

CROSSES AND CROSSROADS: HOW CHANGES IN THE
COMPOSITION OF THE SUPREME COURT ARE UNLIKELY TO
CHANGE THE COURT’S OUTCOME ON ESTABLISHMENT CLAUSE
ISSUES RELATING TO PUBLIC MONUMENTS

*Patrick J. Graham*¹

I. INTRODUCTION

World War One, The Great War, The War to end all Wars; that is what the forefathers of modern American society thought they were fighting when they brandished their weapons and shipped off to foreign lands to defend the United States. The war took more than 9 million lives and left over 21 million wounded in the struggle.² 49 of those lives claimed by the war were laid to rest in Bladensburg, Maryland.³ In honor of those men, the American Legion in 1925 erected a 40-foot cross memorial that was later named the “Peace Cross.”⁴ By 1961, the cemetery and memorial become the property of the Maryland Parks Commission.⁵ By this time, the nearly 40-year-old cross was deteriorating with chunks of concrete falling and endangering motorists on nearby roads.⁶

Recently, the Peace Cross and its supporters have been fighting to keep the monument in place.⁷ Members of the American Humanist Association have called for the cross to come down, explaining that the objection to the cross lies with “Christian favoritism.”⁸ They argue that since the cross is located on public land, a highway median, and is a clear display of the Christian faith, that it ought to come down as it violates the separation of church and state codified in the Establishment Clause of the United States Constitution.⁹

The Supreme Court of the United States is set to hear oral argument on the issue of whether this cross is in violation of the

¹ New Developments Staff Editor, Rutgers Journal of Law and Religion: J.D. Candidate May 2020, Rutgers School of Law.

² *World War One*, HISTORY, https://www.history.com/topics/world-war-i/world-war-i-history#section_15 (last visited April 8, 2019).

³ Jessica Gresko, *Supreme Court Agrees to Hear Case to Determine if Maryland’s Peace Cross Violates the Constitution*, BALT. SUN., Nov. 3, 2018.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Adam Liptak, *40-Foot Cross Divides a Community and Prompts a Supreme Court Battle*, N.Y. TIMES, Feb. 24, 2019.

⁸ *Id.*

⁹ *Id.*

doctrine of separation of church and state.¹⁰ This however, will not be the Court's first encounter with a war memorial using a Christian symbol to commemorate the fallen. In 2010, the Supreme Court issued a decision which left a cross standing at a different war memorial.¹¹ The Court was hardly decisive on the issue with six Justices writing separate opinions.¹²

This article will discuss how the Supreme Court is likely going to rule on the Bladensburg Peace Cross issue given the chances in the Court's composition since 2010. Justice Kennedy, Justice Stevens, and Justice Scalia were each influential in the Court's last decision on this same issue and given President Donald Trump's recent nominations of both Justice Neil Gorsuch and Justice Brett Kavanaugh, the Court will undoubtedly veer in a more decisive direction when it hears the Bladensburg Cross arguments. This article will also analyze how the Court will likely decide based on other prior Christian monument and religious entanglement issues that the modern Court has handled.

II. HISTORICAL BACKGROUND

The United States has been a nation separated from any one particular religious belief system since the Constitution was ratified in 1789. As such, the First Amendment of the Constitution places a general ban on holding one religion above another. That Clause, also known as the Establishment Clause, in pertinent part, reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹³ As a result of this language, Federal Courts have been tasked to keep aspects of religion from penetrating public entities functions since ratification.

The issue of Bladensburg's Peace Cross was first brought in the United States District Court for the District of Maryland.¹⁴ Plaintiffs, American Humanist Association, filed for summary judgment against defendant, Maryland-National Capital Park and Planning Commission, and The American Legion Department of Maryland, which resulted in a grant of summary judgment for the defendants.¹⁵ Plaintiffs argued that the ownership, maintenance,

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ U.S. CONST. amend. I

¹⁴ *Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 147 F. Supp. 3d 373 (D.MD. 2015)

¹⁵ *Id.* at 375.

