No. 17-13025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMANDA KONDRAT'YEV, et al.

Plaintiffs-Appellees,

v.

CITY OF PENSACOLA, FLORIDA, et al.

Defendants-Appellants.

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

BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF DEFENDANTS-APPELLANTS SEEKING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for *Amicus Curiae* Foundation for Moral Law, Inc. represents that it does not have parent entities and does not issue stock. Counsel further certifies that, to the best of his knowledge, the following persons and entities have an interest in this appeal:

Allen, Norton & Blue, PA (law firm for Appellants)

American Humanist Association (law firm for Appellees)

Becket Fund for Religious Liberty (law firm for Appellants)

Beggs & Lane, RLLP (law firm for Appellants)

City of Pensacola, Florida (Appellant)

Clark, Matthew J. (counsel for *Amicus Curiae*)

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Freedom From Religion Foundation (law firm for Appellees)

Foundation for Moral Law, Inc. (law firm for *Amicus Curiae*)

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Kahn, Charles J. (Magistrate Judge)

Kondrat'yev, Amanda (Appellee)

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Ryland, Andre (Appellee)

Suhor, David (Appellee)

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Respectfully submitted,

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Moral Law ("the Foundation") is a public interest organization that defends the unalienable right to acknowledge God and promotes an originalist understanding of the Constitution. The Foundation has an interest in this case because it involves a constitutional challenge to a publicly displayed cross based on what the Foundation believes to be an erroneous understanding of the Establishment Clause.

The Foundation believes that its brief would be useful to this Court for two reasons. First, the Supreme Court's Establishment Clause jurisprudence is, with all due respect to that Court, inconsistent. This circumstance makes it exceptionally difficult for intermediate courts to apply its precedents. Accordingly, the Foundation believes this Court would benefit from an analysis of the published opinions of the five sitting justices who have supported a historical understanding of the Establishment Clause. Second, the Supreme Court's decision in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), left some room for intermediate courts to conduct an originalist analysis of the Establishment Clause, which this brief provides in Section II.

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[1] All parties have consented to the filing of this brief. Rule 29, Fed. R. App. P. Counsel for a party did not author this brief in whole or in part, and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. No person or entity other than Amicus Curiae and its counsel made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Supreme Court's current Establishment Clause jurisprudence is not only confusing, but also contradictory. Consequently, it is very difficult, if not impossible, for intermediate courts to apply that jurisprudence consistently. The framework governing Establishment Clause cases changes frequently, leaving intermediate courts in "Establishment Clause purgatory." *ACLU of Kentucky v. Mercer County*, 432 F. 3d 624, 636 (6th Cir. 2005). In order to answer the question of how a majority of the Supreme Court would decide this case, The Foundation believes it would be helpful to analyze the writings of the five sitting justices who have supported a historical approach to understanding the Establishment Clause.

Justice Thomas would uphold the constitutionality of the Bayview Cross because he believes that (1) the Establishment Clause should not have been incorporated against the States, and (2) in the alternative, the touchstone of Establishment Clause analysis is actual coercion, which is not present here. Justice Gorsuch, in his short time on the Court, has voted like Justice Thomas. He also appears to be more concerned with following the text of the Constitution than with following precedent. As a judge on the Tenth Circuit, he wrote two dissents in cases similar to this one, arguing that the Court's decisions in *Van Orden v. Perry*, 545 U.S. 677 (2005), and *Salazar v. Buono*, 559 U.S. 700 (2010), were more applicable than *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Based on this history,

Justice Gorsuch would probably uphold the constitutionality of the Bayview Cross, either under a textualist or a *Van Orden/Salazar* analysis.

Justice Alito, Justice Kennedy, and Chief Justice Roberts share several factors in common in their Establishment Clause jurisprudence: (1) a Court-created test must comport with the history of public religious displays rather than vice versa, (2) the government must neither discriminate against particular faiths nor communicate hostility towards religion by removing all religious displays from public property; and (3) the Constitution does not necessarily ban the cross, though a symbol of Christianity, from being displayed on public property. These justices each have other particularized attributes to their own jurisprudence, which are detailed below. Considering both their common and particular views of the Establishment Clause, these justices would vote to uphold the constitutionality of the Bayview Cross.

