative, creative, and concise approach.

The award is named for M. Gene Blackburn, LW'55, in recognition of his dedication to the development of appellate advocacy while a professor at Drake Law School.

## **Supreme Court Celebration Competition**

Each year, outstanding appellate advocates at Drake Law School compete in the Supreme Court Celebration Competition for the honor of presenting final arguments to the Iowa Supreme Court.

The competition has recently shifted to a new format, in which it is preceded by an Appellate Advocacy course providing students the opportunity to hone their persuasive writing and oral advocacy talents prior to the competition. The Appellate Advocacy course begins with written advocacy in the form of writing a brief. Student work on their briefs during a semester of detailed, in-depth instruction on best practices in appellate briefing by two experienced mentors. The Honorable Mark Bennett brings a wealth of experience from 24 years on the federal bench, and Louis Sloven is an Iowa Assistant Attorney General who regularly argues before the Iowa Court of Appeals and Supreme Court.

Afterward, the course shifts its focus from written to oral advocacy. Students begin this phase of class with several practice rounds of arguments to strengthen their arguments for the competition. Preliminary rounds then result in the selection of a final group of four advocates, who have the chance to argue before the Iowa Supreme Court. The award for Best Oralist in the final round and the Best Brief (M. Gene Blackburn Award) are announced during annual Supreme Court Celebration events.

## 2019 Supreme Court Celebration Competition Problem

A 40-foot tall monument has stood (and still stands) in the median of an intersection in a small Iowa town, since its completion in 1925. It memorializes local residents who died in combat in World War I. The Sioux County Parks Commission now owns the land and maintains the monument, which is in proximity to other war memorial monuments and serves as a venue for the county's Memorial Day and Veterans Day events. County resources have been used to maintain and light the "Peace Cross," including \$100,000 recently budgeted to repair and restore the cross itself.

The plaintiffs allege that ownership, maintenance, and display of the Peace Cross monument on public property is unconstitutional because it violates the Establishment Clause, which says Congress, states, and local governments "shall make no law respecting an establishment of religion." Under the Lemon test, government action survives this type of challenge if it is driven by a secular purpose (at least in part), has a primary effect that neither advances nor inhibits religion or any particular sect, and does not excessively entangle the government with religion. The District Court found that the Peace Cross monument passed this test, but a majority of judges on the Court of Appeals disagreed. Beyond that clash, there are concerns that Lemon does not provide useful guidance in cases involving monuments—like Van Orden, which applied "legal judgment" and relied on history and tradition to uphold the placement of a Ten Commandments monument on state capitol grounds. Of course, various judges to rule on this claim also disagreed on whether it passed the Van Orden test.

The two questions before the Supreme Court are:

- (1) When faced with a claim that a monument or display violates the Establishment Clause, should courts apply the Lemon test, or should they apply Van Orden—or something else entirely?
- (2) Does this Peace Cross monument survive the applicable test? Does it violate the Establishment Clause for the Sioux County Parks Commission to own and maintain this 40-foot cross, as a war memorial for local residents who fought in World War I?

IN THE SUPREME COURT OF IOWA  
Supreme Court No. 17-1717

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SIOUX COUNTY PARKS COMMISSION,  
Petitioner-Appellant,

vs.

AMERICAN HUMANIST ASSOCIATION, et al.  
Respondent-Appellee.

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR SIOUX COUNTY  
THE HONORABLE JAMES W. GRIMES, JUDGE

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**APPELLANT'S BRIEF**

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FINAL

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

### **I. *Van Orden v. Perry*'s legal judgment test was crafted for passive monuments like the Peace Cross. Should it be applied instead of the *Lemon v. Kurtzman* test?**

#### Authorities

*ACLU of Ky. v. Mercer Cty.*, 432 F.3d 624 (6th Cir. 2005)  
*ACLU of N.J. v. Schundler*, 104 F.3d 1435 (3rd Cir. 1997)  
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*Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664 (1970)

### **II. The Peace Cross uses a religious symbol in a war memorial to portray the sacrifice of fallen soldiers. Does that mean it violates the Establishment Clause?**

## Authorities

*ACLU of Ga. v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983)  
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## STATEMENT OF THE CASE

### Nature of the Case:

Petitioner Sioux County Parks Commission (the “Commission”) is a public entity that owns a war memorial.<sup>1</sup> This memorial—the

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<sup>1</sup> App. at 3.

Peace Cross—uses the form of a Latin cross to honor local veterans World War I.<sup>2</sup> Respondents Steven Lang, Fred Smith, Bishop McNally, and the American Humanist Association (collectively the “Respondents”) brought suit under 42 U.S.C. § 1983 against the Commission in the Iowa District Court for Sioux County.<sup>3</sup> Respondents allege the Peace Cross violates the Establishment Clause.<sup>4</sup> The district court granted summary judgment for the Commission.<sup>5</sup> On appeal, the Iowa Court of Appeals found the Peace Cross unconstitutional.<sup>6</sup> Therefore, it reversed for Respondents and remanded for further proceedings.<sup>7</sup>

The Commission now appeals the appellate court’s reversal and requests this Court reinstate the district court’s grant of summary judgment.<sup>8</sup> The Commission argues: (1) the *Van Orden v. Perry* legal judgment test should apply in evaluating passive monuments like the

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<sup>2</sup> App. at 3.

<sup>3</sup> App. at 10.

<sup>4</sup> App. at 10.

<sup>5</sup> App. at 30.

<sup>6</sup> App. at 61.

<sup>7</sup> App. at 61.

<sup>8</sup> See App. at 30.

Peace Cross; (2) The Peace Cross is a secular monument that exists in proper historical context.<sup>9</sup>

**Course of Proceedings:**

Respondents brought suit under 42 U.S.C. § 1983 against the Commission in the Iowa District Court for Sioux County.<sup>10</sup>

Respondents allege the ownership, maintenance, and display of the Peace Cross on public property violates the Establishment Clause of the First Amendment of the U.S. Constitution.<sup>11</sup> Respondents seek a declaratory judgment, injunction, damages, and fees.<sup>12</sup> The American Legion intervened as a Defendant.<sup>13</sup> All parties filed motions for summary judgment.<sup>14</sup> The district court granted the motions of the Commission and the American Legion, finding the Peace Cross was a proper war memorial that did not endorse religion.<sup>15</sup> The Iowa Court of Appeals reversed the grant of summary judgment, holding the Peace Cross failed the second and third prongs of the *Lemon* test.<sup>16</sup>

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<sup>9</sup> See App. at 30. *Van Orden v. Perry*, 545 U.S. 677, 683–84 (2005) (plurality).

<sup>10</sup> App. at 2.

<sup>11</sup> App. at 10; see U.S. Const. amend. I.

<sup>12</sup> App. at 10.

<sup>13</sup> App. at 10.

<sup>14</sup> App. at 10–11.

<sup>15</sup> App. at 30.

<sup>16</sup> App. at 61.

The appellate court remanded for further proceedings.<sup>17</sup> Judge Clark concurred and dissented in part, finding the Monument was proper.<sup>18</sup> The Commission filed a timely appeal to this Court.<sup>19</sup>

**Statement of Facts:**

Throughout World War I, 49 veterans of Sioux County, Iowa gave their lives in service to the United States.<sup>20</sup> To commemorate their sacrifices, a monument now stands at the intersection of Iowa Highway 75 and Sioux County road B58; the Peace Cross (or the “Monument”).<sup>21</sup> The Commission owns the Monument and the highway median.<sup>22</sup> The Monument consists of a Latin cross adorned with the “U.S.” American Legion symbol at its center on both sides, with the words “VALOR, ENDURANCE, COURAGE, [and] DEVOTION” carved around its upper base.<sup>23</sup> A plaque on the lower base lists the honored veterans and quotes President Woodrow Wilson.<sup>24</sup> Bushes surround and partially obscure the lower base, aside

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<sup>17</sup> App. at 61.

<sup>18</sup> App. at 39.

<sup>19</sup> See App. at 61.

<sup>20</sup> App. at 49.

<sup>21</sup> App. at 3.

<sup>22</sup> App. at 7–8.

<sup>23</sup> App. at 3, 62.

<sup>24</sup> App. at 3, 62.

from a trail allowing visitors to approach.<sup>25</sup> An American flag flies adjacent to the Peace Cross.<sup>26</sup> These features create a patriotic presence, as intended by its designers.

Fundraising for the Monument was initiated by the Sioux County Memorial Committee (the “Organizers”); a private organization seeking to honor the fallen veterans.<sup>27</sup> In 1918, the Organizers solicited funding through pledge sheets which used religious language in describing the veterans’ sacrifice.<sup>28</sup> Following initial fundraising, the Peace Cross’s groundbreaking ceremony centered on military pride and patriotism.<sup>29</sup> When the Organizers failed to secure the necessary funds, the American Legion assumed and completed the project.<sup>30</sup> Public officials dedicated the Monument through a patriotic ceremony in 1925, which included speeches honoring veterans and music by the Army Music School band.<sup>31</sup> Clergy also offered an invocation and benediction.<sup>32</sup> The Peace Cross

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<sup>25</sup> App. at 3, 36, 54.

<sup>26</sup> App. at 3, 62.

<sup>27</sup> App. at 4.

<sup>28</sup> App. at 4–5.

<sup>29</sup> App at 5.

<sup>30</sup> App. at 5–6.

<sup>31</sup> App. at 6–7.

<sup>32</sup> App. at 7.

later became a regular site of Memorial Day and Veterans' Day events.<sup>33</sup> Only three religious services ever occurred at the Monument, all within August of 1931.<sup>34</sup> Almost thirty years later, the Commission acquired the land and Monument due to increased highway traffic.<sup>35</sup> The Commission assumed the costs of maintaining and lighting the Monument.<sup>36</sup> Including a renovation, these costs total \$117,000 with an ongoing allocation of \$100,000.<sup>37</sup> The Peace Cross continues to stand in Sioux County as a proud reminder of our brave servicemembers.

Today, the Peace Cross sits in Veterans Memorial Park.<sup>38</sup> Other monuments in the Park include a World War II memorial, Pearl Harbor memorial, Korea and Vietnam memorial, September 11th walkway and garden, and other patriotic displays.<sup>39</sup> These monuments are noted on the Star-Spangled Banner National Historic Trail Marker.<sup>40</sup> Within the Park, the Peace Cross often hosts military-

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<sup>33</sup> App. at 9.

<sup>34</sup> App. at 43–44.

<sup>35</sup> App. at 44.

<sup>36</sup> App. at 34–35.

<sup>37</sup> App. at 35.

<sup>38</sup> App. at 8.

<sup>39</sup> App. at 8.

