

NO. 06-2355

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAUL F. WEINBAUM and MARTIN J. BOYD,

Plaintiff-Appellants,

v.

CITY OF LAS CRUCES, et al.,

Defendant-Appellees.

On Appeal from the United States District Court
for the District of New Mexico
Hon. Robert Brack, district judge
No. CIV 05-0996 RB/LAM

BRIEF OF APPELLANTS
with an attachment in Digital Form

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ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

Weinbaum, et al., v. City of Las Cruces, New Mexico, et al.,
Cause no. 06-0219 in the United States Court of Appeals for the Tenth Circuit
(dismissed for want of appellate jurisdiction, March 9, 2006)

Chavez, et al. v. Las Cruces Public Schools
Cause no. 06-2060 in the United States Court of Appeals for the Tenth Circuit
(dismissed for want of appellate jurisdiction, May 16, 2006)

In re Paul F. Weinbaum
Cause no. 06-2280 in the United States Court of Appeals for the Tenth Circuit
(writ of mandamus denied, October 20, 2006)

Weinbaum, et al., v. Las Cruces Public Schools
Cause no. 07-2012 in the United States Court of Appeals for the Tenth Circuit
(pending)

JURISDICTIONAL STATEMENT

This is an appeal from a final summary judgment that disposed of all parties' claims in a suit under 42 U.S.C. § 1983 for declaratory and injunctive relief as well as damages. (Aplt. App. p. 522). The district court possessed subject-matter jurisdiction under 28 U.S.C. § 1331 because the case arose under a federal statute. The judgment was entered on November 9, 2006. (Aplt. App. p. 522). Appellants' notice of appeal was timely filed less than thirty days later, on December 6, 2006. (Aplt. App. p. 524). This Court possesses jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED

The district court erred by granting Appellees' motion for summary judgment and denying Appellants' motion for summary judgment because the composition and the use by the City of Las Cruces, New Mexico of a public seal containing iconic Christian religious imagery has the effect of advancing religion by conveying the message that Christian religious belief is favored or preferred, in violation of the Establishment Clause of the First Amendment to the United States Constitution. (Aplt. App. p. 185, 187, 372, 491, 522).

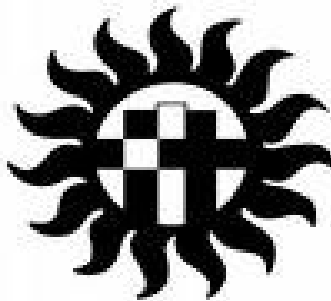
STATEMENT OF THE CASE

Appellants filed this suit under 42 U.S.C. § 1983 for declaratory judgment, damages, and injunctive relief arising from a municipality's use of an official symbol containing religious iconography (specifically, three crosses), which Appellants contend violates the Establishment Clause of the First Amendment to the United States Constitution. (Aplt. App. p. 397). Both parties filed motions for summary judgment. (Aplt. App. p. 54, 185). The district court granted summary judgment in favor of the city and its officials, and denied Appellants' motion for summary judgment. (Aplt. App. p. 491). This appeal followed. (Aplt. App. p. 524).

STATEMENT OF FACTS

Appellants Paul Weinbaum and Martin Boyd are individual residents of the City of Las Cruces, New Mexico. (Aplt. App. pp. 200, 207, 453-54). They filed this suit against the Appellees the City of Las Cruces, New Mexico and its mayor and city council members, based on the City’s use of a seal including three crosses. (Aplt. App. p. 397). Appellants contend that the composition and use of this seal violates the Establishment Clause of the First Amendment to the United States Constitution.

The symbol at issue, referred to herein as the “Las Cruces symbol,” consists of three stacked crosses, with the middle cross raised higher than the other two, within a sunburst. (Aplt. App. p. 26, 287, 405, 300, 454). This is the Las Cruces symbol:



(See Aplt. App. p. 405, 300, 454). As the district court recognized, the cross is an “immediately recognizable symbol for most of Christianity,” and for many Christians, is the most powerful symbol of their faith. (Aplt. App. p. 499). Additionally, a symbol of three crosses, with the middle higher than the other two, symbolizes

Calvary, where Jesus was crucified. (Aplt. App. p. 26, 291). This is one of the most recognizable symbols of Christianity. (Aplt. App. p. 26, 291). Christian churches use the symbol of Calvary. (Aplt. App. p. 291). The symbol is a part of Christian theology. (Aplt. App. p. 26, 291).

There are elements of religion connected to the Las Cruces symbol because the crosses are easily identifiable as a Christian symbol. (Aplt. App. p. 296). The symbol of Calvary is also a recognizable symbol of Christianity outside the city of Las Cruces. (Aplt. App. p. 292). A reasonable observer in a Christian geographical region outside of Las Cruces would consider three crosses to represent Calvary. (Aplt. App. p. 26, 292). The symbol of Calvary also exists on churches in Las Cruces. (Aplt. App. p. 292).

There was also evidence that the cross has a historical connection with the name of the City of Las Cruces. (Aplt. App. p. 504). The term “las cruces” is Spanish for “the crosses.” (Aplt. App. p. 502). The City was founded as a village in 1849, originally bearing the name “El Pueblo del Jardin de Las Cruces.” (Aplt. App. p. 23, 22). The district court wrote that “jardin de las cruces,” literally translated as “garden of the crosses,” is a euphemism for a cemetery. (Aplt. App. p. 504). A widely held theory is that the City is named for groups of crosses placed on graves and at the sites of massacres that occurred in the area in the 18th and 19th centuries.

(Aplt. App. p. 504). The City publishes a brochure, entitled “History of the Crosses: How Las Cruces Got Its Name,” propagating this theory. (Aplt. App. p. 242). However, the City did not begin to use crosses as its official symbol until 1946; prior to that date, the Town’s seal was a bunch of grapes. (Aplt. App. p. 24). Although describing the connection with crosses, the district court did not note any connection between the City and the symbol of Calvary. (Aplt. App. p. 504).

The Las Cruces symbol can be polarizing to members of the community of Las Cruces. (Aplt. App. p. 36, 294). For some citizens of Las Cruces, the use of the three crosses (with the middle one higher) signifies the crucifixion and Christianity. (Aplt. App. p. 26, 256, 267). Some Las Cruces residents see the Las Cruces symbol as a symbol of their faith and as a religious, Christian icon. (Aplt. App. p. 36, 293). Some non-Christians feel discriminated against by the City’s use of the Las Cruces symbol (Aplt. App. p. 200, 201, 207, 208), including at least one non-Christian religious leader, a Rabbi. (Aplt. App. p. 295).

Nonetheless, the City uses the Las Cruces symbol as its official city seal. (Aplt. App. p. 20, 24, 26, 454). It uses the symbol prevalently: It has applied the symbol to public property, including monuments, signs, flags, buildings (including city hall, city counsel chambers, and the library), parks, official uniforms (including the uniforms of the City police officers and firefighters), and vehicles. (Aplt. App.

p. 25, 43, 44, 47, 52, 201, 208, 214, 216-42, 288-89, 300-06, 454). It has applied the symbol to public documents, including the City letterhead, envelopes, communique, official documents, notices, maps, brochures, and advertisements. (Aplt. App. p. 23-25, 38, 40, 42-47, 49, 201, 208, 214, 216-42, 288, 289, 300-06, 454). It has applied the symbol to television broadcasts. (Aplt. App. p. 201, 208). This pervasive use of the Las Cruces symbol pervades the daily lives of the City's residents, including Appellants. (Aplt. App. p. 201, 208, 214, 216-42, 288-89, 300, 301-06).

The individual Appellees are the governing body and the policymakers for the City, and act as its legislative body vested with legal authority to appropriate public funds collected and possessed by the City. (Aplt. App. p. 454). They approve of the continued use of the Las Cruces symbol. (Aplt. App. p. 309, 312, 315, 318, 320). The City expends public monies on the development and the distribution of the Las Cruces symbol. (Aplt. App. p. 454).

Appellants filed this suit under 42 U.S.C. § 1983, seeking a declaration that the City's use of the Las Cruces symbol violates their rights under the First Amendment to the United States Constitution, injunctive relief prohibiting further use of the Las Cruces symbol, and damages. (Aplt. App. p. 397). All parties moved for summary judgment. (Aplt. App. p. 54, 185). The district court concluded that the City's use of the symbol did not have the purpose of advancing a particular religion, did not

have the effect of favoring a particular religion, and did not constitute excessive entanglement between the government and religion, and therefore found that the adoption and use of the Las Cruces symbol did not violate the Establishment Clause. (Aplt. App. p. 491). Based on these conclusions, the district court granted Appellees' motion for summary judgment, and denied Appellants' motion for summary judgment. (Aplt. App. p. 522). Appellants appeal. (Aplt. App. p. 524).

SUMMARY OF ARGUMENT

The Establishment Clause of the First Amendment prohibits the government from promoting or affiliating itself with any religious doctrine. Under the modified *Lemon* test, the government will run afoul of this prohibition if its conduct has the effect of conveying a message that a particular religion or religious belief is favored or preferred.

The corporate seal of a city is a symbol of governmental power. The seal of the City of Las Cruces contains unmistakable religious iconography. This Court has repeatedly determined that the prevalent use of a governmental seal displaying a religious symbol conveys a strong impression that the government endorses that religious belief, and therefore violates the Establishment Clause. The creation and use by the City of Las Cruces of its seal is unconstitutional.

