No. 17-1717

IN THE
# Supreme Court of the United States

THE AMERICAN LEGION, *ET AL.*, *Petitioners*,
v.
AMERICAN HUMANIST ASSOCIATION, *ET AL.*,
*Respondents.*

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

## Brief *Amicus Curiae* of Public Advocate of the United States, Conservative Legal Defense and Education Fund, 60 Plus Foundation, Patriotic Veterans, One Nation Under God Foundation, Fitzgerald Griffin Foundation, Policy Analysis Center, Pass the Salt Ministries, Restoring Liberty Action Committee, and Center for Morality in Support of Petitioners


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Public Advocate of the United States and Patriotic Veterans are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Conservative Legal Defense and Education Fund, 60 Plus Foundation, One Nation Under God Foundation, Fitzgerald Griffin Foundation, Policy Analysis Center, and Pass the Salt Ministries are nonprofit educational, legal, and religious organizations, exempt from federal income tax under IRC section 501(c)(3). Restoring Liberty Action Committee and Center for Morality are educational organizations.

*Amici* organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* filed an *amicus* brief in this case at the petition stage on July 17, 2018.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

The district court and the court of appeals both applied the Lemon and Van Orden tests to the Bladensburg Cross, yet each reached diametrically opposite results. This fact alone demonstrates that these tests only provide the illusion of the rule of law, as they actually empower rule by unelected lawyers serving as judges with *de facto* lifetime appointments. In dissent, Chief Judge Gregory correctively identified the Establishment Clause's purpose was to prohibit coercion in support for government favored churches, not to purge Christianity from the public square.

Having abandoned the text of the Religion Clauses of the First Amendment, the courts have substituted their own principles for those of the People. Consequently, the courts have usurped the right of the People to constitute their government under a written constitution, misusing and abusing their power of judicial review to say what the law is. Instead, unburdened of their constitutionally limited role to discover the law, not make it, the courts have developed case-by-case a confusing and contradictory hodgepodge of rulings in pursuit of an illegitimate goal of religious neutrality.

The Religion Clauses are anything but religiously neutral. Indeed, the key word, "religion," was carefully and deliberately chosen to distinguish, on the one hand, between duties that are owed to the Creator that are, by the law of nature, enforceable only by one's "conscience" — by "reason and conviction" — and on the other hand, those duties that are also enforceable

by civil government — by "force and violence." Religion, then, as it appears in the 1791 Bill of Rights is a jurisdictional term, designed to secure to the People duties owed exclusively to God from usurpation by Caesar. *See Luke* 20:25.

The Bladensburg Memorial Cross was originally designed and erected to commemorate the lives of those who were killed in the line of military duty, and continues to be maintained as a commendation of that service pursuant to the power to punish evil and reward good, as vested in civil rulers by God. *See Romans* 13:1-4. Such monuments and memorials are built and maintained under the authority of civil government to levy taxes on the people to raise and support armies, provide for a navy and to make the rules for those in the armed forces, including the enlistment of clergy to serve as chaplains to prepare the men. From the time of its founding, America has relied upon "the laws of nature and nature's God" to affirm her rightful place as a free and independent United States of America before the Supreme Judge of the world.

In the case below, the types of relief sought by the "non-Christian" plaintiffs demonstrate their anti-Christian agenda: demotion of the Cross, destruction of the cross, or desecration of the Cross by turning it into a pagan obelisk. Many of this Court's decisions over the last 65 years to force the acceptance of pagan practices (such as abortion and sexual license), and the rejection of Christian practices (such as prayer and Bible reading), demonstrate the success of modern Paganism. James Madison warned that the cords of

our Constitution could never constrain human passions unbridled by morality and religion.

Judge Gregory warned against the type of "social conflict" that would follow from an effort to purge from American life any evidence of Christianity. Indeed, judicial rulings that opposed any religion other than Christianity are generally met by strong resistance, but Christians have been tolerant of abusive government. However, courts should not assume that we are not near a "tipping point." Postulate a decision from the Fourth Circuit approving a district court order to remove all the crosses from Arlington Cemetery applying the precedent of this case. Courts would do well to consider whether such an order would be accepted passively or viewed as "the final straw" destined to be resisted to the uttermost.

## ARGUMENT

### I. THE FIRST AMENDMENT RELIGION CLAUSE STATES A MANDATE FOR THIS COURT, NOT AN "OBJECTIVE" TO BE REALIZED THROUGH THE EXERCISE OF JUDICIAL REVIEW.