<sup>40</sup> App. at 8.

related events, particularly patriotic celebrations and meetings of the American Legion.<sup>41</sup> On occasion, clergy have attended to offer an innovation or benediction.<sup>42</sup> Within the context of the Park, the Peace Cross represents one chapter in America's history of war and sacrifice.<sup>43</sup>

For ninety years, the Peace Cross stood without challenge.<sup>44</sup> Now, Respondents allege it is a government endorsement of Christianity.<sup>45</sup> Respondents seek to reduce the Peace Cross to a "slab or obelisk."<sup>46</sup>

**Summary of the Argument:**

This Court should reverse the decision of the Iowa Court of Appeals and reinstate the district court's grant of summary judgment to the Commission. In doing so, this Court should apply the legal judgment test from *Van Orden v. Perry* instead of the test from *Lemon v. Kurtzman*. Under either test, the Peace Cross should be upheld as a secular war memorial.

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<sup>41</sup> App. at 9.

<sup>42</sup> App. at 9.

<sup>43</sup> App. at 9.

<sup>44</sup> App. at 6, 29.

<sup>45</sup> App. at 37–38.

<sup>46</sup> App. at 38.

The legal judgment test best evaluates passive monuments like the Peace Cross. The *Lemon* test was not developed as a universal test for Establishment Clause cases; stretching its analysis has created inconsistency. Passive monuments and displays have suffered disproportionately, as they are more susceptible to the test's subjective elements. These cases should be distinguished and analyzed under *Van Orden*. The legal judgment test focuses on the history behind a monument and how that history is reflected in the monument's nature. The test objectively reviews the monument's features, placement, founding, use, and other characteristics without engaging in subjective perceptions. As a result, it effectively evaluates the passive role monuments play in our communities. Therefore, this Court should distinguish passive monuments and displays under the Establishment Clause and apply the legal judgment test to this case.

Under the legal judgment test, the Peace Cross is a proper war memorial. The history behind the Peace Cross is secular and patriotic. In the aftermath of World War I, the cross became a symbol of the nation's loss and resilience. Since then, it has recurred throughout our history to invoke unity in times of tragedy. This symbolism gives cross-based memorials meaning beyond religion. Further, religious

acknowledgments like the cross are a valuable part of our history that should be cherished. The nature of the Peace Cross reflects this connection with history. The features and placement of the Monument show that it is just one chapter in the story of our changing relationship with war. Since its founding, the Peace Cross has stood to honor local veterans, becoming a site of both patriotic celebration and quiet remembrance in the Sioux County community. Any minor religious acknowledgments and activities are overshadowed by this dominant secular nature. Even under the *Lemon* test, the Peace Cross's secular qualities prevail. Its purpose of honoring veterans has a secular effect on Sioux County while presenting minimal entanglement. As a result, under either test, the Peace Cross should be upheld as constitutional.

## ARGUMENT

### **Jurisdiction**

The district court had general jurisdiction to hear this dispute.<sup>47</sup> The Iowa Court of Appeals had jurisdiction as an appeal arising from an Iowa district court.<sup>48</sup> This Court has jurisdiction to review findings of the Iowa Court of Appeals.<sup>49</sup>

### **I. *Van Orden's* Legal Judgment Test Best Evaluates Passive Monuments.**

#### **Preservation of Error**

The parties raised the issue of the correct test for passive monuments under the Establishment Clause.<sup>50</sup> The district court and appellate court accepted this issue, providing analyses under both tests.<sup>51</sup> Therefore, this argument was preserved for this Court's review.<sup>52</sup>

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<sup>47</sup> Iowa Code § 602.6101 (2019).

<sup>48</sup> *Id.* at § 602.5103(2).

<sup>49</sup> *Id.* at § 602.4102(4).

<sup>50</sup> App. at 15, 42.

<sup>51</sup> App. at 16, 27–28, 46, 51.

<sup>52</sup> *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012).

## **Standard of Review**

Iowa appellate courts review constitutional claims *de novo*.<sup>53</sup> Rulings on summary judgment are reviewed for correction of errors at law.<sup>54</sup>

“Summary judgment is granted if there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law.”<sup>55</sup> Summary judgment should be granted where “the only issue is the legal consequences flowing from undisputed facts.”<sup>56</sup>

## **Merits**

Courts seeking consistency in Establishment Clause cases are better off praying for divine guidance. To alleviate inconsistency, this Court should apply *Van Orden v. Perry*'s legal judgment test when evaluating passive monuments and displays.<sup>57</sup> In these cases, courts should focus on the objective history and nature of the monument rather than subjective observations.<sup>58</sup> First, the test from *Lemon v.*

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<sup>53</sup> *Star Equip., Ltd. v. State*, 843 N.W.2d 446, 451 (Iowa 2014).

<sup>54</sup> *Keller v. State*, 475 N.W.2d 174, 179 (Iowa 1991).

<sup>55</sup> Iowa R. App. P. 6.4 (2019).

<sup>56</sup> *Huber v. Honey*, 591 N.W.2d 53, 55 (Iowa 1993).

<sup>57</sup> 545 U.S. 677, 686 (2005) (plurality).

<sup>58</sup> *See, e.g., id.*

*Kurtzman* was not designed as a universal test.<sup>59</sup> Establishment Clause disputes are fact-intensive and require nuanced analysis.<sup>60</sup> *Lemon*'s one-size-fits-all approach has produced inconsistent results in this diverse area of the law.<sup>61</sup> Second, passive monuments are distinguishable from other Establishment Clause cases. While legislative actions are suited to a *Lemon* analysis, passive monuments are more susceptible to the test's subjective components.<sup>62</sup> A new test must be adopted that is tailored to the unique role these monuments play in our communities. Last, passive monuments are best evaluated by examining their history and nature.<sup>63</sup> *Van Orden*'s legal judgment test focuses on this context, producing consistent results rooted in objective facts.<sup>64</sup> The inconsistency in Establishment Clause cases shows the need for different analyses in specific areas. Presently, *Van Orden* was crafted to evaluate passive monuments like the Peace Cross and should be applied.

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<sup>59</sup> 403 U.S. 602, 612–13 (1971).

<sup>60</sup> *Van Orden*, 545 U.S. at 678.

<sup>61</sup> See, e.g., compare *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005), with *Books v. Elkhart Cty.*, 401 F.3d 857, 869 (7th Cir. 2005).

<sup>62</sup> See *Lemon*, 403 U.S. at 613–14; *ACLU of Ky. v. Mercer Cty.*, 432 F.3d 624, 632 (6th Cir. 2005).

<sup>63</sup> See *Van Orden*, 545 U.S. at 686.

<sup>64</sup> See *id.*

**A. Overbroad Application of the *Lemon* Test has Created Inconsistency Across Establishment Clause Cases.**

The *Lemon* test has plagued the Establishment Clause with inconsistent results. The test asks whether a government action (1) had a secular purpose, (2) had the primary effect of advancing or inhibiting religion, and (3) created an excessive entanglement with religion.<sup>65</sup> While these factors were intended as narrow guideposts, courts have used them as a one-size-fits-all approach.<sup>66</sup> Whether discussing legislative actions, public prayer, school curriculums, state holidays, or passive monuments and displays, *Lemon* attempts to squeeze the Establishment Clause into this three-prong analysis.<sup>67</sup> As a result, *Lemon* is often criticized for its indiscriminate and inconsistent application.<sup>68</sup> This Court should restrict *Lemon*'s application and acknowledge different tests within the Establishment Clause.

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<sup>65</sup> *Lemon*, 403 U.S. at 612–13.

<sup>66</sup> *See id.*

<sup>67</sup> *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 611 (1988); *Marsh v. Chambers*, 463 U.S. 783, 792–93 (1983); *id.*; *Cammack v. Waihee*, 932 F.2d 765, 773 (9th Cir. 1991); *Amancio v. Town of Somerset*, 28 F. Supp. 2d 677, 678–79 (D. Mass. 1998).

<sup>68</sup> *E.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring).

Despite its use, *Lemon* never intended to create a universal test. *Lemon* involved statutes granting public funds to religious institutions.<sup>69</sup> In his opinion, Justice Burger compared similar Establishment Clause cases to develop factors specifically for evaluating relationships between legislatures and religious institutions.<sup>70</sup> That same day, Justice Burger expressed that Establishment Clause cases are not suited to strict tests.<sup>71</sup> Instead, courts should look to similar cases for constitutional guidelines.<sup>72</sup> Despite his narrow intent, these factors became the all-encompassing *Lemon* test.<sup>73</sup> Justice Burger later advocated for nuanced analysis, finding the Court’s “obsession” with *Lemon* detrimental to the Establishment Clause.<sup>74</sup> Notwithstanding, the *Lemon* test continues to be broadly applied.

The test was further complicated by the “reasonable observer” standard. Justice O’Connor conceived the reasonable observer as a

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<sup>69</sup> 403 U.S. at 606.

<sup>70</sup> *Id.* (citing *Walz v. Tax Comm’n of City of N.Y.*, 397 U.S. 664, 674 (1970); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 243 (1968)).

<sup>71</sup> *Tilton v. Richardson*, 403 U.S. 672, 678 (1971).

<sup>72</sup> *Id.*

<sup>73</sup> 403 U.S. at 612–13.

<sup>74</sup> *Aguilar v. Felton*, 473 U.S. 402, 419 (1985) (Burger, J., dissenting).

“personification of a community ideal of reasonable behavior” who is “aware of the history and context of the community[.]”<sup>75</sup> In applying *Lemon*, courts should question whether this observer would see an impermissible endorsement of religion.<sup>76</sup> This subjective hypothetical fractured the Court in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*.<sup>77</sup> Justice O’Connor found the joint display of a Christmas tree and menorah would convey religious pluralism to a reasonable observer.<sup>78</sup> Justice Brennan disagreed, finding an observer could not overlook the menorah’s religious significance.<sup>79</sup> Others rejected the standard all together.<sup>80</sup> This additional layer made the *Lemon* test more reliant on the subjective viewpoint of the judge and therefore more inconsistent.

To add confusion, courts have been inconsistent in applying *Lemon*. The Court declined to apply the test in *Lynch v. Donnelly*, holding *Lemon* was merely a “helpful signpost.”<sup>81</sup> A year later, the test

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<sup>75</sup> *Cty. of Allegheny v. ACLU of Greater Pittsburgh Chapter*, 492 U.S. 573, 632 (1989) (O’Connor, J., concurring).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 635.

<sup>79</sup> *Id.* at 642 (Brennan, J., concurring in part, dissenting in part).

<sup>80</sup> *Id.* at 668 (Kennedy, J., concurring in part, dissenting in part).