and prominent display of the Monument on public property violate the Establishment Clause of the First Amendment.¹⁶ The District court discussed analyzing the issue through the scope the *Lemon* test.¹⁷ This test, as the court explained, is a “useful guidepost” for the court’s analysis of Establishment Clause issues and in the same time, the court rejected use of the *Van Orden* test.¹⁸ The “*Lemon* test,” a test that came out of the 1971 Supreme Court case *Lemon v. Kurtzman*.¹⁹ That test stated, “A government religious practice or symbol will survive an Establishment Clause challenge when it (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) does not foster excessive state entanglement with religion.”²⁰ In its analysis, the District Court determined that there was a secular purpose to the cross as secular purpose is a “low bar” that is satisfied “as long as the government action is not ‘entirely motivated by a purpose to advance religion.’”²¹ Ultimately, the court decided, “the fact that the monument conveys some religious meaning does not cast doubt on the [government’s] valid secular purposes for its display.”²²

The next prong of the *Lemon* test analyzes the monument’s primary effect and whether it advances or inhibits religion. The underlying inquiry for this prong is “whether an informed, reasonable observer would view the display as an endorsement of religion.”²³ The District court decided under this prong that since the Latin cross monument was surrounded by secular symbols commemorating the fallen soldiers and that the cross was fixed with secular symbolism, that the informed, reasonable observer would understand that the cross monument was erected to honor the dead.²⁴

Under the excessive entanglement prong was also construed in favor of the Defendants.²⁵ The Fourth Circuit has only found excessive entanglement where “entanglement between church and state becomes constitutionally excessive only when it has the effect

¹⁶ *Id.* at 380.

¹⁷ *Id.* at 382.

¹⁸ *Id.*

¹⁹ *See Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

²⁰ *Id.* at 612-613.

²¹ *Id.* at 383; *See also Jenkins v. Kurtinitis*, No. ELH-14-1346, 2015 U.S. Dist. LEXIS 34772, 2015 WL 1285355, at *28 (D.Md. Mar. 20, 2015) (citing *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001)).

²² *See City of Elkhart v. Books*, 532 U.S. 1058, 1062 (2001).

²³ *Hewett v. City of King*, 29 F. Supp. 3d 584, 613 (M.D.N.C. 2014).

²⁴ *Am. Humanist Ass’n*, 147 F. Supp. 3d at 387.

²⁵ *Id.*

of advancing or inhibiting religion."²⁶ As such, the District court found that the Park Commission's display and monument is not an endorsement of religion.²⁷ The monument hosts commemorative events and its upkeep and maintenance was not unconstitutional entanglement because the monument does not endorse a particular religion.²⁸

The Fourth Circuit reversed the ruling of the District Court and remanded the case after running its own variation of the *Lemon* test.²⁹ In its decision, the Fourth Circuit believed that the Peace Cross had the primary effect of endorsing Christianity and it excessively entangled the government in that religion.³⁰ According to the court, the cross standing 40-feet tall in the middle of a busy intersection in Maryland has the primary effect of endorsing religion because the cross is the main symbol of Christianity, and it is excessively entangled with the government because the government spends thousands of dollars to maintain the symbol on public land.³¹ To aid its conclusion, the court relied on the pledge sheet that donors for the cross needed to sign, which read:

WE, THE CITIZENS OF MARYLAND, TRUSTING
IN GOD, THE SUPREME RULER OF THE
UNIVERSE, PLEDGE FAITH IN OUR BROTHERS
WHO GAVE THEIR ALL IN THE WORLD WAR TO
MAKE THE WORLD SAFE FOR DEMOCRACY.
THEIR MORTAL BODIES HAVE TURNED TO
DUST, BUT THEIR SPIRIT LIVES TO GUIDE US
THROUGH LIFE IN THE WAY OF GODLINESS,
JUSTICE, AND LIBERTY. WITH OUR MOTTO,
"ONE GOD, ONE COUNTRY AND ONE FLAG," WE
CONTRIBUTE TO THIS MEMORIAL CROSS
COMMEMORATING THE MEMORY OF THOSE
WHO HAVE NOT DIED IN VAIN.

(Emphasis added)³²

The Fourth Circuit reversed the decision of the District court and remanded the case for further proceedings because the display and maintenance of the cross on public land was a violation of the

²⁶ *Hewett*, 29 F.Supp.3d at 618.

²⁷ *Am. Humanist Ass'n*, 147 F. Supp. 3d at 387.

²⁸ *Id.*

²⁹ *Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 874 F.3d 195 (4th Cir. 2017)

³⁰ *Id.* at 200.