Relying predominantly on the three-part test laid down by this Court in Lemon v. Kurtzman, 403 U.S. 602 (1971), the Fourth Circuit panel concluded that the Bladensburg War Memorial Cross violated the Establishment Clause. In their earlier brief supporting the grant of this Petition, these *amici* contended that this Court's Lemon test violated three canons governing the interpretation of legal texts and,

for that reason alone should be disregarded, unworthy of reliance in this or in any other Establishment Clause case. But the case against Lemon is even stronger than that.

The Lemon three-part test appeared one year earlier in nascent form in Walz v. Tax Comm. of New York, 397 U.S. 664 (1970). Both opinions were written by Chief Justice Warren Burger. The Walz Court had previously ruled that, if a law is to survive an Establishment Clause challenge, it must first chart a religiously "neutral course" or "purpose" (Walz at 668); neither advance nor inhibit religion (*id.* at 672); and avoid "excessive government entanglement" (*id.* at 674). In neither opinion did the Chief Justice make any effort to determine if there was anything in the Establishment Clause text to support the newly coined three-part test. To the contrary, in Lemon, he took a swipe at the "**language** of the Religion Clauses," calling it "at best **opaque,** particularly when compared with other portions of the [First] Amendment." Lemon at 612 (emphasis added). In Walz, however, the Chief Justice unleashed a broadside attack, opining that "[t]he sweep of the absolute prohibitions in the [two] Religion Clauses may have been calculated; but the purpose was to state an **objective**, not to write a statute." Walz at 668 (emphasis added).

If the two Clauses state only an "objective" — a target, not a rule — then, one might ask, what is the basis upon which the Court may assert jurisdiction and issue injunctive relief in any case involving the two Religion Clauses? As another earlier Chief

Justice, John Marshall, observed, "there must be some rule of law to guide the court in the exercise of its jurisdiction." Marbury v. Madison, 5 U.S. 137, 165 (1803). Thus, before invoking the power of the Court to rule on the constitutionality of an act of Congress in Marbury, Chief Justice Marshall first addressed the question of whether the Constitution is law. He initiated his inquiry, by affirming that it is the rightful power of the People in constituting their government to define and limit the powers of civil government, and then commit those defined powers and limitations to writing. *Id.* at 176. He then asked, for what purpose are they reduced to writing, and answered:

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation. [*Id.* at 177.]

"[C]onsequently," the Chief Justice continued, "the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Id.* And if this is so, he asked, then what is the role of a court in a particular case "if a [statute] be in opposition to the constitution," but to rule that the superior law — the rule of the Constitution — "governs"? *Id.* at 178. This, the Chief Justice concluded, "is of the very essence of judicial duty." *Id.*

But what if a provision of the Constitution is not viewed as law, but rather held to be a mere statement of an "objective," as Chief Justice Burger characterized the two Religion Clauses to be? The entire edifice of American judicial review of the two clauses collapses,

because judicial review is, and has always been, based on the proposition stated in Marbury: "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. If any provision in the Constitution is not really law, then there is no role for the judiciary to play. If so, the Court's entire bank of Establishment and Free Exercise jurisprudence is not just wrong, but illegitimate. To be sure, as Chief Justice Marshall pointed out in Marbury, some provisions of the Constitution concern discretionary duties, the performance or nonperformance of which are only "politically examinable," not subject to judicial review. *See* Marbury at 165-66. But that was not the approach taken in Walz. To the contrary, the Walz Court embraced a more activist role for the federal judiciary — "to articulate the scope of the two Religion Clauses" — even though Chief Justice Burger lamented even then that "the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis." Walz at 668. Undeterred by that obvious shortfall, the Walz Court soldiered on, ignoring the Marbury premise that it is not for courts to "formulate" the nation's constitutional principles *ad hoc*, but for the People. Marbury at 176. As Justice Scalia observed:

> Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not ... future judges think that scope too broad. [District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008).]

Yet, that is precisely what this Court has done here with its effort to "find a **neutral** course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz at 668-69 (emphasis added). But the clash is of the Court's making, not the People's, as Chief Justice Burger reluctantly conceded in light of "[t]he considerable internal inconsistency in the opinions of the Court" in its effort to substitute the Court's "policy of neutrality" for the "absolute" principles stated in the text of the two Religion Clauses. *Id.* Instead of following Chief Justice Burger's finding of fault with the authors of the two clauses, this Court would do well for this case to return to first things, reexamining the text in accordance with the timeless admonition that:

> In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.... Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning.... [Holmes v. Jennison, 39 U.S. 540, 570-71 (1840).]