<sup>81</sup> 465 U.S. 668, 679, n.1 (1984).

was revived over objection that it lacked any basis in history.<sup>82</sup> In the years following, *Lemon* was killed for a coercion standard, then applied in 1993, declined in 1994, and applied again in 1996.<sup>83</sup> In 2005, the Court applied *Lemon* in *McCreary County v. ACLU of Kentucky* the same day it created the legal judgment test in *Van Orden*.<sup>84</sup> This cycle of death and resurrection led Justice Scalia to compare *Lemon* to a “ghoul in a late-night horror movie[.]”<sup>85</sup> Uncertainty in both results and application have made a “maze of the Establishment Clause[.]”<sup>86</sup>

*Lemon*’s inconsistencies exist throughout the Establishment Clause, including state holiday, public prayer, and religious education cases. On state holidays, Good Friday was a constitutional holiday in Hawaii, but unconstitutional in Illinois.<sup>87</sup> In reconciling these results, the Seventh Circuit shrugged; “Illinois is not Hawaii.”<sup>88</sup> On public

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<sup>82</sup> *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting).

<sup>83</sup> *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696–97 (1994); *Lamb’s Chapel*, 508 U.S. at 395; *Lee v. Weisman*, 505 U.S. 577, 587, 594–95 (1992).

<sup>84</sup> *Van Orden*, 545 U.S. at 686; *McCreary*, 545 U.S. at 859–60.

<sup>85</sup> *Lamb’s Chapel*, 508 U.S. at 398 (Scalia, J., dissenting).

<sup>86</sup> *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

<sup>87</sup> *Metzl v. Leininger*, 57 F.3d 618, 622–23 (7th Cir. 1994); *Cammack*, 932 F.2d at 782.

<sup>88</sup> *Metzl*, 57 F.3d at 622–23.

prayer, courts also lack consistency. For instance, an opening prayer in a legislature is constitutional, but a moment of silence in a public school is unconstitutional.<sup>89</sup> These puzzling results also infect religious education cases. For example, public funds may be given to a religious organization to teach about sexual behavior, but not about secular science or history.<sup>90</sup> Inconsistent cases like these have led courts to find that fear of violating the Establishment Clause can justify unconstitutional actions.<sup>91</sup> The *Lemon* test’s inconsistency across these areas has paralyzed the courts and the public alike.

Passive monument and display cases have likewise never found a consistent pulse. Ten Commandments monuments have been particularly scattered. For example, the Ten Commandments in *McCreary County* were found to endorse religion, but a “substantially similar” monument in *Books v. Elkhart County* conveyed only a message of historical legal principles.<sup>92</sup> *ACLU of Kentucky v. Mercer County* also upheld a Ten Commandments monument despite being

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<sup>89</sup> *Wallace*, 472 U.S. at 56; *Marsh*, 463 U.S. at 792–93.

<sup>90</sup> *Bowen*, 487 U.S. at 589; *Lemon*, 403 U.S. at 618–19.

<sup>91</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 18 F.3d 269, 284 (1994), *rev’d*, 515 U.S. 819 (4th Cir. 1995).

<sup>92</sup> *McCreary*, 545 U.S. at 881; *Books*, 401 F.3d at 862.

“identical in all material respects” to *McCreary County*.<sup>93</sup> Passive display cases are no more congruent. On holiday displays, cities have been both barred from including religious material and compelled to include religious material.<sup>94</sup> Some courts have found cities may ban religious material, while other courts have banned these bans.<sup>95</sup> Even near-identical cases cannot find the line. *Doe v. City of Clawson* upheld a display including a creche, four Christmas trees, lights, Santa Clause, ‘Noel’ and ‘Seasons Greetings’ banners, gifts, garlands, and candles.<sup>96</sup> But *Amancio v. Town of Somerset* struck down a display including a creche, Christmas tree, lights, Santa Clause, and a wreath.<sup>97</sup> The *Lemon* test, when applied to passive monuments and displays, produces these incompatible decisions.

*Lemon* is an unworkable standard that should be restricted in application. While the Iowa Court of Appeals was correct that *Lemon* remains a “useful guidepost” in some cases, the test’s inconsistency

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<sup>93</sup> *Mercer*, 432 F.3d at 626.

<sup>94</sup> *E.g.*, compare *Calvary Chapel Church, Inc. v. Broward Cty.*, 299 F. Supp. 2d 1295, 1303–05 (S.D. Fla. 2003), with *ACLU of N.J. v. Schundler*, 104 F.3d 1435, 1452 (3rd Cir. 1997).

<sup>95</sup> *E.g.*, compare *Knights of Columbus v. Town of Lexington*, 272 F.3d 25, 26 (1st Cir. 2001), with *Flamer v. City of White Plains*, 841 F. Supp. 1365, 1382 (S.D.N.Y. 1993).

<sup>96</sup> 915 F.2d 244, 249 (6th Cir. 1990).

<sup>97</sup> 28 F. Supp. 2d at 678, 681.

shows it fails as a broad brush.<sup>98</sup> Particularly with passive monuments and displays, decisions often hinge on subjective perceptions. In order to create consistency, this Court should consider a separate standard for passive monuments and displays.

**B. Passive Monuments are Distinguishable from Other Establishment Clause cases.**

Passive monuments and displays have suffered disproportionately under *Lemon*. Because of their passive presence, monuments are often assessed on how they are subjectively perceived, thus relying more on the reasonable observer standard.<sup>99</sup> As a result, constitutionality often turns on what the deciding judge considers reasonable.<sup>100</sup> This fundamental problem warrants distinction of passive monuments and displays.

On one end of the Establishment Clause spectrum, the *Lemon* test has value in cases involving legislative actions. The test was created for this scenario.<sup>101</sup> First, the government's purpose can be ascertained through legislative history. Second, the law's effect can be assessed by a before-effective and after-effective comparison. Last,

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<sup>98</sup> See App. at 45.

<sup>99</sup> *Allegheny*, 492 U.S. at 632 (O'Connor, J., concurring).

<sup>100</sup> See, e.g., *id.*

<sup>101</sup> *Lemon*, 403 U.S. at 612–13.

government entanglement can be measured by the involvement of public officials, funds, and resources. But as Establishment Clauses cases move further across the spectrum, they begin to lack the commonality that makes the *Lemon* test valuable.

On the other end of the spectrum are passive monuments and displays. First, unlike legislation, their purpose is less prescriptive and more artistic. Monuments and displays often convey multiple messages and reflect the intent of many people.<sup>102</sup> This makes it difficult to isolate a singular ‘purpose.’ Second, their direct effect is also less discernable. As opposed to changes in policy, passive monuments are simply present.<sup>103</sup> There is no immediate ‘effect’ beyond how the monument is perceived. This encourages courts to lean into the reasonable observer standard. Last, passive monuments threaten little to no entanglement outside placement near government offices or minor use of public funds.<sup>104</sup> Even then, any entanglement is more symbolic than a threat of institutionalization. In contrast, statutes are the law at work and present direct

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<sup>102</sup> *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 475–76 (2009).

<sup>103</sup> *See, e.g., Van Orden*, 545 U.S. at 677–78.

<sup>104</sup> *See, e.g., Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995); *Bowen*, 487 U.S. at 623 (O’Connor, J., concurring).

entanglement. While monuments and displays must also be scrutinized, a test should be adopted that is crafted to this side of the spectrum.

Instead of imagining an observer who is “aware of context and history,” why not just look at the context and history directly?<sup>105</sup> Monuments and displays are defined by the history they invoke and the meaning communities embed in them.<sup>106</sup> Considering the history and nature of a monument gives courts a better picture of its actual role in a community. This area of the Establishment Clause has long been tethered to an observation-centered test that lacks consistency. This Court should resolve this issue by adopting *Van Orden*’s legal judgment test, which considers the context required to evaluate passive monuments and displays.

**C. *Van Orden*’s Legal Judgment Test Properly Focuses on the History and Nature of Passive Monuments.**

The legal judgment test offers the nuance necessary to assess passive monuments and displays. This test was formed in *Van Orden*, as the *Lemon* test was found “not useful” in passive monument

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<sup>105</sup> Compare *Allegheny*, 492 U.S. at 632, with *Van Orden*, 545 U.S. at 677–78.

<sup>106</sup> See, e.g., *Van Orden*, 545 U.S. at 578.

cases.<sup>107</sup> The plurality instead based its analysis on “the nature of the monument” and “our Nation’s history.”<sup>108</sup> By emphasizing context, the test recognizes the role monuments play in our communities. What historical background surrounds the monument? What are its features and setting? Why was it constructed? How has the monument been used? These questions illustrate the monument’s history and nature, giving courts grounds to assess its secular or religious presence. The legal judgment test, when applied, has produced greater consistency in Establishment Clause cases.<sup>109</sup> Because this test is tailored for passive monuments, this Court should adopt its use in this area.

*Van Orden* created the legal judgment test in evaluating a Ten Commandments monument in Texas.<sup>110</sup> The Court first evaluated the Ten Commandment’s historical role as a source of law and morality.<sup>111</sup> The Court also noted similar monuments, finding that religion has historically been acknowledged in public life.<sup>112</sup> Apart from their

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<sup>107</sup> *Id.* at 577–78.

<sup>108</sup> *Id.*

<sup>109</sup> *E.g., ACLU of Ohio Found., Inc. v. Bd. of Comm’rs of Lucas Cty.*, 444 F. Supp. 2d 805, 814 (N.D. Ohio 2006).

<sup>110</sup> *Van Orden*, 545 U.S. at 691–92.

<sup>111</sup> *Id.* at 701–02.

<sup>112</sup> *Id.* at 689–90.

religious roots, the Ten Commandments have historic and legal significance.<sup>113</sup> The monument’s nature was also secular due to its patriotic features—such as an eagle, a flag, and a pyramid—and placement among other historical displays.<sup>114</sup> When considered in context, the Ten Commandments were merely an aspect of the “Texan identity.”<sup>115</sup> Due to its “dual significance,” the monument satisfied the legal judgment test.<sup>116</sup> This evaluation of context should be extended to all passive monuments and displays under the Establishment Clause.

In Ten Commandments cases, the legal judgment test has respected this context while making reasoned distinctions. Because these monuments stand on the same secular history, most have been upheld.<sup>117</sup> For example, the monument in *ACLU of Ohio Foundation, Inc. v. Board of Commissioners of Lucas County* was upheld because it also had a secular nature.<sup>118</sup> It was constructed to promote civic morality, had secular features, and was placed among other historical

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 681.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 691–92.

<sup>117</sup> *E.g., Lucas*, 444 F. Supp. 2d at 814.

<sup>118</sup> *Id.* at 816.

monuments.<sup>119</sup> But Ten Commandments monuments may be distinguished if their nature fails to convey their secular history.<sup>120</sup> For instance, the monument in *American Atheists, Inc. v. Thompson* had a religious nature.<sup>121</sup> It sat in front of the state capitol, alone and unadorned.<sup>122</sup> The court emphasized context, noting the “far different” circumstances of *Van Orden*.<sup>123</sup> These cases show the legal judgment test offers a reasoned consistency in Ten Commandments cases.

