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

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, Public Advocate of the United States, Conservative Legal Defense and Education Fund, Policy Analysis Center, Pass the Salt Ministries, and Restoring Liberty Action Committee in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United and Public Advocate of the United States are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Citizens United Foundation, Conservative Legal Defense and Education Fund, 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 is an educational organization.

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 two *amicus* briefs in a similar case, addressing the constitutionality of a Latin cross erected at the Mount Soledad War Memorial in San Diego, California: in the U.S. Supreme Court on June 4, 2014, and in the Ninth Circuit on October 22, 2014.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; 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

Relying solely upon the tripartite Lemon test, the court below struck down a 40-foot war memorial structured in the form of a cross as an unconstitutional establishment of religion. Long discredited, it is past time for this Court to seriously reexamine the Lemon test as an interpretive tool. Indeed, upon careful analysis, each of its three prongs fails to measure up to three foundational interpretive canons.

First, it does not conform to the threshold interpretive principle requiring that it define "religion," the key term in the Establishment Clause. Second, it rests upon a false dichotomy of the religious/secular, words that have no connection to the Establishment Clause text or purpose. Third, it fails to recognize that the operative word "religion," as it appears in the First Amendment, is not governed by the ordinary meaning canon, but is a jurisdictional term separating those duties owed exclusively to God, free from the coercive power of the State.

Rightfully understood, the war memorial in this case falls within the coercive power of the State, not the exclusive domain of the Creator, in that it commemorates the sacrifice of those who gave their lives in service of the nation in time of war. And there is nothing in the Establishment Clause that prohibits the display of religious symbols, like the cross, to support that patriotic purpose. To rule otherwise, as the court did below, is in open disrespect of America's leading founders whose religious faith inspired the nation's constitutional commitment to religious liberty.

ARGUMENT

The Fourth Circuit panel, voting two to one, found the placement on public grounds of a 40-foot-tall Latin cross memorializing the men "WHO GAVE THEIR ALL IN THE WORLD WAR TO MAKE THE WORLD SAFE FOR DEMOCRACY" to be an unconstitutional establishment of religion. *See* American Humanist Ass'n. v. Maryland-National Capital Park & Planning Comm'n, 874 F.3d 195, 200 (4th Cir. 2017) ("AHA"). The majority reached this conclusion not because an analysis of the First Amendment text requires it, but because this Court's test in Lemon v. Kurtzman, 403 U.S. 602 (1971), mandates it. *See id.* at 204-12. The Fourth Circuit panel is mistaken.

According to Lemon, to survive an Establishment Clause challenge, the court below states unequivocally that the memorial cross must pass three tests — that the "challenged government display must: (1) have a secular purpose; (2) not have a 'principal or primary effect' that advances, inhibits, or endorses religion; and (3) not foster 'an excessive entanglement between government and religion.'" AHA at 204. Even though the panel admitted that it only "**generally** analyzed Establishment Clause issues pursuant to [the Lemon test]," *id.* (emphasis added), it simply assumed that Lemon applies here, and neglected to explore whether, as a preliminary matter, the challenge before it fell outside Lemon's orbit.[2] For example, the panel

[2] The panel did explore whether this Court's decision in Van Order v. Perry, 545 U.S. 677 (2005) applied a standard of review different from Lemon, concluding that it did not. AHA at 205-06.

altogether failed to consider whether this Court's decision in Town of Greece v. Galloway, 572 U.S. ___, 134 S.Ct. 1811 (2014) dictated a new approach to the Establishment Clause, having ditched Lemon for a "historical" contextual assessment of the role of religion in America at the time of its founding. *See* Petition for Certiorari ("Pet.") at 32-33.