³¹ *Id.*

³² *Id.*

Establishment Clause.³³ Certiorari was granted in November 2018.³⁴

Keeping church and state separate so as not to violate the Establishment Clause is a task that has proven to be difficult, even with decades of jurisprudence to lean on in decision-making. The Supreme Court in *Salazar v. Buono* proved that with a 5-4 decision including 3 concurrences and 2 dissents, the issue of separation of church and state is far from a bright line rule.³⁵ In 1934, members of the Veterans of Foreign Wars (VFW) placed a Latin cross on remote, federal land in the Mojave Desert to commemorate soldiers who lost their lives in World War One.³⁶ 90% of the Mojave Desert is Federal land, including the land on which the cross was erected. Frank Buono, the respondent and a retired Mojave Park Service member took issue with the cross being on Federal land, claiming to be offended by its presence in a public place.³⁷ He claimed that the Government should be enjoined from keeping the cross standing as it was a violation of the Establishment Clause of the First Amendment.³⁸

After filing suit, the Central District of California granted summary judgment for Buono.³⁹ The Central District of California decided to use the *Lemon* test set forth by the Supreme Court. With this test in hand, the court in *Buono I* ignored steps 1 and 3 only to find that the primary effect of the cross when viewed by a “reasonable observer,” was that its presence conveyed the idea that the government was supporting Christianity.⁴⁰ The result was an injunction that forbade the government from displaying the cross on the public land at issue.⁴¹ On appeal, the Ninth Circuit affirmed the District Court’s judgment taking the same stance and again invoking the “reasonable observer” without considering prongs 1 or 3 of the *Lemon* Test.⁴²

³³ *Id.* at 212.

³⁴ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 451, 2018 LEXIS 6512

³⁵ *Salazar v. Buono*, 559 U.S. 700, 705 (2010).

³⁶ *Id.* at 706.

³⁷ *Id.* at 707.

³⁸ *Id.*

³⁹ *See Buono v. Norton*, 212 F. Supp. 2d 1202 (CD Cal. 2002) (referred at as *Buono I*).

⁴⁰ *Buono I*, 212 F. Supp. 2d at 1216.

⁴¹ *Id.*

⁴² *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (referred to as *Buono II*).

Several acts were passed during Buono's initial litigation, each of which effectively sidestepped the injunction.⁴³ Under one of these acts, the cross could not be removed from the federal land and another act authorized the transfer of federal land to a private party so that the land the cross sat on would no longer be federal after the transfer.⁴⁴ Buono went back to the courts seeking yet another injunction and the district court again ruled in his favor again finding that transfer of the land on which the cross stood would be a ploy by the government to keep the cross in place after being ordered to take it down.⁴⁵ The Ninth Circuit affirmed again following the same reasoning as the District Court and certiorari was granted by the Supreme Court.⁴⁶

The first opinion in *Salazar v. Buono* was written by Justice Kennedy, who quickly disposed of the challenges to Buono's standing and headed directly to the issue at hand.⁴⁷ Kennedy found that the issue before the Supreme Court was not an Establishment Clause issue because the government appealed and failed on that issue, thereby making the Ninth Circuit's ruling res judicata on the parties.⁴⁸ However, Kennedy found that the District Court did not fully analyze the statute and situation in which it was enacted in context – making the District Court's ruling improper.⁴⁹ He noted, “Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message.”⁵⁰ In supporting the existence of the cross where it stands, Kennedy added, “placement of the cross on government-owned land was not an attempt to set the imprimatur of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers.”⁵¹ The time that the cross has stood, been maintained by private citizens, and been undisturbed by challenged also factored into Justice Kennedy's analysis as he noted, “the cross

⁴³ Consolidated Appropriations Act, 2001 Pub. L. 106-554, § 133, 114 Stat. 2763A-230; Department of Defense Appropriations Act, 2002 Pub. L. 107-117, § 8137(a), 115 Stat. 2278; Department of Defense Appropriations Act, 2003 Pub. L. 107-248, § 8065(b), 116 Stat. 1551; Department of Defense Appropriation Act, 2004 Pub. L. 108-87, § 8121(a), 117 Stat. 1100.

⁴⁴ *Id.*

⁴⁵ *Buono v. Norton*, 364 F. Supp. 2d 1175 (CD Cal. 2005) (referred to as *Buono III*).

⁴⁶ *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007).

⁴⁷ *Salazar*, 559 U.S. at 711-713.

⁴⁸ *Id.* at 713.

⁴⁹ *Id.* at 715.

