FIRST AMENDMENT — ESTABLISHMENT CLAUSE — EN BANC FOURTH CIRCUIT DENIES REHEARING OF HOLDING THAT CROSS-SHAPED WORLD WAR I MEMORIAL VIOLATES ESTABLISHMENT CLAUSE. — *American Humanist Ass'n v. Maryland-National Capital Park & Planning Commission*, 891 F.3d 117 (4th Cir.) (mem.), *cert. granted*, 139 S. Ct. 451 (2018) (mem.).

There is a longstanding tension in Supreme Court Establishment Clause[1] jurisprudence between avoiding the state-sponsored promotion of religion[2] and avoiding court-ordered destructions of old monuments.[3] Recently, in *American Humanist Ass'n v. Maryland-National Capital Park & Planning Commission*,[4] the Fourth Circuit refused to reconsider en banc a panel decision holding that an over-ninety-year-old World War I memorial shaped like a cross violated the First Amendment.[5] The Supreme Court granted certiorari to address how courts should analyze passive monuments.[6] The Fourth Circuit's decision demonstrates that there is ongoing confusion about the relationship between competing doctrinal tests and that this lack of doctrinal clarity creates significant problems.

The disarray in *American Humanist Ass'n* (*AHA*) arises primarily out of a tension between two cases. *Lemon v. Kurtzman*[7] created a three-prong test that must be satisfied to uphold government actions challenged under the Establishment Clause: (1) there must be "a secular legislative purpose"; (2) the "principal or primary effect must be one that neither advances nor inhibits religion";[8] and (3) there must not be "an excessive government entanglement with religion."[9] *Van Orden v. Perry*[10] questioned this test in a controversy over a Ten Commandments monument at the Texas Capitol; in his concurrence, Justice Breyer suggested that no test, only "legal judgment" informed more by context than by doctrine, could resolve the dispute.[11]

Private citizens in Prince George's County, Maryland, began raising money in 1918, long before *Lemon*, to construct a four-story cross with

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[1] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

[2] *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[3] *See* Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment).

[4] 891 F.3d 117 (4th Cir. 2018) (mem.).

[5] *Id.*

[6] 139 S. Ct. 451 (2018) (mem.).

[7] 403 U.S. 602.

[8] *Id.* at 612 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)). For an overview of how the "principal effect" test has been interpreted as a "reasonable observer" test, see Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 80 & n.111 (2017).

[9] *Lemon*, 403 U.S. at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[10] 545 U.S. 677 (2005).

[11] *Id.* at 700 (Breyer, J., concurring in the judgment).

a plaque to honor forty-nine fallen "World War I soldiers from the county."[12] The fundraiser's pledge sheet included language affirming "the existence of one god."[13] When the project ran out of money in 1922, the American Legion took over the project, which was finished in 1925, and held a Christian prayer service at the dedication.[14] The Cross historically has been used for memorial services that included Christian prayer and occasionally was used for Christian Sunday services.[15] However, it also contains secular symbols, such as Legion symbols near the top and the words "valor," "endurance," "courage," and "devotion" inscribed on its base.[16] The Legion plaque has faded over time.[17] In 1961, the Maryland-National Capital Park and Planning Commission (the "Commission"), a state entity, acquired title to the Cross and the underlying land because of safety concerns and has since spent money on the Cross's maintenance.[18] The Cross is "located in the median of a three-way highway intersection in Bladensburg, Maryland"[19] and forms part of a veterans memorial park that includes monuments to veterans of other wars.[20] Between 200 feet and one-half mile away, there are memorials for the War of 1812, World War II, the Korean War, the Vietnam War, and September 11.[21] The American Humanist Association ("AHA") sued the Commission for violating the Establishment Clause by displaying and maintaining the Cross.[22] They wanted to "enjoin[]the Commission from displaying the Cross on public property."[23]

On cross-motions for summary judgment, the district court ruled for the Commission.[24] After lamenting the confusion over the appropriate test, Judge Chasanow applied both the tripartite *Lemon* test and the *Van Orden* "legal judgment" test.[25] Beginning with the *Lemon* test, she held that all three prongs were satisfied.[26] Under *Lemon*, the Cross was permissible because the government had two secular purposes (traffic and safety) for maintaining the Monument, there was no impermissible

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12 Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 200 (4th Cir. 2017). This piece refers to the statue as "the Cross," "the Monument," or "the Memorial."

13 *Id.*

14 *Id.* at 200–01.