The panel's failure to consider the possibility that a test other than Lemon applies is exacerbated by what the Petitioner correctly characterized as "the confused state of this Court's Establishment Clause jurisprudence." Pet. at 4. Indeed, the Petitioner has devoted an entire section of its Petition to making a strong case that this Court's Establishment Clause jurisprudence is in "shambles" and, therefore, is in need of "clarification." *See* Pet. at 20-25. Hence, the Petitioner seeks this Court's review of the constitutionality of the war memorial under some test other than Lemon.

To that end, these *amici* urge the Court to grant the Petition and apply an interpretive test that is suited to the original text of the Establishment Clause.

I. RELIGION IS A TERM OF JURISDICTION DEMARCATING THOSE DUTIES THAT ARE NOT ENFORCEABLE THROUGH THE COERCIVE POWER OF THE STATE.

A. By Leaving the Term "Religion" Undefined, the Lemon Test Violates the Fundamental Principle that Every Application of a Text Requires Exposition.

One of the most remarkable features of this Court's Establishment Clause jurisprudence is the absence of any serious effort to interpret the meaning of the word "religion" in the First Amendment. Judges routinely act as if this key word in the two Religion Clauses needs no interpretation. For example, the second prong of the Lemon test assumes the meaning of "religion" is self-evident, in need of no clarification. Indeed, in the famous "Ten Commandments" trial of Alabama Supreme Court Chief Justice Roy Moore, U.S. District Judge Myron Thompson confessed that he could not "formulate" a definition of religion — but then asserted that it would be "unwise, and even dangerous, to put forth, as a matter of law, one definition of religion." Glassroth v. Moore, 229 F. Supp. 2d 1290, 1313, n.5 (M.D. Ala. 2002). Nevertheless, Judge Thompson used the word "religion" over 60 times in his written decision, finding that the Chief Justice's Ten Commandments monument — even though placed in the context of statements by America's founders celebrating the Decalogue's impact on the law and politics in America — violated the Establishment Clause. In so ruling, Judge Thompson violated the threshold interpretive

principle that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Famously, Professor Laurence Tribe attempted to define religion in his first treatise on American Constitutional Law, only to come to the startling conclusion that there were really two different definitions of religion — one for the Establishment Clause and the other for the Free Exercise Clause. This result, however, hit the grammatical wall of the constitutional text, which allows only one definition of religion. *See* L. Tribe, American Constitutional Law at 826-828 (1st ed. 1978). Unsurprisingly, Professor Tribe gave up his quest, calling it a "dubious solution to a problem that, on closer inspection, may not exist at all." *See* American Constitutional Law at 1186 (2d ed. 1988). Self-fulfilled, Professor Tribe excused the courts from wrestling with the meaning of religion, because religious freedom is a matter in "flux," and should not be tied down to any interpretive rule that would fix the meaning for both the Establishment and the Free Exercise Clauses. *Id.* at 1186-88.

Thus, according to the view of Professor Tribe, the term "religion" should remain undefined, lest an "interpretation or construction" lead the courts to "'ascertain[] the thought or meaning of the author" of the Establishment and Free Exercise Clauses, according to the rules of language and subject to the rules of law.'" *See* A. Scalia & B. Garner, Reading Law at 53 (West: 2012). Unfettered from any textual definition of "religion," judges are free under the

second and third prongs of the Lemon test to substitute their personal and evolving notions of what is an unconstitutional establishment of religion.

B. Lemon's First Prong Violates the Supremacy-of-Text Principle of Interpretation.

Not only do the second and third prongs of the Lemon test flunk the first interpretation principle, but the first prong — secular purpose — also falls short of Justice Scalia's second fundamental principle of interpretation which states: "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Reading Law at 56. By this principle, Scalia and Garner affirm that "words are given meaning by their context, and context includes the purpose of the text." *Id.* They go on, elaborating that the purpose must be: (i) "derived from the text"; (ii) "defined precisely"; (iii) "described ... concretely"; and (iv) neither contradictory to, nor supplementary of, the text. *Id.* at 56-57.