In addition, Tenth Circuit Judge Paul Kelly recently postulated that the Supreme Court's decision in *Town of Greece* allows intermediate courts to interpret the Establishment Clause in light of history rather than exclusively by the Court's formulaic tests. *Felix v. City of Bloomfield* 847 F.3d 1214, 1219-21 (10th Cir. 2017) (en banc) (Kelly, J., dissenting from the denial of rehearing en banc). Thus, in light of *Town of Greece*, an analysis of the Establishment Clause's original meaning would be helpful to this Court. The original intent of the

Establishment Clause was to prevent the establishment of coerced participation in a national church and not to remove passive symbols honoring God or portraying Christianity favorably from the public square. Because this case involves neither actual legal coercion nor the establishment of a church, the Bayview Cross passes constitutional muster under an originalist analysis.

ARGUMENT

I. A Majority of the Sitting Justices on the United States Supreme Court Would Uphold the Constitutionality of the Bayview Cross.

The Supreme Court's Establishment Clause jurisprudence is very difficult to apply consistently. Judges from this Court's sister circuits have repeatedly lamented the difficulty of making sense of the Supreme Court's precedents in this area. The following statements are illustrative.

> For more than four decades, courts have struggled with how to decide Establishment Clause cases, as the governing framework has profoundly changed several times.... This confusion has led our court to opine that the judiciary is confined to "Establishment Clause purgatory."

Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs, 788 F.3d 580, 596 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result).

> The case law that the Supreme Court has heaped on the defenseless text of the establishment clause is widely acknowledged, even by some Supreme Court justices, to be formless, unanchored, subjective and provide [sic] no guidance.

Doe ex rel. Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 872 (7th Cir. 2012) (Posner, J., dissenting).

> Whether *Lemon* . . . and its progeny actually create discernible tests, rather than a mere ad hoc patchwork, is debatable. The judicial morass resulting from the Supreme Court's opinions "raises the . . . concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections."

Green v. Haskell Cnty. Bd. of Comm'rs, 574 F.3d 1235, 1235 n.1 (10th Cir. 2009) (Kelly, J., dissenting from the denial of rehearing en banc) (quoting *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring)).

These judges are understandably frustrated. In theory, precedent is supposed to let the parties "know *before they act* the standard to which they will be held rather than be compelled to guess about the outcome of Supreme Court peek-a-boo." *United States v. Virginia*, 518 U.S. 515, 574 (1996) (Scalia, J., dissenting). About the only thing that is certain is that "a majority of the Justices ... have, in separate opinions, repudiated the brain-spun '*Lemon*' test." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting). But beyond that, not much is certain.

For that reason, the Foundation believes that it would be helpful to this Court to understand how the five justices on the Supreme Court who support a more historical approach would likely rule if confronted with this case. The

Foundation argues below that those justices would constitute a majority to uphold the constitutionality of the Bayview Cross.

A. Justice Thomas

Justice Thomas, in particular, is very dissatisfied with the confused state of the Court's Establishment Clause cases. In a 2011 dissent, he criticized the Court's unworkable framework, arguing that the Court's "jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases." *Utah Hwy. Patrol Ass'n v. American Atheists, Inc.*, 132 S. Ct. 12, 14 (2011) (Thomas, J., dissenting). He noted that under the Court's jurisprudence, "a cross displayed on government property violates the Establishment Clause ... except when it doesn't" *Id*. at 19 (citations omitted). "Thus, the *Lemon*/endorsement test continues 'to stal[k] our Establishment Clause jurisprudence' like 'some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.'" *Id.* at 15 (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment)).