15 *Id.* at 201.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at 201–02.

21 *Id.*

22 *Id.* at 202.

23 *Id.* (footnote omitted).

24 Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 147 F. Supp. 3d 373, 376 (D. Md. 2015).

25 *Id.* at 382.

26 *Id.* at 385–87.

endorsement of religion because it had secular elements, and there was no entanglement because the government was not enmeshed with religion.[27] Judge Chasanow then applied the separate "legal judgment" test from Justice Breyer's *Van Orden* concurrence, finding that it too pointed to the constitutionality of the Cross because "[t]he Monument was constructed and financed by . . . a private group," was "surrounded by other war memorials and secular monuments," went "unchallenged for decades," and was "used almost exclusively as a site to commemorate veterans on secular patriotic holidays."[28]

A divided panel of the Fourth Circuit reversed.[29] Both Judge Thacker, writing for the majority,[30] and Chief Judge Gregory, concurring in part and dissenting in part,[31] applied the *Lemon* test as controlling and utilized the *Van Orden* test to support their analyses. But the judges came down differently on how much weight to give to each test and how the law applied to the facts. Judge Thacker agreed with the district court's "secular purpose" prong analysis but rejected its holdings on the "effects" and "excessive entanglement" prongs.[32] Under the "effects" prong, the court found the meaning of the Cross to be "inherent[ly] religious"[33] and the secular elements overwhelmed by the Christian elements.[34] The court thought that the history of the Monument could be interpreted as either secular or religious.[35] Considering those factors under the reasonable observer standard, the court concluded the second *Lemon* prong had been violated because the Cross had "the primary effect of endorsing religion."[36] Judge Thacker found the "excessive entanglement" prong violated because (1) the state spent a substantial sum of money to maintain the Monument and (2) the display preferenced Christianity over other religions.[37] The panel incorporated the *Van Orden* analysis into the second *Lemon* prong.[38] The court found that the Cross differed from Ten Commandments displays in that it lacked a sufficient role in the nation's history and that the Cross's history, though "semisecular . . . [and] unchallenged for 90 years," was insufficient to "aid either side in the analysis."[39] Judge Thacker concluded that the

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[27] *Id.* at 384–87.

[28] *Id.* at 388.

[29] Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 212 (4th Cir. 2017).

[30] Judge Thacker was joined by Judge Wynn.

[31] *Am. Humanist Ass'n*, 874 F.3d at 215, 218 (Gregory, C.J., concurring in part and dissenting in part).

[32] *Id.* at 206, 211–12 (majority opinion).

[33] *Id.* at 207.

[34] *See id.* at 207–10.

[35] *Id.* at 208.

[36] *Id.* at 210; *see also id.* at 210–11.

[37] *Id.* at 211–12.

[38] *See id.* at 206.

[39] *Id.* at 208.

Monument's violation of both the second and third prongs of the *Lemon* test and the weighing of the *Van Orden* factors supported a finding that it ran afoul of the Establishment Clause.[40]

Chief Judge Gregory concurred in part and dissented in part. Although he agreed with the majority on the threshold standing issue, Chief Judge Gregory thought there was no violation of the Establishment Clause. He faulted the majority for erroneously emphasizing the "religious nature of Latin crosses"[41] to the detriment of "the Memorial's secular history,"[42] inventing an unreasonable reasonable observer, and "confus[ing] maintenance of a highway median and monument in a state park with excessive religious entanglement."[43] He thought a reasonable observer would not interpret the Memorial as a state endorsement of religion and cautioned against "pursu[ing] a level of neutrality beyond our constitutional mandate."[44] Chief Judge Gregory also incorporated *Van Orden* into his second *Lemon* prong analysis, using the Memorial's long history and the absence of litigation as evidence that the reasonable observer "perceived its secular message."[45] For the third prong, Chief Judge Gregory believed the entanglement was not excessive because there was no consultation or interaction between religious and state authorities.[46]

The Fourth Circuit denied the petition for en banc hearing.[47] Judge Wynn, concerned about allowing a court to redefine the meaning of religious symbols, found the majority opinion to be "a faithful application of the law."[48] He believed that a court minimizing the meaning of religious symbols would degrade religion, which was a particular concern of the Framers.[49] Chief Judge Gregory dissented from the denial of rehearing en banc for the same reasons he dissented from the panel.[50] Judge Wilkinson also dissented.[51] He agreed with Chief Judge Gregory's dissent on the merits and wrote to speak for "[t]he dead [who] cannot speak for themselves."[52] Judge Niemeyer wrote a separate dissent in which he treated *Van Orden* as controlling and reasoned that there were no substantive grounds on which to differentiate the Cross at issue from

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[40] *Id.* at 212.