This admonition is especially pertinent with respect to the principles undergirding the two Religion Clauses, each word of which was carefully and deliberately

chosen. The message for this Court is clear: respect the text.

## II. RELIGION, AS IT APPEARS IN THE FIRST AMENDMENT, IS AN OBJECTIVE LEGAL RULE OF JURISDICTION SEPARATING MATTERS SUBJECT TO THE POWER OF THE STATE FROM MATTERS SUBJECT ONLY TO INDIVIDUAL CONSCIENCE.

Although America's founders spoke with one voice in favor of "religious freedom," the freedom actually proclaimed in the State Constitutions before the 1791 ratification of the Establishment and Free Exercise Clauses was varied and fluid. Until the 1940's, the differences among these State variants did not seem to matter that much, as each state-guaranteed right was confined by each respective state's geographic boundary. Then, this Court ruled in Cantwell v. Connecticut, 310 U.S. 296 (1940), that the Free Exercise Clause of the First Amendment to the U.S. Constitution applied to the States, followed by this Court's ruling in Everson v. New Jersey, 330 U.S. 1 (1947), that the No Establishment Clause applied to the States as well. *See* J. Nowak, R. Rotunda, J. Young, Constitutional Law § 17.1, 1030 n.2 (3d ed.: 1986).

Putting aside the propriety of those two incorporation decisions, this Court has failed, after 70 years, to develop a coherent and principled unifying body of precedents. Some have attributed this shortfall to "a natural antagonism between a command not to establish religion and a command not to inhibit

its practice." *Id.* at 1030. "This tension between the clauses," the three authors of the Constitutional Law Hornbook Series have asserted, "often leaves the Court with having to choose between competing values in religion cases." *Id.* In a quixotic effort to cut this Gordian knot, Harvard Professor Laurence Tribe once proposed a "twofold definition of religion — expansive for the free exercise clause, less so for the establishment clause," only to abandon his suggestion ten years later. *Compare* L. Tribe, American Constitutional Law at 826-828 (1st ed., Found. Press: 1978) *with* L. Tribe, American Constitutional Law at 1186-1187 (2d ed.: 1988).

Still, even more radically, in one of the leading Ten Commandments monument cases, a federal district judge refused to "formulate" a single definition of "religion," considering that it would be "unwise, and even dangerous." *See* Glassroth v. Moore, 229 F. Supp. 2d 1290, 1313, n.5 (M.D. Ala. 2002). But this lack of any fixed rule did not deter the judge from reaching the conclusion that a Ten Commandments monument celebrating the decalogue's impact on early American law and politics was an unconstitutional establishment of religion. How could that judge have so ruled if he did not know what "religion" meant, especially in light of the canon of construction that "words" when they appear in a written document like a constitution, must be given "the meaning they had when the text was adopted"? A. Scalia & B. Garner, Reading Law at 78-81 (West: 2012).

The truth is that the courts, including this Court, have no working definition of "religion" and appear to

have become satisfied to exercise judicial review under the Religion Clauses without one. *See* W. Van Alstyne, First Amendment: Cases and Materials at 1022-25 (Found. Press: 1991); *see also* G. Stone, *et al.*, Constitutional Law at 1463-66 (Little Brown, 2d ed.: 1991). This refusal to settle on a definition of "religion" empowers courts to disregard the constitutional text and, consequently, to open the door to impose their judicial will on the People.

While it is true that "religion" as it appears in the 1791 First Amendment is undefined by the Constitution, that does not mean that one cannot look elsewhere for a definition. Indeed, in the first case arising under the Free Exercise Clause, Chief Justice Waite readily went "elsewhere ... to the history of the times in the midst of which the provision was adopted." Reynolds v. United States, 98 U.S. 145, 162 (1879). That quest led the justices to the religious freedom controversy that "culminate[d]" in Virginia in 1784 with a bill in the Virginia Assembly "'for teachers of the Christian religion.'" *Id.* at 163. There, the justices found the definition they were looking for in James Madison's "widely circulated" Memorial and Remonstrance, in which Madison — as one of the chief protagonists against the bill — "demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government." *Id.* This jurisdictional understanding of the meaning of religion led not only to the defeat of the Virginia teacher bill, but also to the subsequent enactment of Thomas Jefferson's bill to establish religious freedom, the preamble of which stated:

> [T]hat to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty [and] that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order. [*Id.*]

"In these two sentences," the Reynolds Court concluded, "is found the true distinction between what properly belongs to the church and what to the State."[2] *Id.*

Looking back, we can see that the 139-year-old Reynolds legacy established two things. First, that religious freedom, including both the No Establishment and Free Exercise Clauses, is not a goal, but a limitation on governmental jurisdiction, and second, that the governing principle of both Clauses is a consistent jurisdictional definition of religion.[3]

In truth, in the 139 years since Reynolds, this Court has not made a serious effort to further its

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[2] This holding embodies the jurisdictional principle set out in Holy Writ. *See Luke* 20:25 ("Render therefore unto Caesar the things which are Caesar's, and to God the things that are God's.").