Instead of wrestling with the Court's inconsistent jurisprudence, Justice Thomas believes that the Justices should return to the original public meaning of the First and Fourteenth Amendments by disincorporating the Establishment

Clause. "[T]he text and history of the Clause 'resists incorporation' against the States." *Town of Greece*, 134 S. Ct. at 1835 (Thomas, J., concurring in part and concurring in judgment) (citations and alteration omitted). Unlike the Free Exercise Clause, the Establishment Clause does not protect an *individual* right. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in judgment), but is instead a "federalism provision intended to prevent Congress from interfering with state establishments." *Id.*

Justice Thomas has argued in the alternative that even if the Establishment Clause applies to the states, "[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Town of Greece*, 134 S. Ct. at 1837 (Thomas, J., concurring in part and concurring in judgment) (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)). "[I]t is actual legal coercion that counts—not the 'subtle coercive pressures' allegedly felt by the respondents in this case[.]" *Id.* at 1838.

Applying the foregoing principles to this case, Justice Thomas would hold that the Establishment Clause is inapplicable to this case because the Fourteenth Amendment did not incorporate it against the states or their subdivisions such as the City of Pensacola. Even if it did, the plaintiffs were not legally coerced into supporting the Christian religion or worshipping in a certain manner under penalty

of law. Thus, Justice Thomas would hold that the Bayview Cross does not violate the Establishment Clause. *See Van Orden v. Perry*, 545 U.S. at 694 (Thomas, J., concurring) (finding that the mere presence of a Ten Commandments display, which offended the plaintiff, "involves no coercion and thus does not violate the Establishment Clause.").

B. Justice Gorsuch

While a judge on the Tenth Circuit, Justice Gorsuch wrote two dissents in religious display cases that indicate how he would vote on the issues in this case. First, in *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235 (10th Cir. 2009) (en banc), a three-judge panel of the Tenth Circuit struck down a Ten Commandments display using the *Lemon*/endorsement test. Then-Judge Gorsuch dissented from the denial of rehearing en banc. Noting that a majority of sitting Justices had expressly declined to follow *Lemon* in *Van Orden* and that several sister circuits had taken the same position, *Green*, 574 F.3d at 1244-45, Judge Gorsuch concluded: "Even if we can't be sure anymore what legal rule controls Establishment Clause analysis in these cases, we should all be able to agree at least that cases like *Van Orden* should come out like *Van Orden*. . . . [T]he most elemental dictate of legal reasoning always has been and remains: like cases should be treated alike." *Id.* at 1249.

Second, in *American Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010) (en banc), the Utah Highway Patrol Association had erected crosses on public land to memorialize state troopers who had fallen in the line of duty. A three-judge panel held that, under the *Lemon*/endorsement test, the displays violated the Establishment Clause. The full court refused to grant *en banc* rehearing. Judge Gorsuch, dissenting from the denial, criticized the court for following the *Lemon*/endorsement test instead of *Van Orden* and *Salazar*, even though both decisions were technically plurality opinions. *Davenport*, 637 F.3d at 1108, 1110. He concluded by questioning the Court's constitutional authority to deviate from the text of the Constitution, arguing that the test used to declare the displays unconstitutional "rests on *an uncertain premise*—that this court possesses the constitutional authority to invalidate not only duly enacted laws and policies that *actually* 'respect[] the establishment of religion,' U.S. Const. amend. I, but also laws and policies a reasonable hypothetical observer could *think* do so." *Id.* at 1110 (first emphasis added; alteration in original).

In his short tenure on the Court, Justice Gorsuch has suggested that he is more devoted to the text of the Constitution than to precedents that deviate from that text. *See. e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring in part) (questioning the Court's analytical framework and noting that the Free Exercise Clause "guarantees the free

exercise of religion, not just the right to inward belief (or status)"). He has also voted consistently with Justice Thomas on some significant cases. *See, e.g.*, *Pavan v. Smith*, 137 S. Ct. 2075, 2079-80 (2017) (Gorsuch, J., joined by Thomas, J., dissenting from a summary disposition holding that a same-sex "spouse" should have her name listed on a child's birth certificate); *Peruta v. California*, 137 S. Ct. 1995, 1996-2000 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari in Second Amendment case). His first opinion for the Court concluded with a reminder that a court's job is to apply the law rather than to amend it. *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1726 (2017) (holding that the role of the judiciary is "to apply, not amend, the work of the People's representatives"). Thus, it appears that the mantle of Justice Scalia rests on Justice Gorsuch.