⁵⁰ *Id.*

⁵¹ See Brief for Veterans of Foreign Wars of the United States et al. as *Amici Curiae* 15

has become entwined with public consciousness.”⁵² Kennedy reasoned that the Act giving rise to the land transfer that Buono opposed was passed to solve the very specific issue of avoiding conflict with the Establishment Clause and also honoring a memorial that has stood for several decades and honors fallen heroes.⁵³ Buono fought the cross’ existence by claiming that allowing it to stand would violate the injunction and be an “incomplete remedy” to the constitutional issue at the heart of this matter.⁵⁴ Kennedy combatted this argument by finding that “the goal of avoiding governmental endorsement [of a religion] does not require eradication of all religious symbols in a public realm.”⁵⁵ Justice Kennedy liked this to placing a cross on the side of a public highway where a State Trooper had died and noted that a cross in a position like that would not be governmental endorsement of a particular religion, but rather a tribute to the fallen.⁵⁶ Kennedy’s plurality opinion reversed the judgment of the Ninth Circuit and remanded this issue for further proceedings.⁵⁷

Kennedy’s plurality hardly spoke for the entire court, let alone more than three Justices. Chief Justice Roberts agreed with Justice Kennedy, but his reasons were mostly aligned with the fact that having the cross torn down, then the land sold back to the VFW pursuant to the Act only to have the cross put back up would be completely arbitrary.⁵⁸ For that reason, Justice Kennedy’s conclusion made sense to the Chief Justice.

Justice Alito also concurred in part and concurred in the judgment of Justice Kennedy.⁵⁹ His sole discrepancy with the majority opinion was that he felt the facts of the majority opinion were detailed enough to allow the Court to decide any remaining issues such that this case need not be remanded for further proceedings.⁶⁰ Alito mentioned that monuments can be generally interpreted in many ways, but undoubtedly, the soldiers that erected this cross did so in memorial of the Great War and chose the simple, white cross not as a Christian symbol, but one that symbolizes the rows of white crosses the mark the final resting place

⁵² *Salazar*, 559 U.S. 716.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 718.

⁵⁶ *Id.* at 718-719.

⁵⁷ *Id.* at 722.

⁵⁸ *Id.* at 723.

⁵⁹ *Id.*

⁶⁰ *Id.*

for some many veterans.⁶¹ Removal of the cross, as Justice Alito put it:

Would have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor. The demolition of this venerable if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage.⁶²

Justice Alito further suggested that perhaps a solution to this issue would have been to denote on the cross or a surrounding epitaph that the cross was a diverse symbol, not standing for Christianity, but rather representing all religious creeds of the men that died in World War One.⁶³ Justice Alito roughly lays out the “Endorsement test,” raised by Justice Stevens in the dissent, as one where a reasonable observer would view the symbol with full background knowledge of the history behind the symbol.⁶⁴ With this in mind, Justice Alito believed that the reasonable observer would be able to understand the cross’ existence on the land as a war symbol and nothing more.⁶⁵

Justice Scalia and Justice Thomas joined in concurring with the judgment.⁶⁶ However, their concurring opinion is not of importance in analyzing the merits of the Ninth Circuit’s judgment namely because Scalia and Thomas do not discuss the merits.⁶⁷ Rather, Justices Scalia and Thomas attack the standing argument that Justice Kennedy so quickly disposed of early in the plurality opinion.⁶⁸

Four Justices dissented. Justice Stevens and Justice Breyer authored the dissent and were joined by Justices Ginsburg and Sotomayor.⁶⁹ The dissenters believed that a five-foot-tall, white, Latin cross located on federal land, “necessarily symbolizes one of the most important tenets upon which believers in a benevolent

⁶¹ *Id.*

⁶² *Id.* at 726.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 729.

⁶⁷ *Id.*

⁶⁸ *Id.* at 730.

⁶⁹ *Id.* at 735.

Creator, as well as nonbelievers, are known to differ.”⁷⁰ Not only did the Dissenters believe that the District and Circuit court properly enjoined the government from displaying the Latin cross on federal land, but they also felt that the violation of the Establishment Clause was continued and uncured by the newly passed Act’s authorization of a land transfer to the VFW.⁷¹ The belief was that the government was enjoined from displaying the cross and the transfer, while cutting off the government’s ownership of the land in question, would permit the display of the cross to continue in the face of the injunction.⁷² The dissent went on to express its belief that the Establishment Clause was violated where a religious symbol should favoritism or endorsement of one religion over another.⁷³