This reasoned consistency should be expanded to all passive monuments and displays, including the Peace Cross. Like the Ten Commandments analyzed in *Van Orden*, the Peace Cross is a passive monument.<sup>124</sup> It is not interactive or functional beyond its symbolic existence. Its presence merely invokes the history it stands on and the way that history is presented. It is this unique role of passive monuments that must be considered. The legal judgment test considers this role by grounding analysis in the objective history and

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<sup>119</sup> *Id.* at 815.

<sup>120</sup> *Am. Atheists, Inc. v. Thompson*, No. CIV-14-42-C, 2014 WL 2135963, at \*1 (W.D. Okla. May 22, 2014).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Van Orden*, 545 U.S. at 691–92.

nature of the monument.<sup>125</sup> This is the test necessary to evaluate the Peace Cross and promote consistency in Establishment Clause cases. Therefore, this Court should adopt the legal judgment test in passive monument and display cases and apply it to the Peace Cross.

## **II. The Peace Cross is a Historic War Memorial and is Proper under the Establishment Clause.**

### **Preservation of Error**

The parties raised the issue of the Peace Cross's constitutionality to both the district court and appellate court.<sup>126</sup> The district court accepted its constitutionality while the appellate court rejected its constitutionality.<sup>127</sup> Therefore, this argument was preserved for this Court's review.<sup>128</sup>

### **Standard of Review**

Iowa appellate courts review constitutional claims *de novo*.<sup>129</sup> Rulings on summary judgment are reviewed for correction of errors at law.<sup>130</sup>

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<sup>125</sup> *See id.*

<sup>126</sup> App. at 10, 32.

<sup>127</sup> App. at 30, 61.

<sup>128</sup> *Lamasters*, 821 N.W.2d at 862.

<sup>129</sup> *Star Equip., Ltd.*, 843 N.W.2d at 451.

<sup>130</sup> *Keller*, 475 N.W.2d at 179.

“Summary judgment is granted if there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law.”<sup>131</sup> Summary judgment should be granted where “the only issue is the legal consequences flowing from undisputed facts.”<sup>132</sup>

### **Merits**

The battlefields of World War I became the graveyards of World War I. One by one, soldiers fell, and one by one a cross took their place. Those who survived were left not only with a field of shells and wreckage, but crosses; each representing a comrade, a friend, a loved one.<sup>133</sup> The Peace Cross’s use of this symbol draws upon this secular context, not its religious roots. Under the legal judgment test, the Peace Cross’s history and nature make it permissible under the Establishment Clause.<sup>134</sup> First, the Peace Cross reflects our secular history. The cross’s use as a military grave marker during World War I caused it to linger in the public mind as a symbol of loss, honor, and

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<sup>131</sup> Iowa R. App. P. 6.4.

<sup>132</sup> *Huber*, 591 N.W.2d at 55.

<sup>133</sup> See David Bilton, *The Germans in Flanders 1917–1918: Rare Photographs from Wartime Archives*, 40–41 (Kindle ed. 2013).

<sup>134</sup> See *Van Orden*, 545 U.S. at 691–92.

hope.<sup>135</sup> This symbolism makes the Peace Cross an effective memorial. America has long embraced the use of such symbols when connected with history.<sup>136</sup> Second, the Peace Cross's characteristics show its secular nature. Prominent features of the Peace Cross and its placement among other historical monuments lend it secular context.<sup>137</sup> This context has existed since the Peace Cross's founding as a war memorial, which is reflected in its use as a site of patriotic celebration.<sup>138</sup> Third, in the alternative, the Peace Cross is also permissible under the *Lemon* test.<sup>139</sup> The Monument has the secular purpose and effect of a war memorial. Any minor government entanglement presents no threat of religious establishment. As a result, a reasonable observer would conclude that the Peace Cross is a secular memorial. Therefore, this Court should reverse the decision of the Iowa Court of Appeals and reinstate the summary judgment granted to the Commission by the district court.<sup>140</sup>

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<sup>135</sup> See, e.g., H.R. 16, 68th Cong. § 1 (1924).

<sup>136</sup> See *Van Orden*, 545 U.S. at 678; e.g., *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1033 (10th Cir. 2008).

<sup>137</sup> App. at 3, 8.

<sup>138</sup> App. at 3, 7, 43–44.

<sup>139</sup> See *Lemon*, 403 U.S. at 612–13.

<sup>140</sup> See App. at 30, 61.

**A. The Peace Cross’s Form Reflects Our Common, Secular History.**

Under the legal judgment test, this Court must begin by considering the history behind the Peace Cross.<sup>141</sup> First, the cross has significance as a symbol of death, sacrifice, and hope. This symbolism arose during World War I, where the cross was used as a grave marker for fallen soldiers.<sup>142</sup> After the war, the public turned to the cross as a symbol of the nation’s loss.<sup>143</sup> Similar symbolism has been used throughout American history and continues today.<sup>144</sup> Second, the cross is effective as a memorial due to its embedded symbolism. As a result, the cross is used around the world to honor fallen soldiers.<sup>145</sup> An obelisk would fail to capture this historical symbolism.<sup>146</sup> Last, the cross and other religious symbols have long been present in public life.<sup>147</sup> These symbols are part of our cultural

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<sup>141</sup> See *Van Orden*, 545 U.S. at 691–92.

<sup>142</sup> H.R. 16, 68th Cong. § 1.

<sup>143</sup> *Id.*

<sup>144</sup> See, e.g., *Van Orden*, 545 U.S. at 678; *Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 241 (2d Cir. 2014).

<sup>145</sup> See Commonwealth War Graves Commission, *Find Cemeteries & Memorials*, <https://bit.ly/2AdQOUo> (last visited Mar. 2, 2019) (hereinafter “War Graves Commission”).

<sup>146</sup> See App. at 38.

<sup>147</sup> *Van Orden*, 545 U.S. at 678.

tapestry and can be acknowledged without veneration.<sup>148</sup> The Peace Cross's connection with our nation satisfies the history analysis of the legal judgment test and warrants the Monument's presence in Sioux County.<sup>149</sup>

1. *The cross has historical significance as a symbol of death, sacrifice, and hope, particularly in relation to World War I.*

The cross has broad symbolic meaning that applies to all people. While it is a Christian symbol, the cross can convey more comprehensive principles.<sup>150</sup> This is particularly true in remembering World War I, where the cross was used to mark the graves of fallen U.S. soldiers.<sup>151</sup> The cross came to embody the cost of war and the undying American spirit. Endurance, sacrifice, death, and hope are all wrapped up in the cross's symbolism.<sup>152</sup> The cross's historical role enables its broader principles to dominate its religious roots in the

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<sup>148</sup> *Id.*

<sup>149</sup> *See id.* at 678, 691–92.

<sup>150</sup> *See Port Auth.*, 760 F.3d at 241.

<sup>151</sup> Col. Frederick W. Van Duyne, *Erection of Permanent Headstones in American Military Cemeteries in Europe*, *Quartermaster Review* (Jan. 1930) (available at: <https://www.qmfound.com/article/erection-of-permanent-headstones-in-the-american-military-cemeteries-in-europe/>) (hereinafter “Van Duyne”).

<sup>152</sup> *See H.R. 16*, 68th Cong. § 1.

proper context.<sup>153</sup> As held in *Salazar v. Buono*, “one Latin cross . . . 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.”<sup>154</sup> The Peace Cross stands upon this history of unity and patriotism.

Our history embraced the cross as a universal memorial during World War I. Servicemen were often forced to hastily dig the graves of their comrades on the battlefield, marking their bodies with a crude, wooden cross.<sup>155</sup> Stars of David were also used for some soldiers known to be Jewish.<sup>156</sup> For more than five years, 30,792 crosses remained staked into the battlefields of Europe.<sup>157</sup> Strong public sentiment compelled Congress to fund permanent grave markers.<sup>158</sup> While standard gravestones were planned, marble crosses were ultimately selected due to the public desire to retain the symbolism of

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<sup>153</sup> See, e.g., Arlington National Cemetery, *Argonne Cross (WWI)* (2015), <https://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials/Argonne-Cross> (hereinafter “Arlington, *Argonne Cross*”).

<sup>154</sup> 559 U.S. 700, 721 (2010).

<sup>155</sup> Van Duyne.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

the original markers.<sup>159</sup> Because the cross was associated with the uniform sacrifice of the dead, it was used for headstones generically.<sup>160</sup> While Orthodox Jews requested Stars of David to represent their dead, many Reformed Jews wanted “no distinction” to be made between them and their comrades.<sup>161</sup> As a result, even many Jewish graves were marked with a marble cross.<sup>162</sup> The Fields of Honor remain today as a reminder of the soldiers who never left the battlefield.<sup>163</sup> For them, the cross came to represent not the uniformity of their faith, but the uniformity of their sacrifice.

From its use as memorial, the cross took on broader meaning with the public. Because World War I was America’s first foray into total war on foreign soil, the image of the dead lingered in the public consciousness.<sup>164</sup> At the war’s end, the primary effect felt across the Pacific was loss.<sup>165</sup> The political tribulations of Europe mattered little

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> American Battle Monuments Commission, *Fields of Honor*, ambc.org, <https://www.abmc.gov/multimedia/videos/fields-honor> (last visited Mar. 2, 2019).

<sup>164</sup> Garrett Peck, *The Great War in America: World War I and Its Aftermath*, 30–33 (1st ed. 2018).

<sup>165</sup> *Id.*

to the everyday American.<sup>166</sup> Why did America thrust itself into this global conflict? Why did it cost the lives of friends and family? These questions stirred in America as loved ones lied dead in France. This sentiment conjured the image of rows and rows of bodies, beneath simple wooden crosses.<sup>167</sup> This is the unique effect of World War I that the cross captures; the American feeling of loss, gratitude, and hope for a better future.

In previous wars, Americans also united around symbols that were unique to their time. During the Revolutionary War, popular symbols centered on identity and liberty.<sup>168</sup> These include the Sons of Liberty flag, the snake, and the pine tree.<sup>169</sup> The Sons of Liberty flag proudly displayed thirteen stripes, representing the colonies.<sup>170</sup> The coiled snake offered a simple warning to the British; “DONT TREAD ON ME.”<sup>171</sup> The pine tree, unknown to settling colonists, also came to represent colonial identity and strength.<sup>172</sup> In contrast, the American

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<sup>166</sup> *Id.*

<sup>167</sup> *See* H.R. 16, 68th Cong. § 1; Van Duyne.

<sup>168</sup> Revive 1776, *Revolutionary War Flags and Symbols*, [revive1776.com](http://revive1776.com), <http://revive1775.com/category/revolutionary-war-flags/> (last visited Mar. 2, 2019).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

Civil War produced symbols of separation and conflict.<sup>173</sup> The Confederate flag, along with the dueling colors blue and grey, expressed the feeling of national division.<sup>174</sup> As these wars show, multiple symbols often arise in times of historic crisis. The Iowa Court of Appeals was correct to note the significance of the poppy in World War I, but this does not negate the equal weight of the cross.<sup>175</sup> These successive wars each affected the public in a unique way, which is reflected in their respective symbols.