In this case, Justice Gorsuch may be open to considering whether the Establishment Clause should be disincorporated. But even if he is not, his textualism demonstrates that he would be concerned with whether the Bayview Cross was an establishment of religion as understood by the plain language and original public meaning of the Establishment Clause, an analysis that would focus on actual coercion. Since coercion is not present in this case, Justice Gorsuch would likely not declare the display unconstitutional. Even if he were reluctant to rethink the Court's precedents, his writings in *Green* and *Davenport* indicate that

he would apply *Van Orden* and *Salazar* and thus find the Bayview Cross to be constitutional.

C. Justice Alito

Justice Alito prefers, where possible, an original-intent analysis of the Constitution. *See Town of Greece*, 134 S. Ct. at 1834 (Alito, J., concurring) (noting that inconsistency between historic practices during the Founding Era and any Supreme Court test "calls into question the validity of the test, not the historic practice"). Unlike Justice Thomas, however, Justice Alito has been reluctant to uproot precedent if it is well-settled. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3030-31 (2010) (Alito, J., for the plurality) (declining to reconsider whether the Bill of Rights should be incorporated through the Privileges or Immunities Clause of the Fourteenth Amendment instead of the Due Process Clause because the latter had been done "[f]or many decades"). However, he has stated that the Court's Establishment Clause jurisprudence needs clarification. *See Town of Greece*, 134. S. Ct. at 1831 (Alito, J., concurring) (lamenting that public officials are "puzzled by our often puzzling Establishment Clause jurisprudence"); *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2535 (2012) (statement of Alito, J. respecting denial of petitions for writs of certiorari) (noting that the "Court's Establishment Clause jurisprudence is undoubtedly in need of clarity").

In addition to seeking the Constitution's original intent and thus giving weight to historic practices, Justice Alito also appears to be inclined to approve religious displays whose purpose is to unite the community rather than dividing it. In *Town of Greece*, the Court upheld the constitutionality of opening town hall meetings with prayer by local ministers. 134 S. Ct. at 1815. Justice Alito concurred, noting that although the "first congressional prayer was emphatically Christian ... one of its purposes, and presumably one of its effects, was not to divide, but unite." *Id.* at 1833 (Alito, J., concurring). He noted that he would have voted differently if there was evidence of discrimination against ministers from other faiths. *Id.* at 1831.

Justice Alito has written separately in two cases involving public displays of crosses. In *Salazar*, he voted to uphold the constitutionality of a cross intended to honor fallen soldiers of World War I, notwithstanding that the cross was "the preeminent symbol of Christianity[.]" 559 U.S. at 725 (2010) (Alito, J., concurring in part and concurring in judgment). He noted that because the government did not seek certiorari review of the original injunction, the stand-alone cross would have had to come down but for the land-transfer in that case which he found to be a sufficient remedy. *Id.* 726-27. He also was concerned that the people would consider the government not neutral but *hostile* towards religion if the Court declared the display unconstitutional. *Id.* at 726.

In *Mount Soledad*, Justice Alito voted to deny certiorari in a case involving a cross like the one in *Salazar*, but only because there was not yet a final judgment in that case. *Mount Soledad*, 132 S. Ct. at 2536 (statement of Alito, J.). However, he noted that the constitutionality of the display, which was a "large white cross [that] has stood atop Mount Soledad in San Diego, California, since 1954 as a memorial to our Nation's war veterans" is "a question of substantial importance." *Id.* at 2535. He concluded by hinting that the government should petition for certiorari once a final judgment was in place. *Id.* at 2536.