[3] *See* H. Titus, "Religious Freedom: The War Between Two Faiths" J. Of Christ. Juris. 111, 134-38 (1984-85).

understanding of the jurisdictional meaning of religion. It has ignored the fact that Madison began his Remonstrance quoting from Article I, Section 16 of the 1776 Virginia Declaration of Rights, which defines "religion" as "the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." On its face, this sentence provides a jurisdictional definition of religion, one that is picked up by Madison's Remonstrance in the very next sentence: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate" — which itself is a paraphrase from the 1776 Declaration of Rights which states that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." But Madison's Remonstrance takes this notion a step further, explaining that this free exercise right is unalienable "because what is here a right towards men, is a duty towards the Creator, [and thus] the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him."

Whether a duty is one that is enforceable only by "reason and conviction" is determined by the law of the Creator, not by man's individual conscience, much less by the law or say-so of a civil magistrate. And likewise, whether or not a duty is one enforceable by "force or violence" is also determined by the law of the Creator, not by individual conscience or by a civil magistrate. The point is this: whether any particular duty is categorically one governed only by "reason and conviction" or by "force or violence" is determined by

the laws of nature and of nature's God, not by the will or wishes of either the individual or of the civil magistrate. Thus, Madison's Remonstrance states:

> Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. [*Id.*]

Having laid this natural law foundation, Madison "maintain[ed] that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance." *Id*.

In Reynolds, the Court decided a free exercise claim in light of these founding principles and natural law. At issue was the claim that the laws prohibiting bigamy violated the Free Exercise Clause if applied to a man whose Mormon belief permitted him to have more than one wife. But his argument was unavailing, there being no evidence of a natural right to polygamy. Quite the contrary, Chief Justice Waite observed that "there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity." Reynolds at 165. And, as Justice Field wrote ten years after Reynolds:

> Bigamy and polygamy are crimes by the laws of all civilized and Christian countries.... They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. [Davis v. Beason, 133 U.S. 333, 341 (1890).]

Thus, the Court rejected the view of one religion in favor of what was understood to be a revelation made clear in both Testaments.

## III. ACCORDING TO THE TEXT OF THE NO ESTABLISHMENT CLAUSE, THE BLADENSBURG WAR MEMORIAL IS CONSTITUTIONAL.

"'The realm of religion,'" Justice John Paul Stevens wrote in Wolman v. Walter, 433 U.S. 229, 264 (1977) "'is where knowledge leaves off, and where faith begins...'" With this definition of religion in hand, Justice Stevens confidently concluded that all tax subsidies to any school with a "religious mission" were an unconstitutional establishment of religion, in violation of the First and Fourteenth Amendments of the U.S. Constitution.

Justice Stevens acknowledged that he had lifted his definition from Clarence Darrow's argument in the Scopes evolution trial in Dayton, Tennessee in 1924, but he did not explain why a twentieth century, atheist defense lawyer's argument about religion should control the meaning of the word contained in an eighteenth century document. Nor did Justice Stevens pause to consider whether Darrow's evolutionary

epistemology — the product of the Darwinian revolution of the mid-nineteenth century — should be superimposed upon a document written in a day when American statesmen took the Bible, including the book of *Genesis*, as the predicate for the establishment of relations among nations. *See* W. Davis, Eastern & Western History, Thought and Culture 1600-1815 at 241-68 (1993). For Justice Stevens, it was simply axiomatic that the language of the Constitution should be understood not as it was written, but as it might have been written by men after being enlightened by the most recent developments in science.

But, as Scalia and Garner have contended: "[I]t is ... in no way a vindication of textual evolutionism, that taking power from the people and placing it instead with a judicial aristocracy can produce some creditable results that democracy might not achieve." A. Scalia & B. Garner, Reading Law 88 (West: 2012). Rather, they urge a return to originalism as providing the "only objective standard of interpretation" and a return to the fixed-meaning canon that "words be given the meaning they had when the text was adopted." *Id.* at 78, 89. And as *amici* contended in support of the petition and now in this merits brief, the threshold question in this Establishment Clause case, is whether the existence and maintenance of the Bladensburg Memorial Cross on public land constitutes "religion," that is, a duty owed exclusively to the Creator — enforceable only by "reason and conviction" — whether it is part and parcel of a duty owed to the civil government and, therefore, enforceable by "force and violence."