How does the first prong of the Lemon test fare under the scrutiny of this second interpretive principle? Miserably. First of all, the word "secular" is nowhere to be found in the First Amendment text, indicating that the Establishment Clause's words — "make no law respecting an establishment of religion" — are not only not of "paramount concern," but are of no concern whatsoever. Yet, the very word "establishment" calls to mind the efforts of the American colonies to free themselves from the "established" church of England, which used the power

of the civil government through the licensing of ministers, requiring attendance at church services, and taxing the people to build church facilities, pay pastors, and provide for public charity. *See* P. Hamburger, Separation of Church and State at 89-100 (Harvard Press: 2002).

The purpose of a law "respecting" an "establishment" of "religion" would mean, analogously, "in relation to" and "having regard to" the religious institutions with which America's founders were familiar. The word "secular," or its antonym, "religious," without reference to any word actually employed in the Establishment Clause, leaves the interpreter at-large, free to "smuggle[] in the answer to the question before the decision-maker." Reading Law at 56. Indeed, "secular," standing alone — as it does in the Lemon test — is question-begging, in that it means "pertaining to this present world, or to things not spiritual or holy" without offering any criteria enabling one to determine whether a certain matter lies on one side of the line or the other. *See* N. Webster, American Dictionary of the English Language (1828).

One scholar of the religion clauses, Liberty University Law School Professor Jeffrey Tuomala, has suggested that the "secular/religious" dichotomy that is featured prominently in the Lemon test can best be understood by reference to the works of Immanuel Kant, who divided reality into two separate spheres — one, the public realm where science and reason reign, and the other, the private realm where faith and divine revelation govern. Citing to and quoting from

Justice Oliver Wendell Holmes's 1897 Harvard Law Review article, "The Path of the Law" — in which the noted justice proposed that we ought to "[r]ead the works of the great German jurists, [to] see how much more the world is governed to-day by Kant than by Bonaparte"[3] — Professor Tuomala observes that because:

> Kant's philosophical and theological descendants have had [success] in reimaging the concepts of secular and religious and placing them in separate spheres[,] [t]he state has been able to justify establishing an orthodoxy of secular belief and opinions in the public realm [and has been able to] banish religion to the private realm[,] religion [having] nothing of importance to say with regard to civil government. Those things that are important for society are known or discoverable by some other method than revelation from God. [J. Tuomala, The Casebook Companion for Constitutional Law, Part 9, Ch. 4 at 2 (Feb. 2018) (unpublished manuscript on file in the office of Professor Tuomala at Liberty University School of Law).]

But the fight for freedom of religion in America was not a philosophical, sociological, psychological, or even theological one. Rather, it was a political and legal one. *See* Hamburger at 89-107. The task at hand

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[3] O. Holmes, Collected Legal Papers at 202 (Harcourt Brace: 1952).

was to ascertain and draw the jurisdictional line between the church and the state. And that task, in turn, entailed a search for words that accurately captured the two competing powers, those that were vested in the civil government and thus subject to its coercive power, and those that belonged to the church and thus subject to persuasive power alone. *See* Hamburger at 21-64. The word that was ultimately chosen was "religion," a familiar everyday term but infused with a distinctively new political/legal meaning.

C. Religion Is a Political/Legal Word of Jurisdiction, an Exception to the Ordinary-Meaning Canon.

As Scalia and Garner remind us, words in a written constitution "are to be understood in their ordinary, everyday meanings." Reading Law at 69. Indeed, they have stressed, "[t]he ordinary-meaning rule is the most fundamental semantic rule of interpretation." *Id.* Thus, they have chosen to reprint a long passage from Joseph Story's Commentaries on the Constitution of the United States in which Justice Story states that the words of the Constitution, being "instruments of a practical nature, founded on the **common** business of human life, adapted to **common** wants, designed for **common** use, and fitted for **common** understandings." *Id.* (emphasis added).