The district court sought to distinguish this Court's precedents based on the historical connection between the City and crosses. However, this Court has rejected that distinction. As the Court pointed out, religion and religious symbols have significance to the history of many of our communities, but this does not overcome the prohibitions of the Establishment Clause. While history deserves commemoration, it cannot be honored by the prevalent display of abstract religious imagery.

The district court erred in concluding that the Las Cruces symbol did not

violate the Establishment Clause. This Court should reverse the district court judgment and render judgment holding the symbol unconstitutional, and remand the case to the district court for further proceedings.

ARGUMENTS AND AUTHORITIES

I. Standard of review.

The decision of a district court to grant or deny a motion for summary judgment is reviewed *de novo*. *Adamson v. Unum Life Ins. Co. of Am.*, 455 F.3d 1209, 1212 (10th Cir. 2006). Summary judgment is appropriate if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(c). The Court may affirm only if the record, considered in the light most favorable to the nonmoving party, establishes no genuine issue of material fact, and the movant was entitled to a judgment as a matter of law. *Westland Holdings, Inc. v. Lay*, 462 F.3d 1228, 1229 (10th Cir. 2006).

II. The district court erred in determining that the use of the Las Cruces symbol does not violate the Establishment Clause.

A. First Amendment jurisprudence: The *Lemon* test as modified.

The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹ U.S. CONST. amend. I. It is generally accepted that the framers had two purposes in mind when adopting the Bill of Rights

¹ By incorporation into the Fourteenth amendment, this prohibition is made applicable to the States. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000); *Cantwell v. State of Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Accordingly, State action in violation of the Establishment Clause is unconstitutional.

clauses concerning religious freedom: To prevent the establishment of a national church, and to forbid the national preference of one Christian sect over another. *Harris v. Society of Separationists, Inc.*, 927 F.2d 1401, 1410 (7th Cir. 1991), *citing American Jewish Congress v. City of Chicago*, 827 F.2d 120, 123 (7th Cir. 1987). The district court found “historical cherry picking” of the origins of the Establishment Clause unhelpful (Aplt. App. p. 495) and the Supreme Court agrees: Regardless of its original intent, when the principles of religious freedom and tolerance have been examined in the “crucible of litigation,” the Supreme Court “unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.” *Wallace v. Jaffree*, 472 U.S. 38, 52-53, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985). The Establishment Clause has come “to mean that government may not promote or affiliate itself with any religious doctrine or organization” *County of Allegheny v. American Civil Liberties Union Pittsburgh Chapter*, 492 U.S. 573, 590-91, 109 S.Ct. 3086, 3099-3100, 106 L. Ed. 2d 472 (1989).

Moreover, the First Amendment does not merely prohibit establishment of a state religion; it forbids any law “respecting” the establishment of religion. *Harris*, 927 F.2d at 1410. Thus, a particular governmental practice might not establish a state religion, but it can still run afoul of the Establishment Clause as a law “respecting”

such a religion. *Id.*, citing *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

Whether governmental action violates the Establishment Clause has traditionally been tested by the method articulated by the Supreme Court in *Lemon v. Kurtzman*, often referred to as the “*Lemon* test.” Under this standard, government action violates the Establishment Clause if it fails to meet any of the following conditions: (1) it must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. Justice O’Connor articulated a modified “endorsement test” to refine the first two prongs of this analysis in her concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687-94, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984) (O’Connor, J., concurring), and a majority of the Supreme Court later expressed agreement with this modified *Lemon* test. Under this analysis, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred. See *O’Connor v. Board of Regents of Washburn University*, 416 F.3d 1216, 1224 (10th Cir. 2005), citing *Lynch*, 465 U.S. at 687-94 (O’Connor, J., concurring). Each prong of the *Lemon* test is independent; the challenged government action must survive all three to be permitted under the

Establishment Clause. *Friedman v. Board of County Comm'rs*, 781 F.2d 777, 780 (10th Cir. 1985) (*en banc*).

Although the viability of the *Lemon* test in some circumstances has been questioned, as this Court has pointed out, it has not been overruled and remains the law in this Circuit. *O'Connor*, 416 F.3d at 1224. This Court has also ratified the use of the modified *Lemon* test to determine the specific question of whether a City seal violates the First Amendment. *Robinson v. City of Edmond*, 68 F.3d 1226, 1229 (10th Cir. 1995). Accordingly, a City seal which has the effect of conveying a message that a particular religious belief is favored will fail the *Lemon* test and violate the Establishment Clause. While applying the test, however, the Court must remain mindful that there is “no test-related substitute for the exercise of legal judgment.” *O'Connor*, 416 F.3d at 1224.

B. The Las Cruces symbol is unconstitutional because it has the effect of endorsing Christianity.

The City's use of the Las Cruces symbol is unconstitutional because it fails to satisfy the second prong of the modified *Lemon* test; regardless of the City's purpose, its use of iconic Christian imagery in the City seal has the effect of conveying the message of City endorsement or approval of Christian religious belief.

“The effect prong asks whether, irrespective of a government's actual purpose, the practice . . . conveys a message of endorsement or approval. An affirmative

answer . . . should render the challenged practice invalid.” *Friedman*, 781 F.2d at 781, quoting *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring) (alterations in *Friedman*). The Supreme Court has provided further explanation of unconstitutional endorsement of religion within the second prong of the modified *Lemon* test:

Of course, the word “endorsement” is not self-defining. Rather, it derives its meaning from other words that this Court has found useful over the years in interpreting the Establishment Clause. Thus, it has been noted that the prohibition against governmental endorsement of religion “preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *avored* or *preferred*.” Moreover, the term “endorsement” is closely linked to the term “promotion,” and this Court long since has held that government “may not ... promote one religion or religious theory against another or even against the militant opposite,” [¶] Whether the key word is “endorsement,” “favoritism,” or “promotion,” the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from “making adherence to a religion relevant in any way to a person’s standing in the political community.”

County of Allegheny, 492 U.S. at 593-94 (citations omitted, quote marks and alterations in original).

When evaluating the effect of government conduct under the Establishment Clause, an important concern is whether “the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.” *School District of City of Grand Rapids v. Ball*, 473 U.S. 373,

390, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), *overruled on other grounds*, *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). In applying the test, the Court must consider the particular physical setting of the challenged action. *Robinson*, 68 F.3d at 1229-30. Further, the effect must be evaluated by an objective standard, looking only to the reaction of the average receiver of the government communication or average observer of its action. *Id.*

In other words, the existence of a non-secular effect is to be judged by an objective standard, which looks only to the reaction of the average receiver of the government communication or average observer of the government action. This contrasts with the subjective examination under the purpose test. If the challenged practice is likely to be interpreted as advancing religion, it has an impermissible effect and violates the Constitution, regardless of whether it actually is intended to do so.

Friedman, 781 F.2d at 781. The resulting advancement need not be material or tangible; an implicit symbolic benefit is enough. *Id.*, citing *Larkin v. Grendel's Den*, 459 U.S. 116, 125, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982).

This Court's decision in *Robinson* is on point. In *Robinson*, as here, the principal issue was whether a City seal violated the second part of the *Lemon* test; that is, whether its primary effect was to advance or inhibit religion, or whether it conveyed the message that a particular religion was favored or preferred. *Robinson*, 68 F.3d at 1229. The case concerned the city seal of the City of Edmond, which contained four quadrants bearing different images, one of which depicted a Christian

cross. *Id.* at 1228. Applying the modified *Lemon* test, *Robinson* held that the seal violated the Establishment Clause. *Id.* at 1233.

Robinson noted that the “religious significance and meaning of the Latin or Christian cross are unmistakable.” *Robinson*, 68 F.3d at 1232. The Court pointed out that the cross was a prominent feature of the Edmond seal. *Id.* The seal was also used pervasively. *Id.* Based on these facts and the nearly uniform caselaw holding the Establishment Clause violated when a public body includes a religious icon in its seal, the Court found the seal unconstitutional. *Id.* at 1233.

Robinson followed the previous *en banc* decision of this Court in *Friedman v. Board of County Comm’rs*, 781 F.2d 777 (10th Cir. 1985) (*en banc*), as well as the Seventh Circuit’s decision in *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991). In *Friedman*, this Court considered the seal of Bernalillo County, New Mexico, which contained the Spanish motto “Con Esta Vencemos” (“with this we conquer” or “with this we overcome”) inscribed over a golden Latin cross. *Friedman*, 781 F.2d at 779. The county prominently displayed the seal on county vehicles and used it to identify law enforcement officers. *Id.* at 781. As used in this fashion, the seal conveyed “a strong impression to the average observer that Christianity is being endorsed.” *Id.* at 782. The county’s use of the seal therefore violated the Establishment clause. *Id.*

The Seventh Circuit followed *Friedman* in *Harris*. *Harris*, 927 F.2d at 1414-

15. There, the Court addressed (in consolidated cases) city seals of two different cities, both of which included a cross, among other images. *Id.* at 1403-04. The Court pointed out that the corporate seal of a municipality is a clear symbol of government power. *Id.* at 1412. The Court determined that the obvious presence of a cross on a municipal seal “endorses or promotes a particular religious faith. It expresses an unambiguous choice in favor of Christianity. It presents to any observer a clear endorsement of all those beliefs associated with a Latin cross in violation of the Establishment Clause of the first amendment.” *Id.* “The conspicuous depiction of the pre-eminent symbol of a particular faith on that seal conveys a message of approval that is simply inconsistent with the first amendment.” *Id.* The use of Christian imagery on a municipal seal will “inevitably create an unmistakable impression that the local government tacitly endorses Christianity.” *Id.* at 1414. The Court concluded that “sectarian religious imagery simply has no place on municipal seals.” *Id.* at 1402.