Without a doubt, the law of the Creator that applies to this case is of the latter category, not the former. One need only to examine Hugo Grotius's monumental work, The Law of War and Peace (Walter J. Black, Inc. N.Y.: 1949), to know that "the law of nature" is the source of laws governing war between nation. For example, Grotius has a chapter entitled "General Rules from the Law of Nature governing what is legitimate in War. Trickery and Falsehood." *Id*. at 269-282. And as Professor Jeffrey Tuomala has summarized "the rules regarding declarations of war are requirements of the law of nature:"

> This general view was shared by the Founding Fathers and is evidenced by their legal defense in the Declaration of Independence, which appeals to the "laws of nature and of nature's God." Classical scholars recognized that the rules regarding declarations of war are requirements of the law of nature. [J. Tuomala, "Just Cause: The Thread that Runs So True," FACULTY PUBLICATIONS & PRESENTATION: LIBERTY UNIV. at 31 (1994).]

Both of petitioners' opening briefs have provided this Court with a vivid and detailed description of the memorial cross, itself, its environs, its history, and its use. *See* Brief for the American Legion Petitioners at 2-10 and Brief for Petitioner Maryland-National Capital Park and Planning Commission at 4-13. In essence, the picture painted reveals a memorial dedicated to the men and women who have served their country in the military in times of war. *See Romans* 13:3. Foremost among the duties of civil

government ordained by God is the defense of the nation from invading foreign enemies, including taxing the people to raise and support armies, to provide and maintain a navy, and to make the rules for the government and regulation of the land and naval forces. Thus, Congress and the President are empowered to declare war, grant letters of marque and reprisal to use whatever force and violence as authorized by God. *Romans* 13:1-4. Additionally, civil authorities may use conscription[4] of the able-bodied to fight. *See* Selective Draft Law Cases, 245 U.S. 366 (1918). *See also Deuteronomy* 20:1-9.

In support of the nation's defense, civil rulers may open and operate service academies, award individual service medals for bravery, and erect and maintain memorials to remember the fallen, and to purchase land for military cemeteries. *Romans* 13:3(b). Civil authorities may also build chapels on land dedicated for military purposes, and employ military chaplains. Military chaplains, in turn, were tasked with counseling Christian soldiers. Indeed, in an order dated July 9, 1776, General George Washington wrote:

> The honorable Continental Congress having been pleased to allow a Chaplain to each

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[4] Even in the early Quaker State of Pennsylvania conscription was authorized, albeit with a way out: "Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent...." Constitution of Pennsylvania, Section VIII, Aug. 16, 1776), reprinted in Sources of Our Liberties 330 (R. Perry & J. Cooper, eds., ABA Foundation: 1972).

> Regiment.... The Colonels or commanding officers of each regiment are directed to procure Chaplains accordingly; persons of good Characters and exemplary lives — To see that all inferior officers and soldiers pay them suitable respect and attend carefully upon religious exercises. The blessings of Heaven are at all times necessary but especially so in times of public distress and danger - the General hopes and trusts, that every officer and man will endeavor to so I've, and act, as becomes a Christian soldier defending the dearest rights and Liberties of his country. [N. Cousins, In God We Trust at 50-51 (Harper: 1958).]

On March 3, 1791, the First Congress authorized President Washington to appoint a chaplain for the "Military Establishment of the United States." The Second and Third Congresses reaffirmed the office of the military with appropriations of federal tax money to support it. R. Cord, Separation of Church and State at 54 (Lambeth: 1982). Surely, no one could envision that the 1791 No Establishment Clause could be read to mandate the removal of a monument because it prominently displayed a Christian cross. Equally fantastic would be the suggestion that the Framers elevated the value of "religious neutrality," so as to preclude any inquiry whether an individual chaplain's theological views on war were incompatible with the nation's military and civilian leaders.[5]

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[5] *See* H. Titus, "Public School Chaplains: Constitutional Solution to the School Prayer Controversy," 1 REGENT U. L. REV. 19, 46-53

In sum, under a textual analysis of the No Establishment Clause, once it is demonstrated that the Bladensburg war memorial falls under the jurisdiction of the civil government, then no further inquiry need be made into its purpose or effect, religious or otherwise. For Establishment Clause concerns, the presence of the cross is constitutionally irrelevant. Indeed, to isolate the cross, as the Fourth Circuit panel did, constitutes an illegitimate exercise of judicial power which is duty-bound to apply the "original understanding" of the meaning of the word, "religion," unalterable by the preferences or directions of judges. As George Washington wrote in 1788 from his headquarters at Valley Forge:

> While we are zealously performing the duties of good Citizens and Soldiers we certainly ought not to be inattentive to the higher duties of Religion. To the distinguished Character of Patriot, it would be our highest glory to add the more distinguished character of Christian. The signal instances of providential Goodness which we have experienced and which now almost crowned our labours with complete success, demand from us in a peculiar manner the warmest returns of gratitude and piety to the Supreme Author of all good. [Cousins at 51.]