But what if the religion clauses employed common words, but with uncommon meanings? According to the ordinary-meaning canon, there is an exception for "a technical meaning," one that developed its own

"nomenclature" capturing a "specialized meaning" which is "'above the comprehension of the general bulk of mankind'" where "'recourse, for explanation, must be had to those, who are most experienced in that art.'" *Id.* at 73. Such is the case respecting both religion clauses that appear in the First Amendment to the U.S. Constitution.

At the time of America's founding, each of the original 13 states had some form of an established State religious order, either of a single state-supported denomination or of multiple established denominations, accompanied by various provisions securing religious tolerance. *See* Tuomala, Part 9, Ch. 2 at 5. The 1780 Massachusetts Constitution is illustrative. Article II laid down the Commonwealth's rule of religious toleration:

> It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession of sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship. [1780 Constitution of Massachusetts, Article II reprinted in Sources of Our Liberties at 374 (R. Perry & J. Cooper) (NYU Press: 1973).]

Article III of that Constitution laid down the Commonwealth's established church order:

> As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through a community but by the institution of the public worship of GOD, and of public instructions in piety, religion, and morality: Therefore, to promote their happiness, and to secure the good order and preservation of their government, the people ... have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision ... for the institution of the public worship of GOD, and for the support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily.... And all moneys paid by the subject to the support of ... public ... teachers of his own religious sect or denomination.... And every denomination of Christians, demeaning themselves peaceably ... shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law. [Sources at 374-75.]

Four years before the Massachusetts Constitution was ratified, Virginia was charting an altogether different path to religious liberty. Before the War for Independence, Virginia taxed everyone to support the Anglican Church, and poured that money into the church's coffers not only to build churches and pay pastors and Christian teachers, but also to fund charities operated by the established church. Religious adherents of other denominations had to raise their own financial help, and had to pay for their own pastors, teachers, and other programs. However, due to compromises made with dissenters brought about by the War for Independence, this strict ecclesiastical church/state order led to increased religious tolerance in the Commonwealth. J. Ragosta, Jefferson's Legacy, America's Creed at 40-72 (U. of Va. Press: 2013).

In 1784, in a further effort to moderate this state of affairs, Governor Patrick Henry introduced the "Bill Establishing a Provision for Teachers of the Christian Religion" which, if enacted, would have transformed the Virginia ecclesiastical order from a single established church to mirror the establishment order in Massachusetts, imposing a tax to support Christian teachers, but allowing the taxpayer to pay the tax to the teacher of his choice. *See* Tuomala, Part 9, Ch. 2 at 5. Two obstacles stood in Henry's way. Eight years before, in 1776, Virginia had rejected mere religious toleration in favor of the robust "free exercise of religion." No longer could religious activities be overridden by laws protecting the "public peace" or civic order, as was true of Massachusetts. Those activities were placed outside the jurisdiction of the

state, being subject only to "the dictates of conscience." Second, in order to curb claims of individual "conscience," the people of Virginia gave new meaning to a familiar word, "religion," to certify whether a "religious" or other activity was outside the power of the State. Thus, Article 1, Section 16 of the 1776 Virginia Constitution read as follows:

> That **religion, or 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**; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience. [Sources at 312 (emphasis added).]

Under this new formulation of "religion," the law of the Creator determined whether a particular "exercise" was subject to the individual conscience ("reason and conviction"), or to the coercive power of the state ("force or violence"). In his famous "Memorial and Remonstrance," James Madison reinforced this point, stating that religion, as defined in Article I, Section 16 of the 1776 Virginia Constitution, is an "unalienable right ... towards men" because its "duty towards the Creator ... is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." J. Madison, "Memorial and Remonstrance," reprinted in 5 The Founders Constitution at 82 (item 43) (P. Kurland & R. Lerner, eds.) (U. of Chi. Press: 1987).