Other cases involving municipal seals bearing iconic religious images reach the same conclusion. *See Webb v. City of Republic, Missouri*, 55 F.Supp.2d 994, 1000-01 (W.D. Mo. 1999) (portrayal of Christian fish symbol on city seal “impermissibly excludes other religious beliefs or nonbeliefs and – intended or not – depicts Christianity as the religion recognized and endorsed by the residents of Republic”);

American Civil Liberties Union v. City of Stow, 29 F.Supp.2d 845, 851 (N.D. Oh. 1998) (by including cross in its seal, city impermissibly advanced or endorsed the religion of Christianity).

The result should be the same in this case. The central image in the Las Cruces symbol is three crosses. “There can be no doubt that a Latin cross is the principal and unmistakable symbol of Christianity as practiced in this country today.” *Harris*, 927 F.2d at 1403. The symbol is used pervasively, including on municipal vehicles and the uniforms of law enforcement officers, as well as public documents and buildings. (Aplt. App. p. 23-25, 38, 40, 42-47, 49, 201, 208, 214, 216-42, 288, 289, 300-06, 454). Residents of Las Cruces, both Christian and non-Christian, perceive the seal as a symbol of the Christian religion. (Aplt. App. p. 26, 200, 207, 292). Whether intended or not, the use of iconic Christian imagery in the public seal of the City of Las Cruces conveys the message that Christianity is the religion endorsed by the City. This message is prohibited by the Establishment Clause.

The district court attempted to distinguish *Robinson* and *Friedman* based on the name of the City Las Cruces, holding that a reasonable observer would understand the crosses to symbolically represent the City rather than to endorse Christianity. (Aplt. App. p. 513). A similar argument was rejected in *Harris*. There, a city which was established by the reverend of a Christian church sect, and which had been

founded with religious intent, argued that the Christian imagery in its seal merely commemorated its historical origins. *Harris*, 927 F.2d at 1414. While recognizing that this unique religious heritage may deserve commemoration, the Court nonetheless determined that “the City may not honor its history by retaining the blatantly sectarian seal, emblem and logo. These symbols transcend mere commemoration, and effectively endorse or promote the Christian faith.” *Id.* at 1414-15. “No appeal to history can abate that [sectarian] message when the images in the seal are abstract symbols of a particular Christian sect.” *Id.* at 1415. This Court in *Robinson* also rejected the theory that historical significance could justify a seal’s otherwise impermissible use of religious imagery. As the Court pointed out, an appeal to history “could always ‘trump’ the Establishment Clause, because of the undeniable significance of religion and religious symbols in the history of many of our communities.” *Robinson*, 68 F.3d at 1232.

The district court also pointed out that some secular businesses in Las Cruces utilize the cross symbol. (Aplt. App. p. 508). This fact is insignificant. Private businesses are free to use religious imagery in their signs and advertising; this does not deprive them of their religious message or justify governmental use of the same symbol. Thus, it is not uncommon for businesses and private persons to display the ichthys (the Christian fish symbol) despite its religious connotation. Indeed, the use

of religious imagery by businesses is just as likely to indicate an appeal to religious solidarity as it is to indicate that the icon has nonreligious import.

This Court's *en banc* decision in *Friedman* and its more recent holding in *Robinson* should govern the outcome in this case. As in those authorities, the crosses are prominently displayed on the Las Cruces symbol. As in those authorities, the symbol is used pervasively, including use on public vehicles and uniforms of law enforcement officers. And as those Courts found, an average observer of this pervasive public display of unmistakable religious imagery would likely interpret it to endorse the religion of Christianity, in violation of the Establishment Clause of the First Amendment to the United States Constitution. The district court erred in concluding otherwise.

The Court should reverse the order granting Appellees' motion for summary judgment and denying Appellants' motion for summary judgment, render judgment declaring the Las Cruces symbol unconstitutional, and remand the case for assessment of damages, attorney fees, and appropriate injunctive relief.

CONCLUSION

Appellants respectfully request that the Court reverse the judgment of the district court, and render judgment in favor of Appellants declaring that the Las Cruces symbol violates the First Amendment to the U.S. Constitution; that the case be remanded to the district court for assessment of damages, injunctive relief, attorney fees, and any other appropriate remedies; and that they be awarded their costs of appeal, and such other relief to which they may be justly entitled.

STATEMENT REGARDING ORAL ARGUMENT

This case presents complicated and important issues of First Amendment jurisprudence. Appellants respectfully submit that oral argument will materially aid the Court in deciding these issues, and request the Court to grant oral argument.

Respectfully submitted,

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/s Brett Duke

Brett Duke

Attorney for Appellants

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I hereby certify that the foregoing Brief of Appellants has been filed in the office of the Clerk of the United States Court of Appeals for the Tenth Circuit, via priority U.S. mail, and a true and correct copy of the brief has been served on Appellees' Counsel, **Matthew Holt**, Holt, Babington, Mynatt, PO Box 2699, Las Cruces, NM 88004-2699, via first-class U.S. mail, on this 6th day of March, 2007. The attachment electronically filed includes an attachment in Digital Form. This electronically filed document is also served on the attorney for appellees electronically at mph@hbm-law.com on March 7, 2007.

/s Brett Duke

Brett Duke

Attorney for Appellants

ATTACHMENT

**DISTRICT COURT'S MEMORANDUM OPINION
GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT
AND DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**PAUL F. WEINBAUM,
OLIVIA S. WEINBAUM,
MARTIN J. BOYD,**

Plaintiffs,

vs.

No. CIV 05-0996 RB/LAM

**CITY OF LAS CRUCES, NEW MEXICO,
WILLIAM MATTIACE, individually,
and in his official capacity as Mayor of the
City of Las Cruces, DOLORES ARCHULETA,
individually, and in her capacity as a member
of the City Council of the City of Las Cruces,
New Mexico, DOLORES CONNOR,
individually, and in her capacity as a member
of the City Council of the City of Las Cruces,
New Mexico, JOSE FRIETZE, individually,
and in his capacity as a member of the City
Council of the City of Las Cruces, New Mexico,
KENNETH MIYAGASHIMA, individually, and
in his capacity as a member of the City Council of
the City of Las Cruces, New Mexico, WESLEY
STRAIN, individually, and in his capacity as a member
of the City Council of the City of Las Cruces, New
Mexico, and STEVE TROWBRIDGE, individually,
and in his capacity as a member of the City Council
of the City of Las Cruces, New Mexico,**

Defendants.

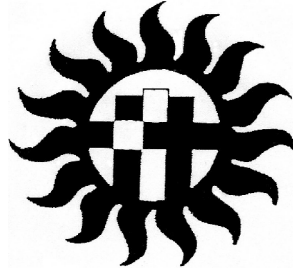
MEMORANDUM OPINION AND ORDER

THIS MATTER came before the Court on Cross Motions for Summary Judgment (Docs. 140 and 142), filed on June 29, 2006. Jurisdiction arises under 28 U.S.C. §1331 (2000).

Having reviewed the submissions of the parties, and being otherwise fully advised, I grant Defendants' motion and deny Plaintiffs' motion.

I. Background.

Plaintiffs¹ allege that the adoption of the official symbol by the City of Las Cruces, New Mexico (“Symbol”) violates the First Amendment of the United States Constitution. U.S. Const. amend. I. The Symbol consists of three crosses surrounded by a sunburst:



The City of Las Cruces (“the City”) displays the Symbol prominently on public property, (Affidavits of Paul F. Weinbaum and Martin Boyd, M.D., Exs. 1-28), and uses the Symbol on official documents. (*Id.*)

Plaintiffs contend that the City’s extensive use of the Symbol pervades the daily lives of city residents, including Plaintiffs. They allege that the City’s creation and use of the Symbol is an endorsement and advancement of religion in violation of the Establishment Clause of the First

¹ Plaintiffs are residents of the Las Cruces area. Olivia Weinbaum is the unemancipated minor daughter of Paul Weinbaum. In order for this Court to exercise jurisdiction under Article III, Plaintiffs must allege, and ultimately prove, that they have standing. *See Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006). Allegations of personal contact with a state-sponsored image suffice to establish standing in a First Amendment case. *O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005) (citing *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989)). Plaintiffs Paul Weinbaum and Martin Boyd aver that they are “constantly forced to view the Las Cruces symbol.” (Pls. Exs. 1 & 2.) Plaintiffs Paul Weinbaum and Martin Boyd may also have standing as municipal taxpayers. *See Flast v. Cohen*, 392 U.S. 83 (1968); *Women’s Emergency Network v. Bush*, 323 F.3d 937, 943 (11th Cir. 2003); *Freedom from Religion v. Zielke*, 845 F.2d 1463, 1470 (7th Cir. 1988). However, the record contains no allegations that confer standing on Olivia Weinbaum. Moreover, as an unemancipated minor, Olivia Weinbaum lacks the legal capacity to sue on her own behalf. *See Fed. R. Civ. P. 17(c)*; 6A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure* § 1570 (2006). For these reasons, the claims of Olivia Weinbaum are dismissed without prejudice.