[41] *Id.* at 218 (Gregory, C.J., concurring in part and dissenting in part).

[42] *Id.* at 217.

[43] *Id.* at 218.

[44] *Id.* at 221.

[45] *Id.* at 220.

[46] *Id.* at 222.

[47] *Am. Humanist Ass'n*, 891 F.3d at 118. The vote was 8–6. *Id.*

[48] *Id.* at 122 (Wynn, J., voting to deny the petition to rehear).

[49] *Id.* at 120.

[50] *Id.* at 122 (Gregory, C.J., dissenting from the denial of rehearing en banc). He was joined by Judges Wilkinson and Agee.

[51] Chief Judge Gregory and Judge Agee joined his dissent.

[52] *Am. Humanist Ass'n*, 891 F.3d at 123 (Wilkinson, J., dissenting from the denial of rehearing en banc).

the Ten Commandments display in *Van Orden*.[53] He also expressed concern for the fate of monuments across America.[54]

Collectively, the opinions in *AHA* serve as a prime example of the obscurity of Establishment Clause jurisprudence and the ambiguity of Justice Breyer's *Van Orden* concurrence. *Van Orden*'s shortcomings in clarity are largely attributable to two factors. First, *Van Orden* was unclear about its relationship with *Lemon*. Second, standing alone, Justice Breyer's concurrence failed to articulate a clear standard.[55] Both of these factors are evident in the confusion throughout the opinions in *AHA*.

First, the relationship between *Van Orden* and *Lemon* is unclear.[56] Does *Van Orden* supplement *Lemon*, replace *Lemon*, preempt *Lemon*, or have some other relationship to that test? Justice Breyer's concurrence implies that *Lemon* does not resolve Establishment Clause questions.[57] But this assertion is hard to square with the other Establishment Clause case of the 2004 Term, *McCreary County v. ACLU of Kentucky*,[58] where the Court kept to the *Lemon* framework and concluded that both content and context suggested the purpose of a courthouse Ten Commandments exhibit was predominantly religious and that the principle of neutrality had been violated.[59] Justice Breyer simply does not give a definitive answer to the question of *Lemon*'s role in the analysis.[60]

The differing modes of analysis in *AHA* demonstrate the lack of clarity over how *Van Orden*'s legal judgment test relates to the *Lemon* test. By applying only *Lemon* to resolve the Establishment Clause question, the Fourth Circuit did not take *Van Orden* and Justice Breyer's "legal judgment" test seriously. Judge Thacker interpreted *Van Orden* as ordering up a serving of *Lemon* with a side of "due consideration given to the *Van Orden* factors" because "Justice Breyer clarified that the *Lemon* test continues to act as a 'useful guidepost[]' . . . [and] actually

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[53] *Id.* at 123–25 (Niemeyer, J., dissenting from the denial of rehearing en banc).

[54] *Id.* at 125.

[55] For the argument that Justice Breyer's "pragmatic good sense" is preferable to "comprehensive resolution," see Richard H. Fallon, Jr., Essay in Honor of Justice Stephen G. Breyer, *A Salute to Justice Breyer's Concurring Opinion in* Van Orden v. Perry, 128 HARV. L. REV. 429, 431 (2014).

[56] *See id.*

[57] *See* Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment) ("While the Court's prior tests provide useful guideposts . . . no exact formula can dictate a resolution to such fact-intensive cases." (internal citations omitted)); *see also id.* ("I see no test-related substitute for the exercise of legal judgment.").

[58] 545 U.S. 844 (2005).

[59] *See id.* at 851, 869, 875–76, 881; *The Supreme Court, 2004 Term — Leading Cases*, 119 HARV. L. REV. 169, 258–68 (2005).