Madison continued:

> 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] every man who becomes a member of any particular Civil Society [does] it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that **Religion is wholly exempt from its cognizance**. [*Id.* (emphasis added).]

II. RELIGION AS IT APPEARS IN THE FIRST AMENDMENT IS RELIGION AS EXPRESSLY DEFINED IN ARTICLE I, SECTION 16 OF THE 1776 VIRGINIA CONSTITUTION.

To be sure, "[t]he word 'religion' is not defined in the [U.S.] Constitution." Reynolds v. United States, 98 U.S. 145, 162 (1879). So, this Court went elsewhere "to ascertain its meaning, and nowhere more appropriately ... than to the history of the times in the midst of which the provision was adopted." *Id.* Significantly, the Court did not go to Webster's 1828 Dictionary for religion's ordinary meaning, but to the unique historical circumstances that gave birth to the freedom which, the Court stated, "culminate[d] in Virginia" in 1784. *Id.* at 162-63. In that year, the Court continued, "'a bill establishing provision for teachers of the Christian religion'" was before the Virginia Assembly. *Id.* at 163. Scheduled for passage at the next assembly, the Court observed, the bill "brought out a determined opposition." *Id.* Leading the opposing forces was none other than James

Madison, whose "Memorial and Remonstrance" the Court affirmed had been "widely circulated and signed, and in which he demonstrated 'that **religion, or the duty we owe the Creator**,' was not within the cognizance of civil government." *Id.* (emphasis added). Consequently, the Reynolds Court concluded that Henry's proposed bill was defeated. *Id.*

It is noteworthy that Madison opened his "Memorial and Remonstrance" with a verbatim quote from the entire definition of religion found in Article I, Section 16 of the 1776 Virginia Constitution:

> "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." [Founder's Constitution at 32.]

Remarkably, this definition, as it appeared in the Virginia constitution, serves only as the basis to secure the "free exercise of religion." By repeating the definition as the basis for rejecting Henry's tax measure supporting Christian teachers, Madison applied the same definition of religion as the foundation of the disestablishment guarantee. Thus, when the First Congress worked through the various proposals to secure the blessing of religious liberty in the federal Bill of Rights, it settled on the text which read "shall make no law respecting an establishment of religion, prohibiting the free exercise thereof." As to religion, the meaning having been settled in Virginia, the First Amendment was designed to mark the same jurisdictional line: that which belongs exclusively to God and that which belongs to "Caesar," *i.e.*, the State.

As Madison would write many years later in his *Detatched Memoranda*:

> Ye States of America which retain in your Constitutions or Codes, any aberration from the sacred principle of religious liberty, by giving to Caesar what belongs to God,[4] or joining together what God has put asunder, hasten to revise your systems, and make the example of your Country as pure and compleat, in what relates to the freedom of the mind and its allegiance to its maker, as in what belongs to the legitimate objects of political and civil institutions. [*See* "Detatched Memoranda, ca. 31 January 1820," *Founders Online*, National Archives.[5]]

III. THE MONUMENT HERE IS NOT A FORBIDDEN ESTABLISHMENT OF RELIGION.

The threshold question in every Establishment Clause case is, then, a jurisdictional one. Thus, the question here is whether the erection on public land and the maintenance by public workers of the Bladensburg monument is the performance of a duty owed to God, or a matter belonging to Caesar? Whether the monument falls on one side or the other is not determined by the presence or absence of

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[4] *See* Luke 20:25.

[5] https://founders.archives.gov/documents/Madison/04-01-02-0549.

religious symbols, such as the Christian cross. Nor is it determined by the presence or absence of a religious message. Rather, it is determined by the purpose of the memorial, whether it is commemorative of the sacrifices that the persons memorialized are being remembered for the service for their country in time of war. If so, then the memorial acknowledges the death of Christ upon the cross as an example for those who would sacrifice their lives to save others.[6] Therefore, the memorial cross may be supported by the power of the civil authorities to tax and spend for the nation's welfare. If, on the other hand, the cross has been placed as a symbol of Christ's resurrection for the souls of all mankind, then its placement and maintenance would send a message of God's forgiveness and mercy. Thus, then the memorial would be like the levy or a tax on the people to establish a church or religious icon solicitous to the needs of the soul. To answer this question, one must examine the monument itself and its placement more closely.