World War I's unique effect was captured in the cross and came to permeate American art and culture. Congress acknowledged this trend:

[W]ooden crosses have marked the graves on the battle fields of Europe of American soldiers, sailors, and marines who died in the World War from the first burials in war time until the present day[.] . . . [T]hese wooden symbols have, during and since the World War, been regarded as emblematic of the great sacrifices which that war entailed, have been so treated by poets and artists and have become peculiarly and inseparably associated in the thought of surviving relatives and comrades[.]<sup>176</sup>

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<sup>173</sup> See Ron Field & Robin Smith, *Uniforms of the Civil War*, 20 (1st ed. 2001); McWirter et al., *Confederate Flag: Turning the Tide on a Symbol of the South*, Wall Street Journal (June 23, 2015), <https://www.wsj.com/articles/confederate-flag-turning-the-tide-on-a-symbol-of-the-south-1435103870>.

<sup>174</sup> See *id.*

<sup>175</sup> See App. at 50.

<sup>176</sup> H.R. 16, 68th Cong. § 1.

This is captured in the poem *In Flanders Fields*, which invokes the image of poppies blowing between countless crosses.<sup>177</sup> Other poets, including Ernest Hemingway, also used the imagery of the cross.<sup>178</sup> In literature, the anti-war novel *The Four Horsemen of the Apocalypse* ends with the protagonist gazing at the rows of crosses before him.<sup>179</sup> The novel was the best-selling book in America in 1919 and spawned a popular 1921 film.<sup>180</sup> Paintings from artists such as Horace Pippin and Otto Dix incorporated the haunting images of white, marble crosses.<sup>181</sup> The cross's militaristic significance gave rise to this cultural and artistic significance, further removing the symbol from its religious roots.

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<sup>177</sup> John McCrae, *In Flanders Fields* (1915).

<sup>178</sup> *E.g.*, Ernest Hemingway, *Champs D'Honneur* (1923) (“Soldiers never do die well; Crosses mark the places — Wooden crosses where they fell, Stuck above their faces[.]”).

<sup>179</sup> Vicente Blasco Ibáñez, *The Four Horsemen of the Apocalypse* (1916).

<sup>180</sup> Project Gutenberg, *Bestsellers, American, 1895–1923*, [https://www.gutenberg.org/wiki/Bestsellers,\\_American,\\_1895-1923\\_\(Bookshelf\)](https://www.gutenberg.org/wiki/Bestsellers,_American,_1895-1923_(Bookshelf)) (last visited Mar. 2, 2019); *The Four Horsemen of the Apocalypse* (Metro Pictures 1921).

<sup>181</sup> Jodi Heckel, *Poet Janice Harrington's New Work Reflects on Life and Art of Painter Horace Pippin*, Ill. News Bureau (Oct. 12, 2016); Otto Dix, *Soldiers' Grave Between the Lines*, Museum of Modern Art (1924).

The cross has reappeared as a unifying memorial in subsequent wars. Following World War II, the U.S. Army established graveyards on the beaches of Normandy.<sup>182</sup> Wooden crosses were again replaced with default marble crosses or Stars of David in the alternative.<sup>183</sup> More than 9,000 markers remain there today.<sup>184</sup> Crosses were again used as temporary grave markers during the Korean War.<sup>185</sup> This repeated symbolism emanates from World War I and is synonymous with the cost of war in America.

The cross is still seen as a symbol of American sacrifice and fortitude today. The Ground Zero Cross became such a symbol after September 11th, 2001.<sup>186</sup> The intersecting girders found in the wreckage of the World Trade Center gave viewers solace in the face of

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<sup>182</sup> WW2 US Medical Research Centre, *607th Quartermaster Graves Registration Company, Unit History*, <https://www.med-dept.com/unit-histories/607th-quartermaster-graves-registration-company/> (last visited Mar. 2, 2019).

<sup>183</sup> *Id.*

<sup>184</sup> American Battle Monuments Commission, *Normandy American Cemetery and Memorial*, [abmc.gov](http://abmc.gov), <https://www.abmc.gov/news-events/news/access-normandy-american-cemetery-beach-closed-public> (last visited Mar. 2, 2019) (hereinafter “*Normandy Cemetery*”).

<sup>185</sup> LTC John C. Cook, *Graves Registration in the Korean Conflict*, Quartermaster Review (Mar. 1953), [http://www.qmmuseum.lee.army.mil/korea/gr\\_korea.htm](http://www.qmmuseum.lee.army.mil/korea/gr_korea.htm).

<sup>186</sup> *Port Auth.*, 760 F.3d at 241.

tragedy.<sup>187</sup> In *American Atheists, Inc. v. Port Authority of New York and New Jersey*, the court found the Ground Zero Cross gave individuals of all belief systems “a symbol of hope, faith, and healing.”<sup>188</sup> The cross is still displayed today, capturing the wounded but resilient spirit of that day.<sup>189</sup> In times of national loss, the cross is often revisited for this universal significance.

The cross has recurred throughout American history as a unifying symbol for all people in times of adversity.<sup>190</sup> Its consistent usage conjures more than religion. In times of crisis, the cross reminds us of what we have lost, the mutuality of our suffering, and our strength as a county to push forward.<sup>191</sup> This is the symbology woven into the Peace Cross and reinforces its secular presence in Veterans Memorial Park.

2. *The cross is an effective memorial because it links the past with the present.*

The purpose of a memorial is to embed the past in the present, ensuring that significant people and events are not forgotten. An

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 246–47.

<sup>190</sup> *See, e.g., Normandy Cemetery; Van Duyne.*

<sup>191</sup> *Port Auth.*, 760 F.3d at 241.

effective memorial reflects communal gratitude and gives the subject a manifest identity.<sup>192</sup> This civic art should be tailored to capture what makes the subject worth memorializing. As generations visit the site, the memorial becomes a place of remembrance, healing, and unity.<sup>193</sup> In this way, memorials are a “repository for a collective social and cultural memory.”<sup>194</sup> This is particularly true of war memorials.<sup>195</sup> After World War I, communities adopted the cross as a symbol of those lost.<sup>196</sup> Unlike the obelisk proposed by Respondents, the Peace Cross captures that moment in history.<sup>197</sup> Therefore, the Peace Cross should stand as the historic memorial that it is.

It is not unusual for public memorials to center on the cross, especially in remembering World War I. The Argonne Cross in Arlington National Cemetery memorializes all American soldiers who died in World War I.<sup>198</sup> Like the Peace Cross, the Argonne Cross

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<sup>192</sup> Michael H. Koby & Ash Jain, *Memorializing Our Nation’s Heroes: A Legislative Proposal to Amend the Commemorative Works Act*, J. L. & Pol. 99, 134 (2001) (hereinafter “Koby, *Memorializing*”).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> H.R. 16, 68th Cong. § 1.

<sup>197</sup> *See App.* at 38.

<sup>198</sup> Arlington, *Argonne Cross*.

references the battlefields of Europe.<sup>199</sup> It features a wreathed eagle at its center, showing its patriotic nature.<sup>200</sup> The Ninth Circuit held the Argonne Cross's religious elements were overwhelmed by the history surrounding it.<sup>201</sup> The Cross of Sacrifice similarly honors Americans who enlisted in the Canadian forces during in World War I.<sup>202</sup> Through symbolism, both these monuments invoke the spirit of those lost and the public sentiment surrounding their sacrifice.<sup>203</sup> Other crosses memorializing veterans can be found around the globe.<sup>204</sup> While the Iowa Court of Appeals emphasizes the size of the Peace Cross compared to these other memorials, this fact is not determinative; all these monuments stand on the same historical grounding in proper context.<sup>205</sup> These crosses crystalize the history behind them, making them effective memorials.

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Trunk v. City of San Diego*, 629 F.3d 1099, 1124 (9th Cir. 2011).

<sup>202</sup> *Id.*

<sup>203</sup> *See id.*

<sup>204</sup> *See* War Graves Commission (including Australia, Canada, China, Egypt, France, India, Indonesia, Lebanon, Myanmar, New Zealand, Pakistan, Singapore, Syria, United Kingdom, United States, and Yemen).

<sup>205</sup> *See* App. at 58.

As a memorial, the Peace Cross captures this same sentiment by drawing on the symbolism of World War I.<sup>206</sup> Beyond its parallel to the Fields of Honor, the Peace Cross embodies the collective sentiment of the Sioux County community.<sup>207</sup> The mourning, strength, and hope of the public are tied to its symbolism. This gives modern viewers a place not only to honor fallen soldiers, but to understand the affect the war had at a local level.<sup>208</sup> The Iowa Court of Appeals erred in holding the cross only has value because of its religious roots; these historic and communal values are also fused to the cross's symbolism and are worthy of preservation.<sup>209</sup> The artistic form of the Peace Cross has broader meaning and makes it an effective memorial.

Unlike the Peace Cross, an obelisk fails to capture this history.<sup>210</sup> As a memorial, an obelisk lacks connection to the sacrifice of World War I veterans or the way the public remembered them. Reducing the Peace Cross to a slab of blank slate also wipes away our history for a blank slate. The Monument's symbolism, historic

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<sup>206</sup> See Van Duyne.

<sup>207</sup> See App. at 42–43.

<sup>208</sup> Koby, *Memorializing* at 134.

<sup>209</sup> See App. at 49.

<sup>210</sup> See App. at 38.

identity, and embedded cultural memory would be eradicated.<sup>211</sup> Veterans Memorial Park would cease to show the evolution of America at war in exchange for a redacted history.<sup>212</sup> Like the Argonne Cross and the Cross of Sacrifice, the Peace Cross should be respected as an effective memorial.<sup>213</sup> The Peace Cross artfully memorializes its subject regardless of its acknowledgement of religion.

3. *Aspects of American public life routinely acknowledge religion.*

With historical context, governmental entities can acknowledge religion in public without violating the Establishment Clause.<sup>214</sup> Religious language in our Pledge of Allegiance, on our money, and on the memorials of our Founding Fathers are all tolerated.<sup>215</sup> Further, religious symbols exist in our courts, government offices, and other public spaces.<sup>216</sup> This passive acknowledgement is permissible due to

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<sup>211</sup> See H.R. 16, 68th Cong. § 1; Koby, *Memorializing* at 134.

<sup>212</sup> See App. at 36.

<sup>213</sup> See *Trunk*, 629 F.3d at 1124.

<sup>214</sup> See, e.g., *Van Orden*, 545 U.S. at 682.

<sup>215</sup> *Id.* at 689, n.9, 695–96; Jeff Kinley, *The End of America?: Bible Prophecy and a Country in Crisis*, 29, 56–57 (Kindle ed. 2017) (hereinafter “Kinley, *Prophecy*”).

<sup>216</sup> See *Van Orden*, 545 U.S. at 689–90.

the “unbroken history” of religion in our country.<sup>217</sup> When religion is acknowledged within historical context, the values of the Establishment Clause are not disturbed.