Amendment. Further, they claim that the City’s creation and use of the Symbol has the effect of advancing religion and fostering excessive governmental entanglement with religion. Plaintiffs brought suit under 42 U.S.C. § 1983 (2000), seeking a declaratory judgment, a permanent injunction, damages, as well as attorney and expert witness fees.

The question presented to the Court is whether, in Las Cruces, New Mexico, the Establishment Clause of the First Amendment allows the display of a city seal which contains three crosses. I hold that it does.

II. Establishment Clause Jurisprudence.

In 1997, Establishment Clause jurisprudence was considered to be in “hopeless disarray,” *Bauchman v. W. High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997), and “the task of parsing the Supreme Court’s recent Establishment Clause cases [proved] nothing short of Herculean.” *Id.* at 565 (Murphy, J., concurring in part and dissenting in part). What was true in 1997 is no less true in 2006, particularly in light of the 10 separate opinions authored in *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005) and *Van Orden v. Perry*, 125 S. Ct. 2854 (2005). It is into this murky, turbulent water that this Court must wade.

The Religion Clauses of the First Amendment provide: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” U.S. Const. amend. I.² The First Amendment “expresses our Nation’s fundamental commitment to religious liberty by means of two provisions—one protecting the free exercise of religion, the other barring establishment of religion.” *McCreary County*, 125 S. Ct. at 2746 (O’Connor, J., concurring). With

² The First Amendment applies to “the States and their political subdivisions” through the Fourteenth Amendment. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 301 (2000).

the Religion Clauses, the Framers “intended not only to protect the integrity of individual conscience in religious matters, . . . but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate[.]” *McCreary County*, 125 S. Ct. at 2742 (Souter, J.) (citing *Wallace v. Jaffree*, 472 U.S. 38, 52-54 and n. 38 (1985)). The First Amendment was “meant to endure, and to meet ‘exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.’ ” *McCreary County*, 125 S. Ct. at 2744 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819)).

The Founders “were aware that they were designing a government for a pluralistic nation-- a country in which people of different faiths had to live together.” Jon Meacham, *American Gospel* 101 (2006). At that time, the young nation already boasted considerable “religious diversity,” with “Congregationalists dominating New England, Anglicans down south, Quakers in Pennsylvania, Catholics huddling together in Maryland, [and] Baptists seeking refuge in Rhode Island.” Akil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 45 (1998).

Indeed, two of the greatest legal minds of our time, Justice Scalia and Justice Stevens espouse nearly polar-opposite views of the Establishment Clause. Their respective positions illuminate the divisiveness that the provision’s meaning engenders, and demonstrate the issue’s complexity.

Justice Scalia rejects the notion that “[r]eligion is to be strictly excluded from the public forum”; he argues that the Establishment Clause permits state “acknowledgment of a single Creator” - specifically, “the God of monotheism.” *See McCreary County*, 125 S. Ct. at 2748, 2753 & n.3 (Scalia, J., dissenting). In support, Justice Scalia cites instances in which early American leaders and official proclamations of the federal government expressed “gratitude to God” in official or public settings. *Id.* at 2748-49, 2754 (noting that these statements and official acts “show *what [the Clause]*

meant” to those who crafted it). Justice Scalia believes that, because the Framers and young government openly “favor[ed] religion . . . [and] invoked God,” it is clear that the Establishment Clause does not proscribe state endorsement of “the God of monotheism.” *Id.* at 2753, 2755. The Justice patently rebukes the neutrality principle. *See id.* at 2750-52.

With equal zeal, Justice Stevens maintains that the First Amendment “erect[s] a wall of separation between church and state” and that “government must remain neutral between valid systems of belief.” *See Van Orden*, 125 S. Ct. at 2875, 2890 (Stevens, J., dissenting). In marked contrast to Justice Scalia, Justice Stevens believes that “the historical record of the preincorporation Establishment Clause is too indeterminate to serve as an interpretive North Star.” *Id.* at 2888 (“the leaders of [the] founding era” held “widely divergent views” of establishment). The Justice posits that interpreting the provision’s meaning requires examining “the Clause’s text and history [and] the broad principles that remain valid today.” *Id.* at 2888. Hence, in Justice Stevens’ view, “[t]he evil of discriminating today against atheists, ‘polytheists[,] and believers in unconcerned deities,’ . . . [is] a direct descendent of the evil of discriminating among Christian sects.” *Id.* at 2890.

Justices Scalia’s and Stevens’ diametrically opposed perspectives on, not only what the Establishment Clause proscribes, but also how to interpret the provision, underscores just how contentious this area of the law remains. Quite plainly, their differing views of history and case law dispel the notion that there are easy answers to be had in Establishment Clause jurisprudence.³

³ Historical cherry picking is not helpful; it is divisive. In a recent article, Judge McConnell argues that modern Establishment Clause jurisprudence has failed to comprehensively examine America’s experience, pre- and post-founding, with establishment. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003). The meticulously researched piece evidences that the young nation’s views of establishment were significantly more nuanced and complex than modern case law - with its frequent ad hoc citation to various Founders’ statements and official government actions - suggests. *See id.* at 2115-81 (documenting that a majority of the thirteen colonies had established churches prior to the Revolution, but that establishment took very different forms from colony to colony; *see also id.* at 2182-2205

“The First Amendment contains no textual definition of ‘establishment’, and the term is certainly not self-defining.” *McCreary County*, 125 S. Ct. at 2742. Given the competing values underlying the First Amendment and the need to accommodate an evolving society, “an elegant interpretive rule to draw the line in all the multifarious situations is not to be had.” *Id.* There is “no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.” *Van Orden*, 125 S. Ct. at 2868 (Breyer, J., concurring in the judgment) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)).

When defining the contours of the Religion Clauses, the “touchstone for our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’” *McCreary County*, 125 S. Ct. at 2733 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). However, adherence to neutrality must be tempered by a mindfulness of the basic purposes of the Clauses; namely, to “ ‘assure the fullest possible scope of religious liberty and tolerance for all’ . . . [and] to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.” *Van Orden*, 125 S. Ct. at 2868 (Breyer, J., concurring in the judgment) (quoting *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring), and citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 717-29 (2002) (Breyer, J., dissenting)).

“Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the ‘understanding, reached . . . after decades of religious war, that liberty and social

(examining the varied rationales for establishment in different colonies, including theological, political, and theoretical justifications). Scholarship that examines the Clause’s origins - in an unbiased and dispassionate way - as Judge McConnell’s article does, contributes a great deal to the otherwise rancorous debate.

stability demand a religious tolerance that respects the religious views of all citizens’ ” *McCreary County*, 125 S. Ct. at 2733 (quoting *Zelman v. Simmons-Harris*, 536 U.S. at 718 (Breyer, J., dissenting)). “By showing a purpose to favor religion, the government ‘sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members’ ” *McCreary County*, 125 S. Ct. at 2733 (quoting *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309-310 and *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

Unfortunately, neutrality as the constitutional lynchpin is not free of problems. *See McCreary County*, 125 S. Ct. at 2750 (Scalia, J., dissenting) (discussing why neutrality is a “thoroughly discredited say-so.”). Justice Scalia criticizes the inconsistencies inherent in application of neutrality and hypothesizes that the Court’s “genuine ‘good reason’ for occasionally ignoring the neutrality principle . . . is the instinct for self-preservation the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretations of the democratically elected branches.” *McCreary County*, 125 S. Ct. at 2752 (Scalia, J., dissenting).

The validity of such criticism is reflected in the current state of our society. Efforts to avoid divisiveness and the trend toward neutrality have led to dilution of religious meaning in the United States. *See* Patrick M. Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 Fla. L. Rev. 1, 6 (2005). “Formal neutrality may indirectly impede the exercise of religious liberty [and] severely undermine[] the theoretical foundation of American religious liberty by subverting the original theology on which it was grounded.” Daniel O. Conkle, *The Path of American Religious Liberty: from the Original Theology to Formal Neutrality and an Uncertain Future*, 75 Ind. L. J. 1, 25 (2000). Strict adherence

to neutrality squelches the idea that religion is “distinct and distinctly important” to our society. *Id.*

Justice Breyer recognized this flaw when he wrote:

[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious . . . [s]uch absolutism is not only inconsistent with our national traditions, . . . but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.

Van Orden, 125 S. Ct. at 2868 (Breyer, J., concurring in the judgment) (internal citations omitted).

Justice Breyer elaborated:

[T]ests designed to measure ‘neutrality’ alone are insufficient, both because it is sometimes difficult to determine when a legal rule is ‘neutral,’ and because ‘untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.

Van Orden, 125 S. Ct. at 2868-69 (Breyer, J., concurring in the judgment) (quoting *Schempp*, 374 U.S. at 306) (Goldberg, J., concurring)).