Inscribed at the base of the 40-foot cross are the words: VALOR, ENDURANCE, COURAGE, and DEVOTION. On its pedestal is a large plaque dedicating it to the "HEROES ... WHO GAVE THEIR LIVES IN THE GREAT WAR FOR THE LIBERTY OF THE WORLD." Added in the vicinity of the original structure is the Veterans Memorial Park surrounded by numerous remembrances commemorating the fallen in the Nation's conflicts. All of these features attest to

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[6] *See, e.g.,* John 15:13 ("Greater love hath no man than this, that a man lay down his life for his friends.").

a monument supported by civil authorities pursuant to their power to conscript men to defend the nation against her enemies. Conspicuous by their absence, there is nothing about the cross and its environs calling attention to Christ's sacrificial death upon the cross for the benefit of the lost. The cross of Christ, while prominent, is unadorned of any proselytizing message and, thus, does not portray the duty of anyone "to render ... such homage and such only as he believes to be acceptable to him." "Memorial and Remonstrance," Founder's Constitution, p. 32, item 43. Thus, the monument is not a forbidden establishment of religion, but a constitutionally permitted employment of Christian principles honoring those who gave their lives to the cause of liberty. *See* Romans 13:1-4. The Establishment Clause poses no barrier to religiously based public policy so long as the object is within the jurisdiction of the State's coercive power.

IV. THE FOURTH CIRCUIT PANEL DECISION EVIDENCES IGNORANCE OF OUR NATION'S HISTORY AND HOSTILITY TO THE CHRISTIAN FAITH.

As Professor Laurence Tribe has observed, "[t]he Supreme Court has referred to 'the established principle that the Government must pursue a course of **complete neutrality** toward religion.'" American Constitutional Law, 2nd ed., at 1188 (citations omitted) (emphasis added). Although Professor Tribe's treatise questions the courts' consistency applying this high-sounding principle, if this be the rule for courts to follow, Judge Stephanie Thacker's opinion below for a

majority of the panel is hardly neutral toward Christianity. Rather, she gives every indication that she finds Christianity to be personally offensive. In contrast, she is very empathetic to, and solicitous of, the feelings of non-Christians and anti-Christians.

A. Judge Thacker Takes Offense at Positive References to God.

Judge Thacker's opinion for the panel below opens by asserting that "[t]he monument here has the primary effect of endorsing religion and excessively entangles the government in religion.... [T]he **purported** war memorial breaches the 'wall of separation between Church and State.'" AHA at 200 (emphasis added) (citing Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)). The fact that Judge Thacker resorts to minimizing what has been recognized for a century as a war memorial to being less than that — a "purported" war memorial — signaled that she was so offended by the symbol of the cross that she was blind to or refused to see the war memorial that others saw, and that comment set the anti-religious tone for her opinion.[7]

In her search to find an impermissible "endorsement of religion," Judge Thacker relies on a truly obscure document — the "pledge sheet" used by

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[7] *See generally*, Herbert Schlossberg, Idols for Destruction: The Conflict of Christian Faith and American Culture, on "The Rule of the Elite," at 192-94 (Crossway Books: 1990) ("People who attach themselves to ideologies often accept willingly the blinders that serve as a badge of membership.").

the memorial's "private organizers" to raise funds for its construction. Although no current observer of the memorial would ever know of the existence or content of this "pledge sheet," Judge Thacker finds the war memorial's impermissible principal purpose revealed in words from the pledge sheet that she found particularly revealing, and particularly offensive:

- "trusting in God,"
- "the Supreme Ruler"
- "Godliness," and
- "One God."