Applying the foregoing principles, Justice Alito would hold that the public display of a cross is consistent with this nation's history and traditions. *See* City's brief at 55-57. As the City explains, the cross has served the important public purpose of bringing the community together. *Id.* at 17-23. The record contains no evidence that the City has discriminated against people of other faiths who have sought to gather in the park by the cross or to erect their own monuments. *Id.* at 22. Finally, the cross in Bayview Park does not stand alone, which was Justice Alito's concern in *Salazar*. Instead, other memorials and plaques are in the same park. *Id.* at 14. Thus, Justice Alito would find that the Bayview Cross is constitutional.

D. Justice Kennedy

Often viewed as the Court's swing vote, Justice Kennedy authored two of the Court's recent Establishment Clause opinions, both of which ruled in favor of

religious expression. In 2010, he authored the lead opinion in *Salazar v. Buono*, which was joined in full by Chief Justice Roberts and in large part by Justice Alito.[2] Justice Kennedy declined to apply *Lemon*. *Compare Salazar*, 559 U.S. at 708 (noting that the district court applied *Lemon*) *with id.* at 715-22 (conducting the analysis without any reference to *Lemon*).

As best as the Foundation can discern, three key factors influenced Justice Kennedy's decision. First, the cross was not solely a religious symbol but was also intended to honor fallen soldiers. "[A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Salazar*, 559 U.S. at 721. Second, drawing on Justice Breyer's concurring opinion in *Van Orden*, Justice Kennedy stated: "Time also has played its role. The cross had stood on Sunrise Rock for nearly seven decades before the statute was enacted. By then, the cross and the cause it commemorated had become intertwined in the public consciousness." *Id.* at 716. The third factor was the divisive effect of removing the cross. *Id.* at 716-17. While

[2] Justice Alito differed only in wanting to reverse and render rather than to reverse and remand. *Salazar*, 559 U.S. at 723 (Alito, J., concurring in part and concurring in judgment). Justices Scalia and Thomas were forced to concur in the judgment because they did not believe the Court had jurisdiction to address the merits. *See id.* at 735 (Scalia, J., joined by Thomas, J., concurring in judgment) (lamenting that Article III's jurisdictional limitations cost the Court "an opportunity to clarify the law").

Justice Kennedy reasoned that placing a cross on top of a city hall year round would be an issue of concern, *id.* at 715, he noted that "[t]he Constitution does not oblige government to avoid any public acknowledgement of religion's role in society." *Id.* at 718-19.

Four years later, speaking for the Court in *Town of Greece*, Justice Kennedy stated:

> *Marsh* [*v. Chambers*, 463 U.S. 783 (1983)] stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.

134 S. Ct. at 1819.

Writing for a plurality,[3] he stated that government may "acknowledge the place religion holds in the lives of many private citizens" as long as it does not "proselytize or force truant constituents into the pews." *Id.* at 1825.

> That many appreciate these acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content.
>
> ....

[3] The majority divided over what constituted "coercion." Justices Thomas and Scalia argued that coercion had to be physical or legal; Chief Justice Roberts, Justice Kennedy, and Justice Alito seemed to think that some form of "really bad peer pressure" would suffice. Three judges of the Sixth Circuit Court of Appeals contend that Justice Thomas's concurrence controls on the coercion issue in *Town of Greece*. *Bormuth v. County of Jackson*, No. 15-1869, slip op. at 27-28 n.10 (6th Cir. Sep. 6, 2017) (en banc) (opinion of Griffin, Batchelder, and Thapar, JJ.).

> The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece.
>
> ....
>
> In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion.

Id. at 1825-26.

Applying the foregoing principles to this case, Justice Kennedy would likely find that the public display of the Bayview Cross has the dual purpose of acknowledging the role religion plays in the lives of citizens of Pensacola and honoring fallen soldiers. He would also note that the cross has stood without objection for 76 years, a period of time comparable to the history of the display in *Salazar*. Given these factors, he would probably be concerned that removing the cross would send the message that government is hostile towards religion. Like Justice Alito, he might have been concerned if the cross were the only display in the park or was on top of a government building, but such is not the case here. He also might be concerned had the City attempted to proselytize or discriminate against dissenters, but neither of those circumstances exists in this case. The plaintiffs took offense at the cross, but offense "does not equate to coercion." *Id.* Thus, Justice Kennedy would affirm the constitutionality of the cross.