Many public spaces incorporate religious language and symbolism with historical context. Monuments like the Lincoln Memorial, Jefferson Memorial, and Washington Monument are inscribed with Christian Bible verses.<sup>218</sup> Government buildings often contain similar acknowledgements. For example, the Library of Congress features the Giant Bible of Mainz and Gutenberg Bible.<sup>219</sup> Christian Bible verses are carved into its walls near a statute of Moses carrying the Ten Commandments.<sup>220</sup> The National Archives, the U.S. Supreme Court, and other federal courts contain similar Ten Commandments monuments.<sup>221</sup> This Court has recognized that even explicitly Christian language and symbols can take on secular

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<sup>217</sup> *Id.* at 678.

<sup>218</sup> Kinley, *Prophecy* at 56–57.

<sup>219</sup> *Id.* at 56.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 56–58.

meaning.<sup>222</sup> These acknowledgements have broader cultural value that warrant their continued existence.

Crosses can likewise be acknowledged in public when connected with our secular history. For instance, crosses have been used in city emblems. In *Weinbaum v. City of Las Cruces*, a city's emblem used three crosses to memorialize Mexican soldiers massacred during the city's founding.<sup>223</sup> The emblem was constitutional despite its religious roots due to its ties to local secular history.<sup>224</sup> In *Murray v. City of Austin*, the city's cross-centered emblem was also constitutional due to its "long-standing unique history" and connection with the founding family's coat of arms.<sup>225</sup> In contrast, the emblem in *Friedman v. Board of County Commissioners of Bernalillo County* lacked historical significance.<sup>226</sup> The radiant cross seal had no "credible secular historical explanation" and was merely advertising Catholicism.<sup>227</sup> Where context exists, "[e]ven a purely religious

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<sup>222</sup> *Kliebenstein v. Iowa Conf. of the United Methodist Church*, 663 N.W.2d 404, 408 (Iowa 2003) ("[T]he phrase 'spirit of Satan' has meaning in a secular, as well as sectarian, context.").

<sup>223</sup> 541 F.3d at 1022–23, 1033.

<sup>224</sup> *Id.* at 1033–34.

<sup>225</sup> 947 F.2d 147, 155 (5th Cir. 1991).

<sup>226</sup> 947 F.2d 777, 781 (10th Cir. 1985).

<sup>227</sup> *Las Cruces*, 541 F.3d at 1034 (citing *Friedman*, 947 F.2d at 781).

symbol may acquire independent historical significance by virtue of its being associated with significant non-religious events.”<sup>228</sup> The cross, when used in tandem with history, can be acknowledged in public life without violation.<sup>229</sup>

The Peace Cross has the necessary historical linkage to exist in public life. Unlike the biblical quotes, Ten Commandments, and religious credos found throughout government, the Peace Cross contains no religious command.<sup>230</sup> Instead, the Peace Cross draws on our secular history, like the emblems in *Las Cruces* and *City of Austin*.<sup>231</sup> Due to its historical grounding, the Peace Cross—like many other public acknowledgements of religion—is a proper public memorial.

The background of the Peace Cross satisfies the history analysis of the legal judgment test.<sup>232</sup> The cross’s adoption as a symbol during World War I and effectiveness as a memorial make it an appropriate symbol in public life.<sup>233</sup> The Peace Cross stands on this historical

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<sup>228</sup> *Ellis v. City of La Mesa*, 990 F.2d 1518, 1526 (9th Cir. 1993).

<sup>229</sup> *See id.*

<sup>230</sup> *See App.* at 3–5.

<sup>231</sup> *Las Cruces*, 541 F.3d at 1033–34; *Austin*, 947 F.2d at 155.

<sup>232</sup> *See Van Orden*, 545 U.S. at 683.

<sup>233</sup> *See H.R. 16*, 68th Cong. § 1; Koby, *Memorializing* at 134.

meaning, passing the first hurdle of *Van Orden*'s test. This history is not just implicit; it is reflected in the nature of the Peace Cross. Its features, placement, founding, and use all carry this historical background to the foreground of the Monument.

**B. The Peace Cross's Nature Conveys its Underlying Secular Context.**

Under the legal judgment test, this Court must next consider the nature of the Peace Cross. Three commonly analyzed factors evidence the Peace Cross's secular nature. First, the Peace Cross's features and placement among other memorials give it secular context.<sup>234</sup> Second, the Monument was founded to commemorate veterans.<sup>235</sup> While some religious language was involved in its development, militaristic honor was the driving focus.<sup>236</sup> Last, the Peace Cross has been consistently used for secular events.<sup>237</sup> Only a handful of religious events have taken place there, compared to countless patriotic celebrations.<sup>238</sup> These three characteristics show

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<sup>234</sup> See, e.g., *ACLU of Ky. v. Grayson Cty.*, 591 F.3d 837, 854–55 (6th Cir. 2010); *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1174–75 (W.D. Wash. 2005).

<sup>235</sup> App. at 4–5.

<sup>236</sup> App. at 4–5.

<sup>237</sup> App. at 43–44.

<sup>238</sup> App. at 43–44.

an overall secular nature that conveys the history behind the Monument.<sup>239</sup> Therefore, the Peace Cross satisfies the nature analysis of the legal judgment test and should be permitted to stand.

1. *The Peace Cross's features and placement among other war memorials offer appropriate context.*

The Peace Cross's physical features and placement weigh in favor of its secular nature. Courts recognize that a monument's religious connotations can be negated by secularizing features and settings.<sup>240</sup> When surrounded by this context, a monument is more likely to be secular in nature.<sup>241</sup> Key features of the Peace Cross and its placement in Veterans Memorial Park show its secular nature.<sup>242</sup> As a result, the Peace Cross is offered in secular context and does not violate the Establishment Clause.

Courts have treated monuments and displays with secular context favorably. This context can arise from secularizing features or placement among other secular displays.<sup>243</sup> Features were highlighted in *Card v. City of Everett*.<sup>244</sup> There, the Ten Commandments

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<sup>239</sup> See *Van Orden*, 545 U.S. at 683.

<sup>240</sup> *E.g.*, *id.* at 691–92.

<sup>241</sup> *Id.*

<sup>242</sup> App. at 3, 36.

<sup>243</sup> *Card*, 386 F. Supp. 2d at 1174–75.

<sup>244</sup> *Id.* at 1174.

monument incorporated an American flag and eagle, suggesting a patriotic nature.<sup>245</sup> Further, the monument was placed near a war memorial and behind shrubbery.<sup>246</sup> This setting gave context to the monument and prevented its use for religious events.<sup>247</sup> Placement was also emphasized in *ACLU of Kentucky v. Grayson*.<sup>248</sup> The court noted the Ten Commandments were displayed with other secular documents, a law-oriented explanation, and historical photographs.<sup>249</sup> These facts showed the display was not religious in nature.<sup>250</sup> These cases illustrate the importance of physical features and setting in establishing context.

In contrast, courts have been unfavorable when monuments with religious connotations offer no context. In *Gonzales v. Northern Township of Lake County*, a city erected a crucifix in a public park.<sup>251</sup> While the crucifix initially had a dedication plaque, it was lost and never replaced.<sup>252</sup> It was not displayed alongside other monuments

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 1175.

<sup>247</sup> *Id.* at 1173.

<sup>248</sup> 591 F.3d at 841–42.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 840–41.

<sup>251</sup> 4 F.3d 1412, 1414 (7th Cir. 1993).

<sup>252</sup> *Id.*

and had no historical significance.<sup>253</sup> As a result, the crucifix did not have “secular trappings sufficient to neutralize its religious message.”<sup>254</sup> Monuments should be designed and placed in secular context to avoid such violations.

The Peace Cross is surrounded by historical context that overwhelms any sectarian connotations.<sup>255</sup> Both sides of the Monument center on the American Legion symbol; a red star on a blue background with “U.S.” in gold.<sup>256</sup> The base features patriotic language; “VALOR; ENDURANCE; COURAGE; [and] DEVOTION.”<sup>257</sup> A plaque identifies the Monument as a World War I memorial to 49 local veterans.<sup>258</sup> An American flag also flies adjacent to the Peace Cross.<sup>259</sup> These features are similar to those in *Card* and *Grayson*.<sup>260</sup> Regarding placement, the Peace Cross is placed on a highway median.<sup>261</sup> While the Iowa Court of Appeals is correct this prevents drivers from parking directly at the site, it also prevents its

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 1423.

<sup>255</sup> *See App.* at 53.

<sup>256</sup> *App.* at 3.

<sup>257</sup> *App.* at 3.

<sup>258</sup> *App.* at 3.

<sup>259</sup> *App.* at 3.

<sup>260</sup> *Grayson*, 591 F.3d at 841–42; *Card*, 386 F. Supp. 2d at 1175.

<sup>261</sup> *App.* at 3.

use for religious services.<sup>262</sup> Further, the Peace Cross's inclusion in Veterans Memorial Park shows its secular nature.<sup>263</sup> The area includes monuments to veterans of World War II, Korea, and Vietnam and victims at Pearl Harbor and the World Trade Centers.<sup>264</sup> All these monuments comprise the Star-Spangled Banner National Historical Trail.<sup>265</sup> The complex walks visitors through our historic sacrifices and change as a country. In context, the Peace Cross is just one chapter in the story of how the American people have dealt with war, loss, and change.

Respondents claim this context is insufficient. They contend its cross-shape dwarfs its patriotic features, among which the plaque is obscured by bushes.<sup>266</sup> Further, its placement near a highway makes the cross-shape visible to drivers who are unable to see some features at a distance.<sup>267</sup> Other cross-centered public monuments have been upheld despite being in high-traffic areas and being larger than the

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<sup>262</sup> *See Card*, 386 F. Supp. 2d at 1175; App. at 53.

<sup>263</sup> *See App.* at 36.

<sup>264</sup> App. at 36.

<sup>265</sup> App. at 36.

<sup>266</sup> *See App.* at 46, 54.

<sup>267</sup> *See App.* at 53–54.

Peace Cross.<sup>268</sup> Like the Ten Commandments in *Van Orden*, the Peace Cross does have religious connotations.<sup>269</sup> But its form reflects its secular role in history, not its religious roots.<sup>270</sup> This is supported by its prominent and ever-present patriotic features, unlike the crucifix in *Gonzales*.<sup>271</sup> While some features may not be visible from a distance, drivers may be able to see other historic memorials in the area which afford context.<sup>272</sup> Therefore, both visitors up-close and afar can appreciate the historic role of the Peace Cross. As a result, Respondents' attempt to deemphasize the Peace Cross's context should fail.

2. *The Peace Cross was founded to honor fallen World War I soldiers.*

In understanding a monument's nature, courts often look to its founding. When a monument was designed for a secular role, it is more likely secular in nature.<sup>273</sup> In contrast, monuments are often

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<sup>268</sup> See, e.g., *Meyer v. City of Okla. City*, 496 P.2d 789, 790 (Okla. 1972) (holding that a 50-foot cross on public fair grounds was permissible).