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(1991).

## IV. IF ALLOWED TO STAND, THE FOURTH CIRCUIT DECISION WOULD ESTABLISH THE RELIGION OF PAGANISM.

### A. The Fourth Circuit Decision Exemplifies Everything that Is Wrong with this Court's Establishment Jurisprudence.

After evaluating the constitutionality of the Bladensburg Memorial Cross, first under the Lemon test, and then under Van Orden v. Perry, 545 U.S. 677 (2005), the District Court of Maryland granted the motions for summary judgment filed by the Maryland-National Capital Park and Planning Commission and the Intervenor-Defendants American Legion, *et al.* Despite acknowledging the widespread criticism of Supreme Court Establishment Clause jurisprudence, the district court tried valiantly to employ this Court's atextual, judge-devised tests.

The District Court attempted to apply the Lemon three-part test which requires that the conduct "'(1) must be driven in part by a *secular purpose*; (2) must have a *primary effect* that neither advances nor inhibits religion; and (3) must not *excessively entangle* church and State.'" American Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n, 147 F. Supp. 3d 373, 382 (D.Md. 2015). Even though the Van Orden "legal judgment" test is more difficult to fathom, the district court did its best to "'reflect and remain faithful to the underlying purposes of the [Establishment and Free Exercise] Clauses, taking into account both context and consequences measured in light of those purposes.'" *Id.*

Demonstrating that these tests are little more than empty vessels into which judges pour their own religious views and political preferences, the Fourth Circuit disagreed with the district court on all points. "The monument here has the primary effect of endorsing religion and excessively entangles the government in religion." American Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n, 874 F.3d 195, 200 (4th Cir. 2017). The panel opinion described the Bladensburg War Memorial as a "purported war memorial..." and took pains to describe the Cross as both "giant" and "'mammoth'" (*id.* at 200), even though the size of the cross turned out to be irrelevant to its decision. What really mattered was that the three individual plaintiffs who the court described as "non-Christian," viewed the Cross as "unwelcome," "believ[ing]" the display "amounts to governmental affiliation with Christianity [and] are offended[6] ... and wish to have no further contact with it." *Id.* at 202. Thus, injunctive relief sought by these plaintiffs was "removal or demolition of the Cross, or removal of the arms from the Cross 'to form a non-religious slab or obelisk.'" *Id.* at 202, n.7.

In dissent, Chief Judge Gregory stepped back from these extensive applications of these two curious tests

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[6] The fact that some people are "offended" by the Cross was well known to the Founders as it is as old as the New Testament. *See 1 Corinthians* 1:18. What has changed is that the feelings of a small group of persons claiming a modicum of offense are now catered to by the judiciary in decisions which overrule the actions of states and the nation based not on the Establishment Clause as written, but based on the personal preferences of judges willing bend its words to their will.

to examine the text and purpose of the constitutional provision under review and to consider the societal risk of the decision reached by his two colleagues:

> The Establishment Clause was intended to combat the practice of "[compelling individuals] to support and attend government favored churches...." [T]he Clause does not require the government "to purge from the public sphere" any reference to religion.... "Such 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." [American Humanist Ass'n, 874 F.3d at 215 (Gregory, J. dissenting) (emphasis added).]

### B. If Allowed to Stand, the Decision Fuels a Pagan Religious Insurgency.

Completely identifying with, and empathizing with, the three "non-Christian" plaintiffs being compelled to view a symbol that they claim disturbs them, the Fourth Circuit devoted not even one sentence to the religious message that would be sent on remand by a district court order granting the plaintiffs any of three types of requested relief:

- **Demotion of the Cross** — "removal ... of the Cross." *Id*. at 202, n.7.
- **Destruction of the Cross** — "demolition of the Cross." *Id*.