Under any theory or application of the First Amendment to a governmental display of a religious symbol, the difficult question is always where to draw the line: “[T]here is no test-related substitute for the exercise of legal judgment.” *Id.* Legal judgment “is not a personal judgment.” *Id.* The exercise of such judgment “must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes.” *Id.*

At any rate, if anything is clear in Establishment Clause jurisprudence it is this: “Establishment Clause questions are heavily dependent on the specific context and content of the display.” *See O’Connor*, 416 F.3d at 1222 (citing *Van Orden*, 125 S. Ct. at 2869 (Breyer, J., concurring in the judgment)). The inquiry is, necessarily, “fact- intensive.” *Van Orden*, 125 S. Ct. at 2869 (Breyer,

J., concurring in the judgment). With that in mind, I turn my attention to the facts of this case.

III. Context.

A. The Christian Cross.

The Christian or Latin cross is an immediately recognizable symbol for most of Christianity. Although the cross is depicted in many shapes and sizes, the best-known form is the Latin cross, an equal-armed cross with a longer foot. For Christians, the cross is the most powerful symbol of their faith - the symbolic representation of redemption and of the atoning death of Jesus Christ. For others, the cross has been, historically, a powerful symbol as well; sadly and too often it has been a symbol of oppression, persecution, and sometimes death.

On Christmas Day 800, Charlemagne was crowned by Pope Leo III as “the great and peace-bringing Emperor of the Romans.” Thomas Bokenkotter, *A Concise History of the Catholic Church* 97 (1990). In a startling example of differing perspectives, Charlemagne was also known as the “butcher of the Saxons.” Derek Wilson, *Charlemagne* 199 (2006). In retaliation for resistance to Christianization, Charlemagne had 4,500 men beheaded in one day. Wilson at 46-47.

The Crusades (1095-1272) are viewed, by Christians, as noble, inspired efforts to retake the Holy Land. Bokenkotter at 138. Muslims and Jews, on the other hand, view the Crusades as cruel and savage. *Id.* at 139.

During the period of the Spanish Inquisition, Jews were forced to convert to Christianity. James Reston, Jr., *Dogs of God: Columbus, the Inquisition, and the Defeat of the Moors*, 260-61 (1990). Refusal to convert could result in expulsion, imprisonment, or death. *Id.* Synagogues were turned over to the royal treasury or converted to Christian Churches. *Id.* Over 120,000 Jews were expelled from Spain in 1492, a region where they had lived and prospered for over 800 years. *Id.*

Variants of the cross were prominent symbols in Nazi Germany. While the swastika was the most notorious example, Nazi military decorations included the Iron Cross, the Knight's Cross, and the Grand Cross. Gordon Williamson, *The Iron Cross: A History 1813-1957*, 65-66 (1990). Millions suffered through one of mankind's darkest hours, at the hands of those proudly wearing crosses.

B. The Significance of Three Crosses.

The New Testament describes the crucifixion of Jesus. The gospels of Matthew, Mark, and Luke indicate that the Romans crucified two criminals along with Jesus at Calvary, one on His right side, and the other on the left. *Matthew 27:38; Mark 15:27; Luke 23:32-33*. From these passages, the "three crosses"--one Latin cross, slightly taller than the crosses to the right and left of it--have come to symbolize the crucifixion of Jesus and the two criminals.

C. Brief History of Las Cruces.

Las Cruces is New Mexico's second-largest city. It is located in the Rio Grande Valley, forty miles north of El Paso, Texas and Ciudad Juarez, Chihuahua, Mexico, and about 300 miles south of Santa Fe, New Mexico. Founded as a village in 1849, Las Cruces incorporated as a town in 1907, and reincorporated as a city in 1946. (Hunner⁴ Report at 6.)

Native Americans occupied the region before the 16th century. Warren A. Beck, *New Mexico, A History of Four Centuries* 23 (6th ed. 1975). From 1527 to 1537, Alvar Nunez Cabeza

⁴ Jon Hunner, Ph.D, Associate Professor and Director of the Public History Program at New Mexico State University, was appointed to serve as an expert witness on the history of Las Cruces, including the historical context of the name, "Las Cruces," and the use of crosses within the community of Las Cruces. (Doc. 55.) *See* Fed. R. Evid. 706. On September 11, 2006, I ruled that Dr. Hunner was qualified to testify as an expert witness on the history of Las Cruces, including the historical context of the name, "Las Cruces," and the use of crosses within the community of Las Cruces, but granted Plaintiffs' Motion to Strike with respect to Section Two of the of the Hunner Report, entitled "Governmental Protection of the Practice of Religion," the second and third paragraphs on page 19, continuing to page 20, and any other legal opinions rendered by Dr. Hunner. (Doc. 157.)

de Vaca, Alonso del Castillo Maldonado, Andrés Dorantes de Carranca, and the Moor Estevan wandered the Southwest after they were marooned near present-day Galveston, Texas. (Hunner Report at 3.) At least six Spanish expeditions followed, propelled by the myth of the Seven Cities of Cibola. Marc Simmons, *New Mexico, An Interpretive History* 13-14, 35 (Univ. of N.M. Press 1988). None of the members of the early expeditions stayed and settled in the area. *Id.* at 35.

In 1598, Don Juan de Oñate and a group of settlers traveled north from New Spain, and formally declared possession of Nuevo México when they crossed the Rio Grande near present-day El Paso. Beck, *supra*, at 53; Simmons, *supra*, at 35. As he continued north along the Rio Grande Valley through present-day New Mexico, Oñate extended the trail known as “El Camino Real de Tierra Adentro,” (“Camino Real”) which translates as “The Royal Road to the Interior Lands.” (Hunner Report at 3-4.) Although the Camino Real passed through the site that would become Las Cruces, permanent settlement of the area was delayed due to lack of reliable water and Native American raids. (*Id.*) Oñate continued north of present-day Santa Fe, and established the capital of the province at Ohkay Ohwingeh (formerly San Juan Pueblo). Gordon Owen, *Las Cruces New Mexico 1849-1999: Multicultural Crossroads* (1999); www.gov.state.nm.us/press/2005/dec/121605_01.pdf.

Except for the Pueblo Revolt (1680-1692) and the Reconquest (1693-1700), the Spanish ruled Nuevo México until 1821, when Mexico achieved independence from Spain. Owen, *supra*, 15-18. After the Santa Fe Trail opened in 1821, the Camino Real became known as the Chihuahua Trail. (Hunner Report at 4.)

In 1848, through the Treaty of Guadalupe-Hidalgo, Mexico ceded Nuevo México, and much of the present-day Southwest, to the United States. (Hunner Report at 14-15); Owen at 25. In 1849,

Pablo Melendres, the mayordomo of Doña Ana, a village about fifteen miles to the north of present-day Las Cruces, asked the United States Army to help relieve overcrowding in his community. (Hunner Report at 4.) Lt. Delos Sackett used a rawhide rope to lay out a grid of streets and founded *El Pueblo del Jardin de Las Cruces*, which translates as “the City of the Garden of the Crosses.” (*Id.*)

D. Origin of the Name “Las Cruces.”

“Las Cruces” is Spanish for “the crosses.” Plaintiffs are not willing to concede this translation and suggest that the term “Las Cruces” can also be translated “the crossings.” While some historians have noted this possible ambiguity, Owen, *supra*, at 31, and it is true that the plural of both *cruz* (cross) and *cruce* (crossing) is *cruces*, the potential for confusion dissipates when the gender of the respective nouns is considered. All nouns in Spanish have either masculine or feminine gender, except for one or two nouns of undecided gender. John Butt & Carmen Benjamin, *A New Reference Grammar of Modern Spanish* 1 (3d ed. 2000).

Cruz is a feminine noun, *Concise Oxford Spanish Dictionary* 175 (2d ed. 1998), the plural of which, accompanied by its definite article (which must agree in case and gender with the noun modified) is rendered *las cruces*, while *cruce* is a masculine noun, *id.*, the plural of which, accompanied by its definite article, is rendered *los cruces*. Indeed, if the village had been named for crossroads or crossings, it would have been named *Los Cruces*, and not *Las Cruces*.

Notwithstanding basic linguistics and adding to the uncertainty, one theory on the origin of the name holds that the name “Las Cruces” originated from the intersection of the Chihuahua Trail and the Butterfield Overland Mail Route near Las Cruces. (Hunner Report at 4.) However, this theory lacks historical, as well as linguistic, support. (*Id.*) The Butterfield Overland Mail Route

began service through the area in the 1850s. (*Id.*) In that the Butterfield Trail passed through the area only after the village of *El Pueblo del Jardin de Las Cruces* was founded, the “the crossroads” translation likely would not have been the source of the name “Las Cruces.” (*Id.*; Hunner Depo. at 84-85.)

The more reliable, and widely held, theory holds that the name, Las Cruces, described groups of crosses placed on graves and the sites of massacres that occurred in the area between 1712 and 1840. (Hunner Report at 4.) Indeed, this origin is recounted in a brochure published by the City entitled “History of the Crosses: How Las Cruces Got Its Name.” (Pls.’ Exs. 1 and 2, Affs. of Weinbaum and Boyd, Ex. 28.)