<sup>269</sup> See *Van Orden*, 545 U.S. at 688–89.

<sup>270</sup> See *id.* at 690.

<sup>271</sup> See *Gonzales*, 4 F.3d at 1414; App. at 3.

<sup>272</sup> See App. at 36.

<sup>273</sup> See, e.g., *O'Connor v. Washburn Uni.*, 416 F.3d 1216, 1229–30 (10th Cir. 2005).

constructed to promote religion and only later given secular meaning.<sup>274</sup> This change in function warrants skepticism of the monument's nature.<sup>275</sup> The Peace Cross was conceived as a secular place to remember fallen troops.<sup>276</sup> While some religious activity was present at its founding, it was not prominent or publicly sanctioned.<sup>277</sup> Therefore, the Peace Cross has had a consistent, secular role in Sioux County since its founding.

Courts have treated monuments with secular foundations favorably. In *O'Connor v. Washburn University*, a student challenged a statute on a public campus as anti-Catholic.<sup>278</sup> The court disagreed, finding the statute was selected to promote intellectual and artistic discussion.<sup>279</sup> Similarly, in *Card*, the Ten Commandments monument was founded to promote civic morality.<sup>280</sup> Despite this secular role, the monument's founding involved religion.<sup>281</sup> The monument's donors had an interest in promoting religion and clergy led religious

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<sup>274</sup> See, e.g., *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 618 (9th Cir. 1994).

<sup>275</sup> See *id.*

<sup>276</sup> See App. at 3–4.

<sup>277</sup> See App. at 6–7.

<sup>278</sup> *O'Connor*, 416 F.3d at 1219.

<sup>279</sup> *Id.* at 1231.

<sup>280</sup> *Card*, 386 F. Supp. 2d at 1176.

<sup>281</sup> *Id.* at 1175.

prayers at its unveiling.<sup>282</sup> The city, however, did not have religious motives in accepting the monument and did not publicly sanction the prayers.<sup>283</sup> The court found minor religious participation did not overwhelm the secular nature of the monument.<sup>284</sup> It held the Establishment Clause “does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercise . . . as to have meaningful and practical impact.”<sup>285</sup>

In contrast, courts have been unfavorable to monuments founded as religious sites. In *Separation of Church and State Committee v. City of Eugene*, the court reviewed a cross in a public park erected to promote religion.<sup>286</sup> Once litigation ensued, the city acquired the cross, placed a plaque at its base, and declared it a war memorial.<sup>287</sup> The court was not swayed by this change; the cross’s founding as a religious site showed its overall nature was not

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<sup>282</sup> *Id.* at 1176.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).

<sup>286</sup> *Eugene*, 93 F.3d at 618.

<sup>287</sup> *Id.*

secular.<sup>288</sup> Monuments without these shifting roles are more likely to be permissible.

The Peace Cross was founded to honor local soldiers. Like the statute in *O'Connor*, the Peace Cross had a secular role at its founding.<sup>289</sup> While Sioux County Memorial Committee members (the “Organizers”) employed religious language, their goal was to “commemorat[e] the memory of those who have not died in vain” and create a memorial “that will stand for time and eternity, like the principles they defended.”<sup>290</sup> The American Legion—a veterans organization—secured the final stages of funding to support this cause.<sup>291</sup> At the unveiling, public officials spoke on war and peace, accompanied by patriotic songs.<sup>292</sup> The only religious involvement was the invocation and benediction of a lone clergymen.<sup>293</sup> Like the unveiling in *Card*, this religious activity was minor and unsanctioned.<sup>294</sup> The religious language of the Organizers—whose involvement ceased during fundraising—does not have a “meaningful

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<sup>288</sup> *Id.* at 626.

<sup>289</sup> *See O'Connor*, 416 F.3d at 1231; App. at 3–4.

<sup>290</sup> App. at 4.

<sup>291</sup> App. at 5–6.

<sup>292</sup> App. at 6–7.

<sup>293</sup> App. at 7.

<sup>294</sup> *See Card*, 386 F. Supp. 2d at 1176; App. at 7.

and practical impact” on the overall nature of the Peace Cross.<sup>295</sup> The focus of all involved, even those with religious affinities, was to honor local veterans.<sup>296</sup> Its acquisition by the Commission was similarly not religious, but to regulate traffic.<sup>297</sup> There is no indication that the Commission adopted or supported any religious notions.<sup>298</sup> In context, the Peace Cross’s founding and acquisition were not religious, evidencing its overall secular nature.

Respondents claim the Peace Cross has religious origins. Unlike the cross in *City of Eugene*, the Peace Cross is not a retroactive memorial, but a true tribute to those lost.<sup>299</sup> Undoubtedly, the Organizers employed reverent and religious language in their efforts.<sup>300</sup> But they were acting in the immediate aftermath of the war.<sup>301</sup> They were not commemorating long-since-dead, faceless soldiers, but their neighbors, friends, and family. The Iowa Court of

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<sup>295</sup> App. at 5–6.

<sup>296</sup> App. at 4.

<sup>297</sup> App. at 7.

<sup>298</sup> *See Sumnum*, 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.”).

<sup>299</sup> *Eugene*, 93 F.3d at 618; App. at 4.

<sup>300</sup> App. at 4–5.

<sup>301</sup> App. at 4.

Appeals overlooks this context when analyzing the language used.<sup>302</sup> This language's presence does not diminish the Organizers' efforts; it shows the passion with which they pursued their secular goal of honoring these veterans. As a result, Respondent's attempt to paint the Peace Cross's founding as religious should fail.

3. *The Peace Cross has been almost exclusively used for secular events.*

The Peace Cross's nature is further evidenced by its secular use. Passive monuments are partially defined by the events taking place around them.<sup>303</sup> When a monument has primarily hosted secular events, it is more likely secular in nature.<sup>304</sup> The Peace Cross has often hosted patriotic events while only holding three religious services in in nearly a century.<sup>305</sup> As a result, the Peace Cross should continue to be a site of remembrance and patriotism.

Courts have treated monuments and displays that host secular events favorably. In *Okrand v. City of Los Angeles*, the city's seasonal display in town hall featured the Katowitz Menorah; a polish artifact

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<sup>302</sup> See App. at 51.

<sup>303</sup> See, e.g., *Trunk*, 629 F.3d at 1101.

<sup>304</sup> See, e.g., *Okrand v. City of L.A.*, 254 Cal. Rptr. 913, 917–18 (App. Ct. 1989).

<sup>305</sup> App. at 43–44.

recovered from Nazi Germany.<sup>306</sup> The court highlighted the Menorah's use for educational, cultural, and artistic purposes.<sup>307</sup> While some Chanukah ceremonies were held there, the court found its historical use predominated.<sup>308</sup> As a result, the Katowitz Menorah did not violate the Establishment Clause.<sup>309</sup> Monuments and displays can show a predominate history of secular use even if some religious events have occurred.<sup>310</sup>

In contrast, courts have been unfavorable to monuments that frequently host religious ceremonies. In *Trunk v. City of San Diego*, the Mount Soledad Cross hosted religious services for nearly seven decades.<sup>311</sup> After litigation ensued, the Cross was re-designated as a war memorial and began hosting memorial services.<sup>312</sup> Prior to this change, only a handful of memorial services ever occurred.<sup>313</sup> The court found that a few scattered memorial services did not overcome

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<sup>306</sup> 254 Cal. Rptr. at 914.

<sup>307</sup> *Id.* at 918.

<sup>308</sup> *Id.* at 915, 918.

<sup>309</sup> *Id.* at 922.

<sup>310</sup> *See id.*

<sup>311</sup> *Trunk*, 629 F.3d at 1101.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

its predominate religious use.<sup>314</sup> Sites of frequent religious service often lack this secular nature.

The Peace Cross has been almost exclusively used for secular memorial services.<sup>315</sup> Even the Iowa Court of Appeals agreed that its use has been predominately secular as the site of Memorial Day and Veterans' Day celebrations.<sup>316</sup> These events include patriotic activities such as a presentation of colors, national anthem, singing, laying of wreaths, and public speeches, overshadowing the occasional invocation or benediction.<sup>317</sup> Over nearly a hundred years, the Peace Cross has only hosted three religious services, all confined to August of 1931.<sup>318</sup> This single month—almost nine decades ago—occurred before the Commission owned the Monument.<sup>319</sup> These services are fewer and more remote than those in *Okrand*.<sup>320</sup> This scenario inverts the facts of *Trunk*; a few isolated religious services in the distance past cannot overwhelm the Peace Cross's predominant secular use.<sup>321</sup>

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<sup>314</sup> *Id.*

<sup>315</sup> App. at 43–44.

<sup>316</sup> App. at 43, 51.

<sup>317</sup> App. at 9.

<sup>318</sup> App. at 43–44.

<sup>319</sup> App. at 7, 43–44.

<sup>320</sup> *See Okrand*, 254 Cal. Rptr. at 918.

<sup>321</sup> *See Trunk*, 629 F.3d at 1101.

This consistent history of secular use establishes the Monument’s secular presence.

Respondents claim that the occasional inclusion of invocations or benedictions taint the Peace Cross.<sup>322</sup> These religious acknowledgements have a permissible public function, like opening a legislature with a prayer.<sup>323</sup> These introductory prayers, when “solemn and respectful in tone,” invite those involved “to reflect upon shared ideals and common ends[.]”<sup>324</sup> Where no hostility is shown, these ceremonial acknowledgments can have a pacifying and unifying effect.<sup>325</sup> This is the effect the invocations at the Peace Cross seek; not exclusion, but quiet reflection. As a result, Respondent’s attempt to inflate the religious use of the Peace Cross must fail.

The Peace Cross’s secular history is reflected in its nature.<sup>326</sup> The features and placement of the Monument communicate its incorporation into our broader military history.<sup>327</sup> From its founding, the Peace Cross was devoted to showing Sioux County veterans’ role

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<sup>322</sup> See App. at 9.

<sup>323</sup> See *Town of Greece v. Galloway*, 572 U.S. 565, 582–83 (2014).

<sup>324</sup> See *id.*

<sup>325</sup> See *id.*

<sup>326</sup> See *Van Orden*, 545 U.S. at 683.

<sup>327</sup> App. at 3–4, 8.

in that history.<sup>328</sup> This memorializing nature is evidenced by the Monument's continued use as a site of patriotic celebration.<sup>329</sup> These characteristics show the Peace Cross's overall secular nature. As a result, the Peace Cross satisfies both the history and nature analyses of the *Van Orden* legal judgment test.<sup>330</sup> Therefore, this Court should reverse the decision of the Iowa Court of Appeals and reinstate the district court's grant of summary judgment to the Commission.<sup>331</sup>

**C. Alternatively, the Peace Cross Remains a Proper War Memorial under the *Lemon* Test.**

If this Court applies the *Lemon* test, the Peace Cross is still constitutional under the Establishment Clause.<sup>332</sup> First, the Peace Cross was constructed and obtained for recognized secular purposes; honoring veterans and traffic safety.<sup>333</sup> Second, the primary effect of the Peace Cross is historical, not religious.<sup>334</sup> Its inclusion in Veterans Memorial Park and use as a site of patriotic celebrations evidence its

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<sup>328</sup> App. at 3–4.