- **Desecration of the Cross** — "removal of the arms from the Cross 'to form a non-religious slab or obelisk.'" *Id.*

As to the requested desecration of the Cross, it is particularly revealing that when the "non-Christian" plaintiffs asked the court to remove the arms from the Cross, they were actually asking the court to create a different type of symbol with great historical religious symbolism — a pagan obelisk. The *Encyclopedia Britannica* describes an "obelisk" as a:

> tapered monolithic pillar, originally erected in pairs at the entrances of ancient **Egyptian temples**.... All four sides of the obelisk's shaft are embellished with hieroglyphs that characteristically include religious dedications, usually **to the sun god**, and commemorations of the rulers. ["Obelisk," *Encyclopedia Britannica* (emphasis added).]

The conversion of a Christian Cross to a pagan obelisk is a metaphor for what thoughtful commentators believe is occurring in America. *New York Times* columnist Ross Douthat recently explained:

> [T]here actually is, or might be, a genuinely post-Christian future for America — and that the term "paganism" might be reasonably revived to describe the new American religion, currently struggling to be born.
>
> Whether in the social-justice theology of contemporary progressive politics or the

> transhumanist projects of Silicon Valley, we are watching attempts to revive a religion of *this-world*, a new-model paganism, to "reclaim the city that Christianity wrested away from it centuries ago." [R. Douthat, "The Return of Paganism," *New York Times* (Dec. 12, 2018).]

Historically, Paganism manifested itself in various forms at various times in various cultures, but generally was known for the practices of abortion, abandonment, infanticide, nature worship, sexual license, homosexuality, sexual perversion, slavery, superstition, magic, human sacrifices, and demonic activity. *See* M. Stanton Evans, The Theme is Freedom: Religion, Politics, and the American Tradition at 121-48 (Regnery Publishing: 1994); *see generally* Herbert Schlossberg, Idols for Destruction: The Conflict of Christian Faith and American Culture (Crossway Books: 1990). This Court has somehow found in the U.S. Constitution authority for many of these activities, and the rest could be in our future.

Should the American people choose Paganism over Christianity, at least that would be the choice of the People — but that choice should not be imposed by the judiciary, by taking the sides of the "non-Christian" plaintiffs who seek to rid the landscape of Crosses in favor of pagan symbols which they do not find to be offensive. As Establishment Clause cases are routinely analyzed, the assumption is that the court must take the side of "non-Christian" plaintiffs whenever they feel offended by any manifestation of America's Christian heritage. This method of analysis

in no way reflects the text or historical meaning of the Establishment Clause.

The fallacy undergirding this Court's Establishment Clause jurisprudence is the notion that there is a divide between the religious and the secular. Viewing the world in that manner, a court would categorize the Cross as religious, because it is a Christian symbol, and an obelisk secular, even though to at least to many, it is an anti-Christian religious symbol. As another illustration, courts view instruction about the world's creation by the "Creator" discussed in the nation's charter, the Declaration of Independence, as religious, but the teaching of Darwin's unproven theory of evolution to be secular because it denies the work of a Creator God. But no such dichotomy between the religious and the secular exists. Indeed, this fact is increasingly recognized, as explained by Andrew Sullivan, the former editor of *The New Republic*, now writer-at-large for *New York Magazine*:

> **Everyone has a religion**. It is, in fact, impossible not to have a religion if you are a human being. It's in our genes and has expressed itself **in every culture, in every age**, including our own secularized husk of a society.
>
> By religion, I mean something quite specific: a practice not a theory; a way of life that gives meaning, a meaning that cannot really be defended without recourse to some transcendent value, undying "Truth" or God (or gods).

> Which is to say, even today's **atheists are expressing an attenuated form of religion**. Their denial of any God is as absolute as others' faith in God.... [A. Sullivan, "America's New Religions," *New York Magazine* (Dec. 7, 2018) (emphasis added).]

If Sullivan is correct — and he is — that even atheists have their own religion, then in ordering the tearing down of a Cross a court would not choose the secular absence of religion over the religious, but would have chosen the secular religion of the "non-Christian" and even "anti-Christian" plaintiffs over the religion of Christianity.

### C. Courts Should End their Costly War on Christianity.

With some notable exceptions, this Court has a long record of embracing secular humanism and secularism in catering to the demands of "anti-Christian" plaintiffs who reject Biblical truth and Christian practices.