[60] *See* David B. Owens, *From Substance to Shadows: An Essay on* Salazar v. Buono *and Establishment Clause Remedies*, 20 B.U. PUB. INT. L.J. 289, 298 (2011) ("After *Van Orden* and *McCreary* it is unclear whether courts should look to Justice O'Connor's 'endorsement' test, *Lemon*'s three factors, Justice Breyer's contextual approach, or if Justice Kennedy's view will soon set the standard.").

recognized *Lemon* as a 'more formal Establishment Clause test[].'"[61] But that takes Justice Breyer's statement out of context. Justice Breyer said he "rel[ies] *less* upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves."[62] Justice Breyer gives a sense of one thing not to do — rely solely or mostly on *Lemon* — without clarifying what the actual relationship should look like.[63]

In contrast, the panel dissent and lower court opinion saw the relationship between the tests differently. *Lemon* controlled, but with a slightly larger side of *Van Orden*. Chief Judge Gregory arrived at a different outcome through more emphasis on *Van Orden*. He gave greater weight to those factors than Judge Thacker did but still placed the *Van Orden* analysis within the *Lemon* framework.[64] Meanwhile, Judge Chasanow admitted that it was unclear whether *Lemon* or *Van Orden* controlled, applied each separately, found that they came to the same conclusion, and so avoided answering the question of how they interacted.[65]

Second, even if its relationship to *Lemon* were clear, *Van Orden* on its own provides little substantive guidance regarding how to balance the various considerations germane to Establishment Clause monument cases. This is because Justice Breyer's concurrence did not indicate how to balance the different factors or how those factors related to older Establishment Clause cases.[66] In *Van Orden*, the Court was responding to a challenge to a Ten Commandments monument located outside the Texas Capitol.[67] For Justice Breyer, it was relevant that a display could communicate a secular and a historical message, in addition to a religious message.[68] He thought the monument's history — that it was donated by a private organization motivated by ethics and civic morality in the fight against juvenile delinquency and that the monument acknowledged that donation — was relevant in ascertaining its effect.[69]

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[61] Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 205 (4th Cir. 2017) (first and third omissions in original) (quoting *Van Orden*, 545 U.S. at 700, 703 (Breyer, J., concurring in the judgment)).

[62] *Van Orden*, 545 U.S. at 703–04 (emphasis added).

[63] *But see* Lindsey H. Emerson, Comment, *An Artifact or a Memorial: The Latin Cross and the Establishment Clause*, 85 MISS. L.J. 471, 482 (2016) (suggesting that the *Lemon* factors are a guidepost in a *Van Orden* analysis).

[64] Section III.A discussed the effect prong, *see Am. Humanist Ass'n*, 874 F.3d at 218–21 (Gregory, C.J., concurring in part and dissenting in part), and section III.B focused on the excessive entanglement prong, *see id.* at 221–22. The dissent omitted analysis of the secular purpose prong, likely because the appellants did not challenge the finding of a legitimate secular purpose. *See id.* at 218.

[65] *See* Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 147 F. Supp. 3d 373, 381–86 (D. Md. 2015).

[66] *But see* Fallon, *supra* note 8, at 116 & n.282.

[67] *Van Orden*, 545 U.S. at 681 (plurality opinion).

[68] *See id.* at 701 (Breyer, J., concurring in the judgment).

[69] *See id.* at 701–02. The reasonable observer is nowhere to be found in this analysis. *See id.*

Looking at the physical setting, he argued that the surrounding monuments at the Capitol suggested a secular context because "[t]he setting does not readily lend itself to meditation or any other religious activity[,] [b]ut does provide a context of history and moral ideals."[70] Finally, Justice Breyer found the "determinative" factor was that "40 years passed in which the presence of this monument, legally speaking, went unchallenged."[71] Justice Breyer differentiated *Van Orden* from *McCreary County* on the basis of the lack of a "short" and "stormy" history surrounding the erection of the monument.[72] Justice Breyer gave no indication of how to weigh and balance factors such as the monument's possible messages, physical setting, and history. Nor did he indicate if any other factors are relevant or how this analysis fits into the long-established tests. One might speculate that Justice Breyer's real question was: "Is it really old?"[73] *Van Orden*'s lack of clarity is like a recipe that tells us neither what ingredients to use nor how to use them.

AHA, then, displayed five cooks concocting five very different delicacies with that recipe. The district court applied the *Lemon* test and then, because of "the uncertain status of Establishment Clause jurisprudence," did a *Van Orden* analysis.[74] In her *Van Orden* analysis, Judge Chasanow incorporated some of the facts from her *Lemon* section and gave added emphasis to the Monument's construction by a private group, the organization's primary purpose of honoring the dead, the inclusion of the group's logo to provide separation from the state, the physical setting, the Cross's almost-exclusive use for secular veterans commemorations, and the fact that the Monument had been unchallenged for decades.[75] Judge Thacker turned this analysis on its head. The history, she said, "does not definitively aid either side."[76] She also thought the physical setting cut against the Monument.[77] And all of this analysis was simply incorporated within his *Lemon* test.[78] Chief Judge

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[70] *Id.* at 702.