<sup>329</sup> App. at 43–44.

<sup>330</sup> See *Van Orden*, 545 U.S. at 683.

<sup>331</sup> App. at 2, 61.

<sup>332</sup> See *Lemon*, 403 U.S. at 612–13.

<sup>333</sup> App. at 4, 7; see *Satawa v. Macomb Cty. Rd. Comm'n*, 689 F.3d 506, 515 (6th Cir. 2012); *Trunk*, 629 F.3d at 1108.

<sup>334</sup> See *Salazar*, 559 U.S. at 721.

secular role in the community.<sup>335</sup> Last, government entanglement with the Peace Cross has been minor and appropriate.<sup>336</sup> The Monument is not located near any government offices and requires minimal funding for maintenance and lighting.<sup>337</sup> Considering these prongs, a reasonable observer would conclude the Monument is secular.<sup>338</sup> Therefore, the Peace Cross passes the more subjective *Lemon* test and is a proper war memorial.

The first prong of *Lemon* is satisfied due to the Peace Cross's secular purpose as a war memorial and acquisition to manage traffic.<sup>339</sup> This prong is a low bar which can be passed by showing a "plausible secular purpose," even if not exclusive.<sup>340</sup> While pretextual motives are invalid, courts should not trivially assign unconstitutional motives to governments.<sup>341</sup> In this case, both the district court and Iowa Court of Appeals agreed the Peace Cross has a secular purpose in honoring veterans.<sup>342</sup> This purpose has satisfied *Lemon*'s first

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<sup>335</sup> See App. at 43–44.

<sup>336</sup> See *Rudd v. Ray*, 248 N.W.2d 125, 126 (Iowa 1976).

<sup>337</sup> See App. at 10, 43.

<sup>338</sup> See *Allegheny*, 492 U.S. at 632 (O'Connor, J., concurring).

<sup>339</sup> See App. at 4, 7.

<sup>340</sup> *Lynch*, 465 U.S. at 681, n.6; *Glassman v. Arlington Cty.*, 628 F.3d 140, 146 (4th Cir. 2010).

<sup>341</sup> *Id.* at 612.

<sup>342</sup> App. at 21, 47.

prong in other cases.<sup>343</sup> Further, the Commission had a valid purpose in maintaining traffic safety, which has also been recognized in other cases.<sup>344</sup> Therefore, the Peace Cross overcomes the low hurdle of *Lemon*'s first prong.

The second prong is also satisfied, as the Peace Cross has the primary effect of memorializing veterans. Like the menorah in *County of Allegheny*, the Peace Cross's placement among other war memorials gives it historical context.<sup>345</sup> Its prominent secular features convey a message of patriotism, resulting in its near exclusive use as a site of Memorial Day and Veterans' Day celebrations.<sup>346</sup> A reasonable observer, with reasonable memory, would not recall the three minor religious ceremonies at the Peace Cross in August of 1931.<sup>347</sup> Nor would general invocations held at the Peace Cross overshadow its meaning.<sup>348</sup> Instead, a reasonable observer would see its U.S.

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<sup>343</sup> See, e.g., *Trunk*, 629 F.3d at 1108.

<sup>344</sup> See *Satawa*, 689 F.3d at 525–26 (recognizing a city's interest in regulating traffic but holding a creche display would not disturb traffic); *Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 909 F. Supp. 1187, 1207 (S.D. Ind. 1995) (upholding policy denying religious display in city hall lobby due to traffic flow issues).

<sup>345</sup> See *Allegheny*, 492 U.S. at 632 (O'Connor, J., concurring).

<sup>346</sup> See App. at 3, 43–44.

<sup>347</sup> App. at 43–44; see *McCreary*, 545 U.S. at 866.

<sup>348</sup> App. at 6–7; see *Greece*, 572 U.S. at 582–83.

emblem, the American flag, and the dedication plaque as indicating its patriotic nature.<sup>349</sup> Further, its inclusion in Veterans Memorial Park emphasizes its role in a larger historic display.<sup>350</sup> Like the Ground Zero Cross, the Peace Cross invokes the hardship and hope felt by our nation at a time of loss.<sup>351</sup> This symbolism, in context, does not have a religious effect.<sup>352</sup> As a result, the Peace Cross satisfies the second prong of the *Lemon* test.

The Peace Cross's effect differs from other cross-centered monuments. For example, the cross in *ACLU v. Rabun County* was unadorned, isolated, and intensely bright.<sup>353</sup> The monument was intended to spread Christianity and hosted Easter celebrations.<sup>354</sup> This cross is the type of barren, contextless monument that the Iowa Court of Appeals is rightly concerned with.<sup>355</sup> But in contrast, the Peace Cross is surrounded by secularizing features and placed in historical context.<sup>356</sup> While the Peace Cross is lighted, the record does

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<sup>349</sup> See App. at 3.

<sup>350</sup> See App. at 8.

<sup>351</sup> See *Port Auth.*, 760 F.3d at 241.

<sup>352</sup> See *Lemon*, 403 U.S. at 613–14.

<sup>353</sup> *ACLU of Ga. v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1101 (11th Cir. 1983).

<sup>354</sup> *Id.*

<sup>355</sup> See *id.* at 1111; App. at 48.

<sup>356</sup> See App. at 3, 8.

not indicate this lighting “floods” the area or whether other monuments in Veterans Memorial Park are also lighted.<sup>357</sup> Further, the lighting is necessary for traffic safety.<sup>358</sup> As a result, the Peace Cross’s secular effect distinguishes it from other monuments.

The third *Lemon* prong is also satisfied due to the Peace Cross’s minimal government entanglement. Courts have looked at the extent of public funds expended and the monument’s proximity to government buildings.<sup>359</sup> Regarding funding, government expenditures are permissible so long as they do not advance or inhibit religion.<sup>360</sup> Courts do not focus on the mere expenditure, but instead the activity supported.<sup>361</sup> For example, this Court upheld a statute in *Rudd v. Ray* providing salaried chaplains to inmates.<sup>362</sup> The funds were not meant to promote Christianity, but merely to allow the free exercise of religion.<sup>363</sup> Here, the Peace Cross’s expenses are more detached from religion; the funds are for maintenance and road

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<sup>357</sup> See App. at 8, 10.

<sup>358</sup> App. at 7.

<sup>359</sup> See, e.g., *Bowen*, 487 U.S. at 623 (O’Connor, J., concurring).

<sup>360</sup> See *id.*

<sup>361</sup> See *id.*

<sup>362</sup> *Rudd*, 248 N.W.2d at 126.

<sup>363</sup> *Id.* at 133.

safety.<sup>364</sup> Like *Rudd*, these activities do not advance religion and are proper.<sup>365</sup> Regarding proximity, the Peace Cross does not stand near any government offices.<sup>366</sup> Therefore, a reasonable observer is less likely to intertwine the Monument with governmental policy.<sup>367</sup> These characteristics show the Peace Cross presents no threat of government entanglement.

Cross-centered monuments similar to the Peace Cross have also not threatened government entanglement. For example, the cross monument in *Meyer v. City of Oklahoma City* was located on public fair grounds and required landscaping and electrical expenses.<sup>368</sup> It was in a secular setting with a commercial atmosphere.<sup>369</sup> These characteristics obscured any religious messages.<sup>370</sup> Therefore, these minor expenditures were appropriate.<sup>371</sup> The Peace Cross's context is not commercial, but historic.<sup>372</sup> Its inclusion among other war

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<sup>364</sup> App. at 10.

<sup>365</sup> See *Rudd*, 248 N.W.2d at 133.

<sup>366</sup> App. at 3.

<sup>367</sup> See *Felix v. City of Bloomfield*, 841 F.3d 848, 852, 856–57 (10th Cir. 2016) (finding a Ten Commandments display in front of city hall would lead a reasonable observer to see an endorsement of religion).

<sup>368</sup> 496 P.2d at 790.

<sup>369</sup> *Id.* at 792–93.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> See App. at 3, 8.

memorials nullifies religious connotations.<sup>373</sup> Due to its minimal entanglement, the Peace Cross's use of public funds is appropriate.

The Peace Cross satisfies the *Lemon* prongs despite the test's flaws.<sup>374</sup> The Monument has always stood to honor local veterans who gave their lives in service to this country.<sup>375</sup> The effect of the Peace Cross is secular as a historical war memorial.<sup>376</sup> Its patriotic features and surrounding context would lead a reasonable observer to understand its message of national sacrifice, loss, and strength.<sup>377</sup> And its minimal use of funds is necessary for maintenance and safety.<sup>378</sup> The Iowa Court of Appeals erred in not acknowledging the historical context on which the Peace Cross stands.<sup>379</sup> While the *Van Orden* test better evaluates passive monuments and displays, this case does not turn on the test applied.<sup>380</sup> Under either test, the Peace Cross is constitutional and should stand.<sup>381</sup> For the 49 veterans lost in World War I; for the Sioux County residents who mourned them; and

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<sup>373</sup> App. at 43–44; see *Meyer*, 496 P.2d at 792–93.

<sup>374</sup> See *Lemon*, 403 U.S. at 612–13.

<sup>375</sup> See App. at 4–5.

<sup>376</sup> See App. at 43–44.

<sup>377</sup> See App. at 3, 43–44.

<sup>378</sup> See App. at 7.

<sup>379</sup> See App. at 61.

<sup>380</sup> See *Van Orden*, 545 U.S. at 686.

<sup>381</sup> See *id.*; *Lemon*, 403 U.S. at 612–13.

for onlookers to come, the Peace Cross should remain as a proud symbol of our history.

### **CONCLUSION**

History is valuable; our past informs the present and guides the future. The Peace Cross, along with the other monuments in Veterans Memorial Park, manifests a moment in our past. Defined by the crisis of World War I, it reflects common principles of unity and healing. Like many other religious acknowledgements in our culture, the Peace Cross conveys these broader values. An obelisk would trade the unity of our past for the divisiveness of our present. We must not rewrite the truths the Peace Cross embodies; that we are all united, that our spirit is unwavering, and that we owe our freedoms to those who died defending them.

For the foregoing reasons, we respectfully request this Court reverse the decision of the Iowa Court of Appeals and reinstate the district court's grant of summary judgment to the Commission.

### **REQUEST FOR ORAL SUBMISSION**

The Commission requests oral arguments be scheduled and heard in this case.

Respectfully submitted,

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**#168**

## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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Dated: May 1, 2020

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