Several massacres occurred along the Camino Real/Chihuahua Trail near present-day Las Cruces. (Hunner Report at 4.) In 1712, a group of colonists traveling north to Santa Fe were attacked by Apaches at their campsite about thirty to forty-five miles north of Paso del Norte (present-day Ciudad Juarez). (*Id.*) Soldiers from Paso del Norte buried the victims and erected crosses over the graves. (*Id.*)

In 1787, a bishop, a priest, two military officers, four trappers, and four choir boys were killed at the site. (Hunner Report at 4.) According to Owen, the attack occurred near the Rio Grande and only one boy survived. Owen, *supra*, at 30. In a report dating from 1830, a caravan of forty people traveling south from Taos were all killed in the area, resulting in a “forest of crosses.” (*Id.*); Owen, *supra*, at 31. Another theory held that the brush along the river provided such fine cover for the Apaches that there were several small clusters of crosses, each marking a massacre, scattered around the river bank. Owen, *supra*, at 31.

On February 12, 1847, an eyewitness recorded the following observation in her diary:

Yesterday, we passed over the spot where a few years since a party of Apaches attacked Gen. Armijo as he returned from the Pass with a party of troops, and killed some fourteen of his men, the graves of whom, marked by a rude cross, are now seen.

(Hunner Report at 4-5 (quoting Susan Shelby Magoffin, *Down the Santa Fe Trail and Into Mexico* 203 (Univ. of Nebraska Press, 1982)).) The village of *El Pueblo del Jardin de Las Cruces*⁵ was founded two years after the diary entry. This first-hand report is the most compelling evidence of crosses standing in the area that would, shortly, become Las Cruces.

During the Spanish colonial and Mexican periods, most travelers and settlers in the area were Catholic and crosses were used to mark graves or locations of massacres. (Hunner Report at 5.) The practice of marking graves and the sites of tragedies with crosses remains a common practice in New Mexico to this day. (*Id.*) The accounts of massacres in the area support the premise that multiple crosses marked the site in 1849, when the village was founded and named. (*Id.*) While there may be some confusion regarding the origin of the name, there is no dispute of material fact that the name Las Cruces, means “The Crosses.”

E. Crosses Used as Official Symbols of the Municipality of Las Cruces.

The earliest documented use of three crosses in an official symbol of Las Cruces consists of a lease agreement between the Town of Las Cruces and Mrs. A.L. Sweet, dated July 28, 1941. (Hunner Report, Ex. 1.) The Town’s letterhead contained a grouping of three crosses, the one in the middle larger and higher than the others, with the motto, “The City of the Crosses.” (*Id.*)

Before 1946, the Town’s seal was a bunch of grapes. (Hunner Report, Ex. 2.) On April 16, 1946, the same year that Las Cruces incorporated as a City, the local newspaper reported:

⁵ Spanish speakers will recognize that “*jardin de las cruces*,” garden of the crosses, may well be a euphemism for a cemetery, lending further support for the notion that the name, *Las Cruces*, means “the crosses.”

“At [Mayor Sam] Klein’s request, the council-elect also gave [City Clerk] Mrs. Jackson authority to order a new seal of the city of Las Cruces to replace the old town seal which consists of a bunch of grapes. The new seal designed by [City Attorney E.G.] Shannon will now show three crosses.”

(Hunner Report, Ex. 4.) The City seal has contained three crosses to this day. (Hunner Report, Ex. 3.) Mayor Sam Klein was Jewish. (Hunner Depo. at 94.); Henry J. Tobias, *Jews in New Mexico*, (1990).

Las Cruces celebrated its centennial in October 1949. (Hunner Report, Ex. 5.) The cover of a publication concerning the centennial included three crosses hovering over a depiction of the city skyline against the backdrop of the Organ Mountains. (*Id.*) The cover also included a flying missile, Tortugas Peak, a plowed field, a conquistador carrying a flag, three friars bearing a cross, a Native American on horseback brandishing a rifle, a farmer wielding a hoe, and a graduate holding a diploma. (*Id.*)

In the 1950s, three interlocking crosses emblazoned the sides of Las Cruces police cars. (Hunner Report, Ex. 6.) The cover of the City’s 1963-64 Annual Report included several images illustrating city services and a symbol consisting of three crosses surrounded by a sunburst. (Hunner Report, Ex. 8.) The center cross was slightly taller than the others. (*Id.*) The cover of the 1965 Annual Report employed a slightly different version of the three-crosses-in-a-sunburst symbol. (Hunner Report, Ex. 9.) The version on the 1965 Annual Report is very similar to the symbol currently used by the Las Cruces Public Schools on maintenance vehicles. (Hunner Report, Exs. 9 and 10.)

As of 1969, three crosses, with the center cross larger and higher than the others, adorned the outside of city hall. (Hunner Report, Ex. 7.) Subdivision maps dating from 1972 and 1986 display

the three-crosses-in-a-sunburst motif rising over the Organ Mountains. (Hunner Report, Ex. 11.)

Raymond Garcia, a lieutenant with the Las Cruces Fire Department, previously worked as a purchasing clerk for the City. (Hunner Report at 9.) Mr. Garcia recalls that, in 1974, Ray Escalante, Director of Facilities for the City during the early 1970s, asked Mr. Garcia to update a metal sculpture hanging in City Hall. (Hunner Report at 9.) The old sculpture depicted three crosses, a yucca plant, a roadrunner, and the Organ Mountains. (*Id.*) In redesigning the sculpture, Mr. Garcia re-used the three crosses, and added a flaming circle as a tribute to the Johnny Cash song “Ring of Fire.” (*Id.*) Mr. Garcia describes himself as a former “long-haired, no-religion, Black Sabbath music lover” and insists that he had absolutely no intention to endorse religion when he redesigned the sculpture. (*Id.*)

Bobby De La Rosa, who was employed in the City’s drafting department in the early 1970s, designed a symbol of three crosses encased in a Zia symbol that is used on the sides of Las Cruces police cars. (Hunner Report at 8.)

F. Design of the Symbol.

The Symbol appeared on city letterhead as early as January 16, 1975. (Hunner Report, Ex. 12.) It was created sometime in the early 1970s. (Hunner Report at 8.) According to Mr. De La Rosa, the Symbol “just evolved” from the three-crosses-in-a-sunburst design. (*Id.*) Mr. Escalante recalls that he was asked to oversee the creation of a new design for the City’s symbol. (*Id.*) After winning an in-house design competition, Mr. De La Rosa created the Symbol. (*Id.*) According to Mr. De La Rosa: “At no time did religion enter into the concept of the logo [t]here was never any discussion of religion at all.” (*Id.*)

Art Robertson, retired Director of Personnel for the City, remembers that Donald Davidson,

a representative of an El Paso advertising agency, presented the Symbol to the City Council at a work session in 1974 or 1975. (Hunner Report at 8.) Mr. Robertson recalled that the City Council voted to adopt and copyright the Symbol. (*Id.*)

Dr. Hunner uncovered no indication that the City contemplated a religious meaning with respect to use of the Symbol in particular or three crosses in general. (Hunner Depo. at 94.) Other than the use of crosses in the Symbol, the record contains no evidence that the City acted with a religious purpose when it created, adopted, or used the Symbol. Although the events surrounding the design of the Symbol are uncertain, there is no material fact in dispute concerning the absence of religious purpose in the design of the Symbol.

G. The City's Use of the Symbol

The City displays the Symbol on public monuments, signs, flags, city council chambers, the library, parks, official uniforms, and official vehicles. (Hunner Depo. 9-16, Pl. Exs. 1 & 2, Weinbaum and Boyd Affs., Exs. 1, 4, 5-15, 17 and 18.) The City uses the Symbol on television broadcasts and public documents, including letterhead, envelopes, official documents, notices, maps, brochures, and advertisements. (Hunner Depo. 11, Weinbaum and Boyd Affs., Exs. 19-27 and 28.) When used on some City vehicles, the Symbol is accompanied by the words "FOR OFFICIAL USE ONLY." (Weinbaum and Boyd Affs., Exs 17 & 18.) When used on some City publications, notices and advertisements, the Symbol is accompanied by the words "PEOPLE HELPING PEOPLE." (Weinbaum and Boyd Affs. Exs. 21-24; 25-26; 28.) The City has published a brochure, entitled "History of the Crosses: How Las Cruces Got Its Name," that describes the secular origins of the name. (Weinbaum and Boyd Affs., Ex. 28.)

City Police Officers wear a patch that includes a slightly modified Symbol; the entire patch

is 4.5 inches high and the crosses on the patch are less than .5 inch high. (Mem. in Support of Defs.’ Mot. for Summ. J. at 14.) A modified version of the Symbol appears on the side of City police cars; the crosses in the version on the police cars are two inches high. (*Id.*) At all times, the City has paid for the development, application and display of the Symbol and modified Symbols (collectively “Symbol”) with public funds. (Mem. in Support of Defs.’ Mot. for Summ. J. at 15.)

H. Crosses used to identify non-religious entities in Las Cruces.

The Las Cruces Chamber of Commerce has used three crosses as a symbol since 1970, (Hunner Report Ex. 14), and currently includes three crosses in its logo. See <http://www.lascruces.org/>. A number of businesses in Las Cruces use three crosses to identify themselves as local enterprises. (Def. Exs. C, D, E, F, G, H, and I.)