E. Chief Justice Roberts

Chief Justice Roberts has written little on the Establishment Clause. In both *Salazar* and *Town of Greece*, he concurred with Justice Kennedy.[4] Logically, therefore, Chief Justice Roberts would vote the same as Justice Kennedy. Because Justice Kennedy would affirm the constitutionality of the Bayview Cross, so would Chief Justice Roberts.[5]

F. Conclusion: A Majority of Sitting Justices Would Affirm the Constitutionality of the Bayview Cross

Based on the above analysis, a majority of the Justices would affirm the constitutionality of the Bayview Cross. Justice Thomas would hold that the Establishment Clause did not apply, and even if it did, no physical or legal coercion occurred in this case. Justice Gorsuch would likely take a similar textualist and originalist approach or, at the very least, find under *Van Orden* and *Salazar* that the cross was constitutional. Noting that public displays of the cross are consistent with this nation's history, that the cross in this case did not stand alone in the park, that there is no evidence of discrimination towards non-Christians, and that the cross tends to unite the people of Pensacola rather than

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[4] Chief Justice Roberts' brief concurring opinion in *Salazar* did not address the Establishment Clause. 559 U.S. at 723 (Roberts, C.J., concurring).

[5] In *Trinity Lutheran Church, Inc. of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), Justice Roberts, writing for the majority, held that a state's interest in avoiding an Establishment Clause violation was not a state interest "of the highest order" that could justify a discriminatory policy against churches. *Id.* at 2024.

divide them, and that removing the cross under those circumstances would evince hostility towards religion, Justice Alito would affirm the constitutionality of the cross. Similarly, Chief Justice Roberts and Justice Kennedy, noting that the cross honored fallen soldiers and had stood for 76 years without objection, would affirm its constitutionality.

II. Under the Original Intent of the Establishment Clause, Which This Court May Consider, the Bayview Cross Is Constitutional.

As noted above, Judge Kelly of the Tenth Circuit has reasoned that *Town of Greece* allows judges of intermediate federal courts to analyze an Establishment Clause challenge in light of history instead of under *Lemon* and its progeny. *Felix*, 847 F.3d at 1216. Part of that analysis is to examine the Establishment Clause's original meaning. *Id.* at 1215-19. Viewed through a historical lens, the Bayview Cross would certainly pass constitutional muster.

A. The Establishment Clause Prohibited Congress from Establishing a National Church.

The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. Almost 200 years ago Justice Joseph Story explained the original intent of the Establishment Clause:

> The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the

> vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age.

3 Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

Story's commentary appears accurate because many of the States still had established churches at the time the First Amendment was ratified. "At the founding, at least six States had established religions[.]" *Newdow*, 542 U.S. at 50 (Thomas, J., concurring in judgment) (citing Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1437 (1990)). The hallmark of those establishments was "'coercion of religious orthodoxy and financial support *by force of law and threat of penalty*.'" *Id.* at 52 (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)). Usually this meant that "attendance at the state church was required" and that "only clergy of the official church could lawfully perform sacraments[.]" *Id.* (quoting *Lee*, 505 U.S. at 640-41) (Scalia, J., dissenting)). Thus, as "strange as it sounds, an incorporated Establishment Clause prohibits exactly what the Establishment Clause protected—state practices that pertain to 'an establishment of religion.'" *Newdow*, 542 U.S. at 51. Regardless of whether the Establishment Clause was properly incorporated against the states,[6] the evidence suggests that the public would have understood the

[6] As a side note, the Foundation finds Justice Thomas's incorporation analysis to be persuasive. For further reading, *see* Martin Wishnatsky, *The Disincorporation*

Establishment Clause as prohibiting the establishment of a church through legal coercion.