[71] *Id.*

[72] *Id.* at 703. In *McCreary County*, the County put up successive exhibits in failed attempts to make the display sufficiently secular. *See* 545 U.S. 844, 869–72 (2005).

[73] *See Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in the judgment) ("[T]hose 40 years suggest more strongly *than can any set of formulaic tests* that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect." (emphasis added)).

[74] Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 147 F. Supp. 3d 373, 388 n.11 (D. Md. 2015); *see also id.* at 388. Interestingly, Judge Chasanow did not think that *AHA*, in contrast to *Van Orden* itself, was a "borderline" case. *Id.* at 388 n.11.

[75] *See id.* at 388.

[76] Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 208 (4th Cir. 2017). He went further and said the length of time the monument sat unchallenged could *undermine* its secularity, which directly contrasts with how Justice Breyer employed the historical analysis. *See Van Orden*, 545 U.S. at 701–02 (Breyer, J., concurring in the judgment).

[77] *See Am. Humanist Ass'n*, 874 F.3d at 209.

[78] *See id.* at 206–11.

Gregory also looked at the *Van Orden* factors through the lens of *Lemon* but thought the setting was sufficiently similar to *Van Orden* and that its history (as well as the length of time it was uncontested) cut in favor of the Cross.[79] In his denial of rehearing en banc, Judge Wynn ignored *Van Orden* except for one line distinguishing this case on the grounds that the Memorial was not "displayed as part of [a] historical presentation that has a predominately secular purpose," as if that was *Van Orden*'s only lesson.[80] In fact, Judge Niemeyer, in his dissent from the denial to rehear en banc, was the only judge to make *Van Orden* the centerpiece of his analysis. He discussed the physical setting.[81] He noted the lack of controversy for the near-century of the Monument's existence.[82] And he concluded that the World War I Memorial Cross is exactly the kind of thing that *Van Orden* allows.[83]

The only clear conclusion is that — "to use a technical legal term of art" — the "Establishment Clause jurisprudence is . . . a hot mess."[84] Other circuits have grappled with these same problems in analyzing static monuments.[85] The Supreme Court can now resolve the indeterminacy of Justice Breyer's legal judgment framework, along with questions such as: who is the reasonable observer and how much does she know; what is the relevant time frame; how long does something have to be around to attain a historical meaning independent of its creators; who gets to determine the meaning of contested cultural objects; does it matter whether the State or private parties created the monument in the first place; and does it matter how or why a monument came to be under State control? It is clear that the Court cares about these questions of history.[86] Perhaps it is time for such old war memorials to attain sui generis status, just like "Under God" in the Pledge of Allegiance,[87] "In God We Trust" on coins,[88] and legislative prayer.[89] Only then will the courts stop "roil[ing] needlessly the dead with the controversies of the living."[90]

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79 *See id.* at 220–21 (Gregory, C.J., concurring in part and dissenting in part).

80 *See Am. Humanist Ass'n*, 891 F.3d at 121 (Wynn, J., voting to deny the petition to rehear).

81 *See id.* at 123–24 (Niemeyer, J., dissenting from the denial of rehearing en banc).

82 *See id.* at 124.

83 *See id.* at 124–25.

84 Kondrat'yev v. City of Pensacola, 903 F.3d 1169, 1179 (11th Cir. 2018) (Newsom, J., concurring in the judgment).

85 *See, e.g.*, *id.*; Trunk v. City of San Diego, 629 F.3d 1099 (9th Cir. 2011).

86 *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 698–705 (2005) (Breyer, J., concurring in the judgment); *see also* Town of Greece v. Galloway, 572 U.S. 565, 592 (2014) (holding that legislative prayer does not violate the Establishment Clause after a historically oriented analysis).

87 *See* Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1012 (9th Cir. 2010).

88 *See* Aronow v. United States, 432 F.2d 242, 243–44 (9th Cir. 1970).

89 *See Town of Greece*, 572 U.S. at 592. In Justice Kennedy's majority opinion, he did not once reference the *Lemon* test.

90 *Am. Humanist Ass'n*, 891 F.3d at 123 (Wilkinson, J., dissenting from the denial of rehearing en banc).