As early as 1919, the annual yearbook at Las Cruces High School was called “The Crosses.” (Hunner Report at 10; Ex. 13.) The Las Cruces Public School District uses a symbol with three crosses to identify its maintenance vehicles. (Hunner Report, Ex. 10.) A sculpture containing three stylized crosses is displayed at the entrance of the Las Cruces Public School District’s Regional Sports Complex. See <http://www.lcps.k12.nm.us/Departments/Athletics/field.shtml>.

IV. Summary Judgment Standard.

Summary judgment should be granted if the record shows “ ‘that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’ ” *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006) (quoting Fed. R. Civ. P. 56(c)). In applying this standard, a court must “view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party.” *Id.* (internal quotation marks and citation omitted).

The moving party bears “the initial burden to show that there is an absence of evidence to support the nonmoving party’s case.” *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1164 (10th Cir. 2000) (internal quotation marks and citations omitted). If the moving party satisfies this burden, the other party must “identify specific facts that show the existence of a genuine issue of material fact.” *See id.* (“party opposing the motion must present sufficient evidence in specific, factual form for a jury to return a verdict in that party’s favor.”).

“A fact is material if under the relevant substantive law it is essential to proper disposition of the claim.” *Faustin v. City & County of Denver*, 423 F.3d 1192, 1198 (10th Cir. 2005) (internal quotation marks and citation omitted). An otherwise well-taken summary judgment motion is not, however, defeated by the “mere existence of *some* alleged factual dispute between the parties . . . the requirement is that there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

V. *Lemon* and its Limits.

The “traditional standard” for Establishment Clause analysis is the three-part test articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1258-59 (10th Cir. 2005) (internal quotation marks and citations omitted). The *Lemon* test provides that “ ‘government action does not violate the Establishment Clause so long as it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement.’ ” *O’Connor v. Washburn Univ.*, 416 F.3d at 1224 (quoting *Bauchman*, 132 F.3d at 551).

Application of the *Lemon* test has proven contentious. *See Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring). Justice Scalia has lamented

that selective application of *Lemon* spawned a “strange Establishment Clause geometry of crooked lines and wavering shapes.” *Lamb’s Chapel*, 508 U.S at 399 (Scalia, J., concurring in the judgment). “Acknowledging *Lemon*’s weaknesses,” Justice O’Connor crafted a concurring opinion in *Lynch v. Donnelly*, that encouraged the Court “to refine the *Lemon* analysis to focus more on whether government is ‘endorsing’ religion.” *Bauchman*, 132 F.3d at 551 (citing *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984)). Justice O’Connor’s concurrence provided a sound analytical framework for evaluating governmental use of religious symbols. See *O’Connor*, 416 F.3d at 1224; e.g., *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 595 (1989) (holiday display featuring crèche and Chanukah menorah).

Under Justice O’Connor’s “endorsement test,” the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that “religion or a particular religious belief is favored or preferred.” *County of Allegheny*, 492 U.S. at 590. Both the purpose and effect prongs are analyzed through the eyes of an “objective observer.” *McCreary County*, 125 S. Ct. at 2734; see also *O’Connor*, 416 F.3d at 1228. An objective observer “takes account of the traditional external signs that show up in the ‘text, legislative history, and implementation . . .’ of the official act.” *McCreary County*, 125 S. Ct. at 2734 (quoting *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308). The objective observer is “presumed to be familiar with the history of the government’s actions and competent to learn what history has to show.” *McCreary County*, 125 S. Ct. at 2737 (citing *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308).

The plurality opinion in *Van Orden* upheld a Ten Commandments display without a discussion of the *Lemon* factors or the endorsement test. *Van Orden*, 125 S. Ct. at 2861-64 (Rehnquist, C.J.). However, until the Court overrules *Lemon*, it remains binding precedent. *O’Connor*, 416 F.3d at

1224. The Tenth Circuit continues to apply the *Lemon* factors, as modified by the endorsement test, while remaining mindful of the teachings of *McCreary County* and *Van Orden*. *Id.*

VI. Application of *Lemon*, modified by the endorsement test, tempered by *McCreary County* and *Van Orden*, to the City’s adoption and use of the Symbol.

The religious significance of the cross is undeniable. *See Friedman v. Bd. of County Comm'rs of Bernalillo County*, 781 F.2d 777, 782 (10th Cir. 1985) (observing that “any statement to the contrary would be disingenuous”). The cross represents the central tenant of Christianity and is held sacred by Christians the world over. At the same time, the cross holds negative connotations for many members of our community. *See Friedman*, 781 F.2d at 782. In that the Symbol contains three recognizable, albeit stylized, Latin crosses, the Symbol bears religious significance and holds the potential for divisiveness.

Religious significance does not necessarily render the City’s use of the Symbol unconstitutional. “Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” *Van Orden*, 125 S. Ct. at 2863. The defining question is whether the City’s use of the Symbol manifests “the ostensible and predominate purpose of advancing religion” or “favor[ing] one faith over another,” *McCreary County*, 125 S. Ct. at 2733, and whether it has the effect of conveying a message that religion or a particular religious belief is favored or preferred. *O’Connor*, 416 F.3d at 1224.

A. Purpose.

There is no direct evidence of the City’s purpose in using three crosses in its seal. The only available evidence is the newspaper report concerning Mayor Klein’s request to adopt the seal upon reincorporation in 1946. The available evidence concerning the design of the Symbol in the early

1970s indicates a secular purpose of identifying the City.

When there is no evidence of the original purpose for adopting a practice, the government may propose possible secular justifications for the challenged practice. *King v. Richmond Co.*, 331 F.3d 1271, 1277 (11th Cir. 2003). While the government “has the obligation to propose a secular justification for the challenged practice . . . [t]his does not mean . . . that the government fails the purpose prong in cases in which there is no available evidence of the original intent for adopting a practice.” *Id.*

The City has identified three secular purposes served by the Symbol: (1) identifying city activities and property; (2) promoting the City’s unique history; and (3) linking the City to its origin. The present City Council has disavowed any religious purpose in connection with the Symbol. (Defs.’ Ex. L.) The record contains no indication that the City acted with a religious purpose in adopting and using the Symbol.

A professed secular purpose is entitled to some deference. *McCreary County*, 125 S. Ct. at 2735. However, that purpose “has to be genuine, not a sham, and not merely secondary to a religious objective.” *Id.* The court has a duty to “‘distinguis[h] a sham secular purpose from a sincere one.’” *Id.* (quoting *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308). Once the government proposes a possible secular purpose for the challenged practice, the party challenging the practice has the opportunity to rebut the stated secular purpose with evidence showing that the articulated purpose is insincere or a sham. *King*, 331 F.3d at 1277 (citing *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987)). The City has articulated a plausible secular purpose for the design of the Symbol. Plaintiffs have presented no evidence that the stated secular purposes are insincere or a sham, or that there was any religious purpose connected to the adoption of three crosses to identify the City or the design or use of the

Symbol.

Plaintiffs argue that this case is controlled by *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995), and *Friedman*, 781 F.2d at 777. In those cases, the issue presented was whether a “government seal or logo containing an unmistakably religious image violates the Establishment Clause.” *E.g.*, *Robinson*, 68 F.3d at 1228 (“The circular seal contains four quadrants, of which [three depict secular symbols] . . . and the last quadrant depicts a Christian cross.”); *Friedman*, 781 F.2d at 779 & n.1 (“The circular seal . . . contains the phrases, ‘Bernalillo County,’ and ‘State of New Mexico’ . . . [and] the Spanish motto, ‘CON ESTA VENCEMOS,’ which translates into English as, ‘With This We Conquer,’ or ‘With This We Overcome,’ [that] arches over a golden latin [sic] cross, highlighted The cross occupies roughly half the seal”). In each case, the defendants’ arguments that the cross simply represented the communities’ Christian heritage or history were squarely rejected. *E.g.*, *Robinson*, 68 F.3d at 1232 (rejecting defendants’ argument that “the City seal is permissible because it symbolizes “the unique history and heritage of Edmond”); *Friedman*, 781 F.2d at 779, 782 (reversing district court’s finding “that the significance of the sheep and cross was solely historical”).

The Court finds these cases readily distinguishable from the case at bar. Las Cruces’ name, quite simply, sets this case apart from those cited by Plaintiffs. A reasonable observer of the Symbol would understand that the crosses represent, symbolically, this uniquely named geopolitical subdivision, rather than an endorsement of Christianity. *Cf. Robinson*, 68 F.3d at 1227 (challenge to City of Edmond, Oklahoma’s official seal); *Friedman*, 781 F.3d at 779 (challenge to Bernalillo County, New Mexico’s official seal). In that the actual name of the City is symbolically represented by the crosses, this case is more analogous to *Murray v. City of Austin*, 947 F.2d 147 (5th Cir.1991).

In *Murray*, the Court of Appeals for the Fifth Circuit found the City of Austin, Texas's official logo to be constitutional, notwithstanding its inclusion of a Latin cross. *Id.* at 149. The *Murray* court's decision turned on the fact that the Austin logo was modeled after "the family coat of arms of Stephen F. Austin, the 'father of Texas' and the person after whom the City is named." *Id.* Austin's familial coat of arms contained a Latin cross. *Id.* In holding that the logo did not have the effect of endorsing religion, the Fifth Circuit found that "the insignia has the principal or primary effect of identifying city activity and property and promoting Austin's unique role and history." *Id.* at 155.