- The Bible teaches that Christians are to "[p]ray without ceasing" (*I Thessalonians* 5:17) and to pray "[f]or kings, and for all that are in authority" (*I Timothy* 2:2), but this Court has ruled that even a short nonsectarian prayer[7]

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[7] The banned New York Regents prayer simply stated: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Only Justice Potter Stewart dissented, understanding that the

may not be read in public schools (*see* Engel v. Vitale, 370 U.S. 421 (1962));

- The Bible teaches that "[t]he fear of the LORD is the beginning of knowledge" (*Proverbs* 1:7), but this Court has ruled that the Bible may not be read in public schools (*see* Abington School District v. Schempp, 374 U.S. 203 (1963));

- The Bible teaches that "[d]id not he that made me in the womb make him? and did not one fashion us in the womb?" (*Job* 31:15), but this Court has ruled that unborn children may be killed in their mother's womb based on an atextual constitutional right to privacy (*see* Roe v. Wade, 410 U.S. 113 (1973)[8]);

- The Bible teaches that God created the institution of marriage as the union of one man and one woman (*see Genesis* 2:18-25), but members of this Court have known better, ruling that same-sex marriage is required by the U.S. Constitution, not as originally written or intended, but as certain justices feel it

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court's decision "led not to true neutrality with respect to religion, but to **the establishment of a religion of secularism**." Engel at 421 (Stewart, J. dissenting) (emphasis added).

[8] Significantly, Justice Blackmun's decision for the Court in Roe began his analysis of the constitutional right to abortion with a review of the practices of Pagan Greek and Roman cultures. *Id*. at 130-32.

should be interpreted (*see* Obergefell v. Hodges, 135 S.Ct. 2584 (2015)).[9]

The Common Law was, at its core, Christianity. Justice Matthew Hale of King's Bench in Taylor's Case, 1 Ventris 203; 3 Keble 697 (King's Bench 1676), declared that "The Christian religion is a part of the law itself." Likewise, in Rex v. Woolston, 2 Strange 832; 1 Barnardiston 162 (King's Bench 1676), the court held that "Christianity in general is parcel of the common law of England; and therefore to be protected by it." Blackstone plainly stated "christianity is part of the laws of England." Blackstone, IV Commentaries on the Laws of England at 59. Joseph Story exclaimed that "It appears to me inconceivable how any man can doubt, that Christianity is a part of the common law." Joseph Story Life and Letters, I (Sept. 15, 1824), quoted in James McClellan, Joseph Story and the American Constitution at 120 (U. Okla. Press: 1971).

Biblical Christianity undergirds every aspect of our general government, from the Declaration of Independence's invocation of God's divine providence in our quest for independence, to its explicit reverence expressed for our Creator God, to the very concept of a written Constitution,[10] and to the Constitution's

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[9] In dissent, Chief Justice Roberts made clear the Court's decision had nothing to do with the Constitution. *Id*. at 638 (Roberts, C.J., dissenting).

[10] *See 1 Samuel* 10:24-25 ("And Samuel said to all the people, See ye him whom the LORD hath chosen, that there is none like him among all the people? And all the people shouted, and said, God save the king. Then Samuel told the people the manner of the

division of authority between legislative, executive, and judicial branches,[11] and even the hierarchal nature of the federal judiciary.[12]

Courts need to count the cost of sanctioning an effort to replace Christianity with anti-Christianity as the spiritual foundation of the nation. Secular Humanism or Paganism or Scientism or any other variety of anti-Christianity cannot give transcendent meaning. It cannot answer the question as to how we should then live.

The Bible anticipates that there could be a time such as this in the history of nations. "If the foundations be destroyed, what can the righteous do?" *Psalm* 11:3. In commenting on this verse, nineteenth century Presbyterian Theologian Albert Barnes explained:

> The word "foundations," here, refers to those things on which society rests, or by which social order is sustained — the great principles of truth and righteousness that uphold society, as the foundations on which an edifice rests uphold the building. [Albert Barnes, Notes on the Whole Bible, Psalm 11.]

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kingdom, and wrote it in a book, and laid it up before the LORD. And Samuel sent all the people away, every man to his house.").

[11] *See Isaiah* 33:22 ("For the LORD is our judge, the LORD is our lawgiver, the LORD is our king; he will save us.").

[12] *See Exodus* 18:13-27.

Should the war on Christianity continue, and the Biblical foundations on which the nation was built erode further, the judiciary will bear special responsibility for the undermining of the constitutional republic, for, as John Adams explained:

> we have no government armed with power capable of contending with human passions unbridled by **morality and religion**. Avarice, ambition, revenge, or gallantry, would break the strongest cords of our Constitution as a whale goes through a net. Our Constitution was made only for a **moral and religious** people. It is wholly inadequate to the government of any other. [John Adams, "Message from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts," (Oct. 11, 1798) (emphasis added).]

## CONCLUSION

The decision of the Fourth Circuit should be reversed and the case remanded with orders to grant summary judgment to the defendants.

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