For many of the Founders, the belief that the federal government should not coerce people into supporting a church was not based merely on considerations of federalism, but on the belief that there are matters over which only God is sovereign. *See, e.g.*, *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 64 (1947) (Rutledge, J., dissenting) (App'x) (reproducing James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785)); 3 Story, *Commentaries*, at § 1870 ("The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well of revealed religion."); *Newdow*, 542 U.S. at 54 (Thomas, J., concurring in part and concurring in judgment) (noting that true jurisdictional separation of church and state "clearly stem from arguments reflecting the concepts of natural law, natural rights, and the social contract between government and a civil society ... rather than the principle of nonestablishment in the Constitution."). Thus, the First Amendment prohibition against the legal imposition of a national religion did not arise from political compromise, but from the notion that the duties that man owes to God are not subject to government definition or enforcement.

Proclamation: Emancipating the Establishment Clause from the Fourteenth Amendment, 5 Faulkner L. Rev. 259 (2014).

Applying the foregoing principles to this case, the donation of the Bayview Cross to a public park in Pensacola by a private organization was not a coercive "establishment of religion" as understood by the Framers. The cross obviously is not a church. The City forces nobody to come to the cross and worship God in a Christian manner (or any manner for that matter). The people who come to the park are free to either ignore the cross or take the opportunity to reflect on any religious beliefs that they may hold, but coercion is not part of the equation at all. Given that the City has not established a church or forced anyone within its jurisdiction to worship or do anything of a religious nature because of the cross, no constitutional violation exists.

B. The Establishment Clause Did Not Prohibit the Government from Encouraging Christianity or from Acknowledging the Sovereignty of God.

This last point requires little elaboration, since it naturally flows from the previous point. If the Establishment Clause only prohibits the government from coercing belief, then it does not prohibit the public displays of religious symbols, including those that encourage Christianity or recognize the sovereignty of God. As Justice Story said,

> Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to

> hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

3 Story, *Commentaries*, at § 1868.

The Northwest Ordinance, which the United States Code designates as one of the "organic laws" of our country, declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Yale Law School Avalon Project, Northwest Ordinance, § 14, art. 6 (July 13, 1787), http://avalon.law.yale.edu/18th_century/nworder. Historian David Barton argues that the Northwest Ordinance is "[p]erhaps the most conclusive historical demonstration of the fact that the Founders never intended the federal Constitution to establish today's religion-free public arena." *Original Intent* 47 (5th ed. 2008). The Framers of the Ordinance were also the Framers of the First Amendment. *Id.*

The Founders publicly acknowledged God and praised Christianity. George Washington advised the Delaware Indian Chiefs: "You do well to wish to learn ... above all ... the religion of Jesus Christ.... Congress will do everything to assist you in this wise intention." Barton, at 174. Thomas Jefferson, who was not an orthodox Christian, attended church at the Capitol. *Id.* at 125. John Adams stated: "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." *Id.* at 188. James Madison said, "And to the same Divine Author of every good and perfect gift we are indebted for all

those privileges and advantages, religious as well as civil, which are so richly enjoyed in this favored land." *Id.* Thus, the Founders not only permitted but encouraged the propagation of Christianity and the public recognition of God.

A public display of a passive monument like a cross, which is a symbol of Christianity, is not offensive to the Establishment Clause. Even if some of the Founders had personal doubts about the truths of Christianity or the nature of the Gospel, they still recognized the benefits that Christianity conferred on society. Thus, as long as no coercion was involved, the Founders would not have objected to the public display of a cross. Neither does the First Amendment in light of its original meaning. As Judge Vinson stated, "[L]ook[ing] to what the Founding Fathers intended ... the cross is certainly constitutional." *Kondrat'yev v. City of Pensacola*, No. 16-195 (N.D. Fla. June 19, 2017) (slip opinion at 10).

CONCLUSION

A five-Justice majority of the Supreme Court is likely to agree that the Bayview Cross does not violate the Establishment Clause. Because the Founders agreed that religion and morality were indispensable supports of the new government, they also would have had no objection to the Bayview Cross.

The Foundation respectfully requests that the judgment of the district court be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. Rule 32-4, this brief contains 5,592 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on October 3, 2017, I caused the foregoing to be filed electronically via the Court's electronic filing system, which served it upon the following registered counsel of record for the parties:

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