As several courts have noted, the *Lemon* test is the guiding analysis for whether and when a monument’s existence or maintenance violates the Establishment Clause.⁷⁴ The *Lemon* case was a Supreme Court decision, with origins in the Eastern District of Pennsylvania, that decided the issue of whether public funding used by church affiliated primary and secondary schools for the purposes of non-secular activity was a violation of the Establishment Clause.⁷⁵ The Court answered that question in the affirmative finding that lines needed to be drawn and to draw those lines, the Court crafted the *Lemon* test that courts use today to answer similar issues.⁷⁶

Not all courts have taken to the *Lemon* test when analyzing the effect of a monument in relation to the Establishment Clause. The Supreme Court in *Van Orden v. Perry* crafted its own analysis for Establishment Clause violations via monument or public display.⁷⁷ In that case, the Court ruled that a Ten Commandments monument located at the Texas state capitol building was a passive monument that should be analyzed by the nature of the monument and its place in our nation’s history.⁷⁸ The Court found that the Commandments have a place in government and in the nation’s history.⁷⁹ Therefore, since the passive monument did not promote a

⁷⁰ *Id.* at 736.

⁷¹ *Id.* at 738.

⁷² *Id.* at 740.

⁷³ *Id.* at 742.

⁷⁴ See *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

⁷⁵ *Id.* at 606.

⁷⁶ *Id.* at 625.

⁷⁷ *Van Orden v. Perry*, 545 U.S. 677 (2005).

⁷⁸ *Id.* at 681-682.

⁷⁹ *Id.* at 735.

purely religious message, it did not offend the Establishment Clause.⁸⁰

III. ANALYSIS

As precedent has proven, the separation of church and state is a constant battle in which the Supreme Court and all subordinate courts have made progress, but still struggle with each time the issue presents itself. This struggle is clear based on the fact that the District court in Maryland and the Fourth Circuit were presented with the same fact, same issue, and identical arguments, yet reached polarizing opposite results.⁸¹ To make the coming argument before the Supreme Court even more unpredictable, Justices Kavanaugh, Gorsuch, and Kagan have replaced Justices Scalia, Stevens, and Kennedy, who all took part in the Court's 2010 decision in *Salazar*.⁸² The Court has, since the election of President Donald Trump, seen a swing toward conservative ideals with the appointment of Justices Kavanaugh and Gorsuch. However, this fact is unlikely to impact the Court's decision in the upcoming matter of the Bladensburg Peace Cross because the Court in *Salazar*, with both Justice Kennedy and Chief Justice Roberts as swing voters, voted to keep the Mojave Desert memorial cross in place.⁸³ As set forth above, Justice Kennedy wrote the plurality decision in support of allowing the VFW to have land transferred to it and thereby effectively allowing the cross to stay in place.⁸⁴ Therefore, even if a conservative and known Christian, like Justice Kavanaugh were to vote to keep the Bladensburg cross standing, then the outcome would be unchanged from the *Salazar* decision.⁸⁵

In addition, Antonin Scalia, perhaps the most conservative Justice on any Court he ever served on, concurred with the decision in *Salazar* based on the lack standing of the parties.⁸⁶ Justice Thomas, in that mindset, joined Justice Scalia's concurrence.⁸⁷ Even if Justice Neil Gorsuch, another known conservative Justice, were to vote in step with the other conservatives, his vote would also

⁸⁰ *Id.*

⁸¹ See *Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 874 F.3d 195 (4th Cir. 2017); *but see Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 147 F. Supp. 3d 373 (D.MD. 2015).

⁸² *Salazar v. Buono*, 559 U.S. 700 (2010).

⁸³ See *Salazar v. Buono*, 559 U.S. 700 (2010).

⁸⁴ *Supra* notes 52-54 and accompanying text.

⁸⁵ See *Salazar v. Buono*, 559 U.S. 700 (2010).

⁸⁶ *Supra* notes 66-68 and accompanying text.

⁸⁷ *Id.*

show no change from *Salazar*.⁸⁸ This would leave Justice Alito, who wrote a concurrence in *Salazar*⁸⁹, Chief Justice Roberts, who also concurred with Justice Kennedy⁹⁰, and the three remaining dissenters, Justice Ginsburg, Justice Sotomayor, and Justice Breyer.⁹¹

Most interesting of all the Justices to be involved in the Bladensburg cross matter will be Justice Kagan. Justice Kagan argued the cause for the petitioner, Ken L. Salazar, Secretary of the Department of the Interior in *Salazar*.⁹² It was future Justice Kagan, who in 2010 convinced the Court that the Establishment Clause would not be violated by allowing the land transfer to the VFW and the cross to remain standing.⁹³ Therefore, even if Justice Kagan felt the facts of the Peace Cross in Bladensburg were different from the facts in *Salazar*, she would be trampling on jurisprudence that she helped establish and ignoring the fact that the Court ruled in her favor on an argument supporting a positive construction of the *Lemon* test.⁹⁴ As a result, Justice Kagan is likely going to be stuck to either supporting a former argument she made or recusal from the matter entirely.

The Supreme Court will likely use the *Lemon* test to result the underlying Establishment Clause issues of the Bladensburg cross. A look at jurisprudence on the Establishment Clause issues via monuments shows that since 1971 when the Supreme Court articulated the test, the Supreme Court and subordinate federal courts have favored the *Lemon* test.⁹⁵ First, the Court will look at the secular purpose of the cross.⁹⁶ Based on the concurring opinions from *Salazar*, the Court will likely find that the cross has a secular purpose as the Mojave Desert cross was found to be sufficiently secular and that cross is factually similar to the one standing in Bladensburg.⁹⁷ Plus, finding a secular purpose has historically been a “low bar,” making this prong easily satisfied.⁹⁸

⁸⁸ See *Salazar v. Buono*, 559 U.S. 700 (2010).

⁸⁹ *Supra* notes 57-61 and accompanying text.

⁹⁰ *Supra* note 58 and accompanying text.

⁹¹ *Supra* notes 70-73 and accompanying text.

⁹² See *Salazar v. Buono*, 559 U.S. 700 (2010).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Lemon*, 403 U.S. at 612-613.

⁹⁶ *Id.*

⁹⁷ *Supra* notes 50-53 and accompanying text.

⁹⁸ See also *Jenkins v. Kurtinitis*, No. ELH-14-1346, 2015 U.S. Dist. LEXIS 34772, 2015 WL 1285355, at *28 (D.Md. Mar. 20, 2015) (citing *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir. 2001))

Next, the Court will determine if the primary effect of the Peace Cross neither advances nor inhibits religion.⁹⁹ This is the step in the analysis where the Fourth Circuit and the Ninth Circuit found that both the Bladensburg cross and the Mojave Desert cross advanced religion as the Latin cross was found to endorse Christianity.¹⁰⁰ However, Justice Alito's concurrence in *Salazar* noted that fact that the "reasonable observer" with an assumed knowledge of the background and history of the monument would know that the Bladensburg cross was erected as a memorial for the fallen soldiers of World War One and that the cross is a traditional military symbol that honors the lives of the fallen.¹⁰¹ Finally, the Court must decide if the monument's existence shows excessive entanglement with the government and religion.¹⁰² However, Justice Kennedy combatted this prong by noting, "the goal of avoiding governmental endorsement [of a religion] does not require eradication of all religious symbols in a public realm."¹⁰³ In addition, the Bladensburg cross has stood in its place since 1925, much like the Mojave Desert cross was erected just after World War One, so, as Justice Kennedy wrote, the Bladensburg cross would also conceivably be "entwined with the public consciousness."¹⁰⁴ With the Supreme Court's changes unlikely to effect the decision in the upcoming Bladensburg cross matter, the *Lemon* test is likely to favor Maryland National and the American Legion.

IV. CONCLUSION

When the American Humanist Association and the Maryland-National Capital Park and Planning Commission together with the American Legion appear before the Supreme Court for argument on the Bladensburg cross, it is the latter who will likely prevail. Although the Supreme Court has undergone changes since the last major Establishment Clause via monument issue in 2010, those changes are most likely to follow the 2010 Court's path. Most notably, Justice Kagan, who argued and won the case for the Petitioner in *Salazar* will cast an interesting vote that will likely support her argument from the past. The Court will likely

⁹⁹ *Lemon*, 403 U.S. at 612-613.

¹⁰⁰ *Buono v. Norton*, 364 F. Supp. 2d 1175 (CD Cal. 2005); *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007).

¹⁰¹ *Supra* notes 61, 63 and accompanying text.

¹⁰² *Lemon*, 403 U.S. at 612-613.

¹⁰³ *Salazar*, 559 U.S. at 718.

¹⁰⁴ *Id.* at 716.

run a *Lemon* test on the issue as that is what the lower courts have done and what the Supreme Court has done on these issues customarily. Based on the findings of the *Salazar* Court, this Supreme Court will likely find for Maryland-National and the American Legion, because their argument echoes similar principles that the Court relied on in 2010. For those reasons, the Supreme Court will likely leave the Bladensburg Peace Cross standing where it has since 1925.