As in *Murray* - where the "connection between the state of Texas, the city of Austin, and Stephen F. Austin is unparalleled" - the connection between Las Cruces and three crosses is "unparalleled." See *Webb v. City of Republic*, 55 F. Supp. 2d 994, 1000 (W.D. Mo. 1999); accord *Robinson*, 68 F.3d at 1232 & n.10 (discussing *Murray*). Additionally, the different outcomes in *Murray*, versus *Robinson* and *Friedman*, further underscore that "factual specifics and context are nearly everything when it comes to applying the Establishment Clause to religious symbols and displays." *Glassroth v. Moore*, 335 F.3d 1282, 1300 (11th Cir. 2003).

In this case, as in *Murray*, the choice of a symbol or seal to represent the City of Austin or the City of Las Cruces was driven by the name of the city. No further deliberation would have been required nor implied in choosing the Symbol, which literally reflects the name. In *Robinson* and *Friedman*, however, the local governing bodies necessarily made their own choices, unrelated to the name of the entity itself, as to what symbols (or seals) would represent the city or county. In making those decisions, in exercising that discretion, the governing bodies revealed attitudes and beliefs, which impermissibly crossed the establishment line.

The secular purposes identified by the City are, absent any evidence to the contrary, sufficiently sincere to pass constitutional muster. The City adopted a seal containing three crosses at the behest of Mayor Klein, who was Jewish. The seal was designed by the City Attorney, E.G. Shannon. Although the exact circumstances surrounding the adoption of the Symbol are unclear, none of the putative designers of the Symbol was motivated by a religious purpose. There is no evidence that the Symbol is now, or was ever, associated with a religious purpose.

The Court has held government action unconstitutional where “openly available data supported a commonsense conclusion that a religious objective permeated the government’s action.” *McCreary County*, 125 S. Ct. at 2735. No evidence of record links the adoption or use of the Symbol with a religious purpose. The objective observer is deemed to be familiar with the history of the government’s actions and competent to understand what history has to show. The Symbol has no objectively available history of manifesting a religious purpose. An objective observer, “aware of the history and context of the community and forum” in which the Symbol appears, *McCreary*, 125 S. Ct. at 2737 (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in part and concurring in judgment)), would not believe that the City acted with an ostensible and predominate purpose of advancing religion, generally, or Christianity in particular, in adopting and using the Symbol.

B. Effect.

“The ‘effect’ prong of the endorsement test asks whether a reasonable observer aware of the history and context of the forum would find the display had the effect of favoring or disfavoring a certain religion.” *O’Connor*, 416 F.2d at 1228. The question of whether the display conveys a message endorsing religion depends on how the display is used. *Id.* Context is crucial. *Van Orden*,

125 S. Ct. at 2869 (Breyer, J., concurring in the judgment). The Establishment Clause prohibits only those government activities which, in the eyes of a reasonable observer, advance or promote religion or a particular religious belief. *Bauchman v. W. High Sch.*, 132 F.3d at 554. “This is an objective inquiry, not an inquiry into whether particular individuals might be offended. . . .” *Id.*

The City uses the Symbol to identify City activity and property. In this context, the Symbol communicates the secular message that the City’s name means “The Crosses” and links the City to its historic roots. This information is available to an objective observer through the brochure published by the City. *See O’Connor*, 416 F.3d at 1228 (observing an objective observer would review brochure describing display). Indeed, many nonreligious businesses in the Las Cruces area use three crosses to identify themselves as local firms. While the Court does not “count heads before enforcing the First Amendment,” *McCreary County*, 125 S. Ct. at 2747 (O’Connor, J., concurring), the use of the crosses to identify local business supports the concept that three crosses are colloquially associated with Las Cruces. (Defs.’ Ex. L.) The circumstances surrounding the adoption and use of the Symbol suggest that the City did not intend to send a religious message through the Symbol.

The City has used three crosses to identify itself since the 1940s and has used the Symbol since the 1970s. The passage of time is relevant to the Establishment Clause analysis. *See Van Orden*, 125 S. Ct. at 2858. “[A]n unbroken practice . . . is not something to be lightly cast aside.” *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). The fact that the City has used the Symbol for more than three decades, combined with the lack of any evidence of an intent to proselytize, is significant in concluding that the adoption and use of the symbol does not have the effect of endorsing religion in general or Christianity in particular.

Plaintiffs contend that the use of the words “for official use only” in conjunction with the

Symbol establishes the City's endorsement of religion. (Pls.' Mem. in Support of Mot. for Summ. J. at 7.) With respect to the photograph of the City Dial-A-Ride van, the words "FOR OFFICIAL USE ONLY" obviously refer to the use of the vehicle, not the use of the Symbol. (Pls.' Exs. 1 and 2, Weinbaum and Boyd Affs., Ex. 17-18.) The other photographs in the record with the words "FOR OFFICIAL USE ONLY" depict a seal used by Las Cruces Public School District, a separate entity from the City. (Pls.' Exs. 1 and 2, Weinbaum and Boyd Affs., Exs. 3 and 16.) Thus, they are not relevant to the analysis herein.

An objective observer would be aware of the origin of the City's name, the historical context in which the name arose, and the City's decades-long use of crosses to identify itself. Viewed in this context, the adoption and use of the Symbol does not have the effect of favoring or disfavoring religion in general or Christianity in particular.

C. Entanglement.

The entanglement analysis typically is applied to circumstances where the government involves itself with a recognized religious activity or institution. *Bauchman*, 132 F.3d at 556. Here, Plaintiffs do not allege that the City has involved itself in a recognized religious activity or institution. However, the parties argued entanglement in their briefs, so the issue will be addressed.

"Entanglement is a question of kind and degree." *Lynch v. Donnelly*, 465 U.S. at 684. The First Amendment does not prohibit all interaction between church and state; entanglement of the two becomes constitutionally "excessive" only when it has "the effect of advancing or inhibiting religion." *Skoros v. City of New York*, 437 F.3d 1, 36 (1st Cir. 2006) (quoting *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997)). The entanglement analysis is properly treated as an aspect of the inquiry into effect. *Skoros*, 437 F.3d at 36.

With respect to the use of the Symbol, the City does not provide any benefit or financial support to a religious institution or afford a religious institution a role in defining legal standards or obligations. There is no evidence that the City sponsors any religious activity through the use of the Symbol. The fact that the City uses public funds to apply the Symbol to public property does not equate to entanglement in light of the secular purposes surrounding the use of the Symbol. The City's use of the Symbol does not constitute excessive entanglement because it does not have the effect of advancing or prohibiting religion.

VII. Conclusion.

The adoption and use of the Symbol by the City does not violate the Establishment Clause of the First Amendment.

The constitutional issues raised in this case are “issues of acute public interest-issues which evoke diverse opinions and strong emotions.” *Bauchman*, 132 F.2d at 545. All the more so in this divisive context, “[w]e take seriously our obligation to uphold the First Amendment of the Constitution, which fundamentally operates to protect minority interests.” *Id.*

The issues raised by Plaintiffs are some of the most divisive of this, or any, time. The Court is also mindful that a suit of this nature “puts nothing in a plaintiff’s pocket and can take a great deal out, and . . . the risk of social ostracism can be powerfully deterrent.” *Van Orden*, 125 S. Ct. 2897 (Souter, J., dissenting).

In the Las Cruces newspapers during the pendency of this litigation, Plaintiffs have been the subject of several letters to the editor and comments in the “Sound Off” column. Many of those letters and comments have gone beyond critical to downright mean. People have suggested that if Plaintiffs have these complaints about the community, they should leave. No, they should not. This

is the United States of America. As concerned citizens and parents, Plaintiffs have every right to raise their concerns in this court.

The beauty of the system of governance passed down by the Founders is that Plaintiffs do not have to leave, that the complaint of those in the minority can and should be heard, and that we are all better for the hearing. In the hearing, we grow as a people and as a Nation. We can and should develop a deeper appreciation for our diversity. We can come to understand that one man's symbol of hope and resurrection power may be, to another, something else entirely. We can be awakened to the notion that the respect and dignity we owe each of our neighbors should not depend on a conforming belief system.

Before leaving the Supreme Court, Justice O'Connor challenged us all with the following:

[T]he goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

McCreary County, 125 S. Ct. at 2746 (2005) (O'Connor, J., concurring).

Mr. Weinbaum, a man of conviction, brought this suit on behalf of himself and his daughter, Olivia, a bright and beautiful child who attends a local school. In bringing this suit, Mr. Weinbaum, must have hoped to make his community, her community, a better place. Sadly, it has come to the Court's attention that the opposite has occurred; that Olivia has been made to suffer for the position her father has taken. If that is true or, if, as a result of this decision it comes true, then shame on us all.

WHEREFORE,

IT IS ORDERED that Defendants' Motion for Summary Judgment (Doc. 140), filed on June 29, 2006, is **GRANTED**, and Plaintiffs' Motion for Summary Judgment (Doc. 142), filed on June 29, 2006, is **DENIED**.

IT IS ORDERED that judgment in favor of Defendants shall issue forthwith.



ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE