

Court Rules Removing 78-Year-Old Cross Would Be 'Aggressively Hostile to Religion'

A federal court of appeals ruled that the World War II-era 78-year-old Bayview Cross in Pensacola, Florida, does not violate the U.S. Constitution and will remain standing. The appeals court noted it has become "embedded in the fabric of the Pensacola community" and that removing it could "strike many as aggressively hostile to religion."

In 1941, the National Youth Administration placed a wooden cross in Pensacola's Bayview Park to be the focal point for the annual Easter sunrise service. The sunrise service was held annually by the Jaycees. In 1969, the original wooden cross was replaced by a 34-foot concrete version. The cross has been a popular gathering place for over 75 years and is one of over 170 displays in Pensacola's parks commemorating the city's history and culture. In 2016, Freedom From Religion Foundation (FFRF) sued the city, claiming that the cross is an "offensive" breach of the U.S. Constitution's separation of church and state and should be torn down.

In 2017, in *Kondrat'yev v. City of Pensacola*, a panel of judges on the court of appeals ruled that the cross must come down, with two of the three judges saying that the outcome was "wrong" but that their "hands were tied" because of the so-called "Lemon Test."

In 2019, the U.S. Supreme Court ordered the appeals court to reconsider its earlier ruling in light of its decision in the American Legion case that the "Peace Cross," a 40-foot cross honoring those who died during World War I, can remain

standing in Bladensburg, Maryland. In its 7-2 decision, the high court made it clear that the so-called "Lemon Test" was not useful for cases involving ceremonial, celebratory or commemorative monuments that include religious imagery. Instead, the justices adopted a "strong presumption of constitutionality" for longstanding monuments. The ruling recognized that "a government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion," which the Constitution does not require. The Supreme Court said that although "the cross is undoubtedly a Christian symbol. . . the cross does not offend the Constitution." The High Court told the appeals court to apply these same principles to the cross in Pensacola.

Yesterday, the federal Court of Appeals specifically noted that the Supreme Court in the American Legion case expressly disregarded the so-called "Lemon Test" in religious display cases. The opinion states that American Legion "jettisoned *Lemon v. Kutrzman*—at least for cases involving religious references or imagery in public monuments, symbols, mottos, displays and ceremonies—in favor of an approach that focuses on the particular issue at hand and looks to history for guidance.. ... American Legion makes two things clear: 1) Lemon and its much-maligned three-part test no longer govern Establishment Clause challenges to religious monuments and displays, and 2) history and tradition play an important role in Establishment Clause analysis."

In addition, the appeals court wrote, "American Legion's clearest message is this: Lemon is dead ... at least with respect to cases involving religious displays and monuments."

Liberty Counsel Founder and Chairman Mat Staver said, "The Court of Appeals made a common-sense ruling that the Bayview Cross does not violate the Constitution and affirmed that the courts must abandon these unworkable manmade tests. Though the High Court should have relegated the 'Lemon Test' to the

dustbin of constitutional history, its initial step of scrapping it from religious monument cases is a welcome first step and has paid off in the ruling for the Pensacola cross," said Staver. {eo}

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