Note that these words do not appear on the memorial, but in the internal records of the memorial's organizers and funders. And none of these words would have shocked the conscience of the Framers of the First Amendment.

B. Judge Thacker Shows Disrespect for the Christian Faith of America's Founders.

In relying on references to God as evidence of an impermissible religious purpose, Judge Thacker demonstrates that she has little familiarity with or respect for the religious views of the nation's Founders even as expressed in public, not private, statements. Take, for example, the term "the Supreme Ruler." A cursory search of Founding Era documents reveals that term and the closely associated term "Supreme Being" were employed publicly, affirming a profound understanding of God's role in the political and legal affairs of nations. For example, then-Massachusetts

Governor Samuel Adams in a Gubernatorial Proclamation stated:

> I concede we cannot better express ourselves than by humbly supplicating the **Supreme Ruler** of the World ... that the confusions that are and have been among the Nations may be overruled for the promoting and speedily bringing on that holy and happy period, when the Kingdom of our Lord and Saviour Jesus Christ may be everywhere established, and all people willingly bow to the Sceptre of Him who is the Prince of Peace. [Samuel Adams, Fast Day Proclamation, (March 20, 1797), Harry Alonzo Cushing, edt. IV The Writings of Samuel Adams at 407 (New York: G. P. Putnam's Sons, 1908) (emphasis added).]

Connecticut Governor Samuel Huntington, one of the signers of the Declaration of Independence and chief justice of the Connecticut Supreme Court, also publicly used the term which Judge Thacker found to be an impermissible endorsement of religion:

> It becomes a people publicly to acknowledge the over-ruling hand of Divine Providence and their dependence upon the **Supreme Being** as their Creator and Merciful Preserver . . . and with becoming humility and sincere repentance to supplicate the pardon that we may obtain forgiveness through the merits and mediation of our Lord and Savior Jesus Christ. [Samuel Huntington, "A Proclamation for a

> Day of Fasting, Prayer and Humiliation" (Mar. 9, 1791) (emphasis added).]

Judge Thacker's hostility to the memorial solely because it is in the shape of a cross is the polar opposite response that could be expected from the Founders.[8]

C. Judge Thacker Empathizes with Those Who Oppose Christianity.

Offering no consideration of the original meaning of the Establishment Clause, Judge Thacker favors the sensitivity of the "non-Christian residents" of Prince George's County who have what she describes as "unwelcome contact with the Cross" because they "are offended by [it]" and "wish to have no further contact with it." Thus, Judge Thacker adopts as her test for the permissible bounds of the Establishment Clause, ratified in 1791, the personal preferences and sensitivities of "non-Christian" and likely "anti-Christian" plaintiffs. Surely the Founders did not intend that the scope of the Establishment Clause would be determined in such a manner.

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[8] A message by Billy Graham explains the modern visceral reaction to the cross by some. "I've found in my own ministry that I can preach anything else, and it's called popular.... But when I come to the ... cross ... that is the stumbling block. That's the thing people do not want to hear. That's the thing that is an offense.... Without the cross, there is no salvation, there is no forgiveness." Billy Graham, "Why Does the Cross Offend People" (Mar. 3, 2016).

As to the remedy for the assumed violation, Judge Thacker described that the injunctive relief sought by the plaintiff was "removal or demolition of the Cross, or removal of the arms from the Cross 'to form a non-religious slab or obelisk.'" AHA at 202 n.7. And, in a concluding footnote to her opinion, she left open to the district court all options for removing the offensive cross: "Upon remand, the parties should note that this opinion does not presuppose any particular result (i.e., **removing the arms** or **razing** the Cross entirely); rather, the parties are free to explore alternative arrangements that would not offend the Constitution." AHA at 212 n.19 (emphasis added). Note that, while other options may arise on remand to the District Court, the approaches specifically identified by the Court to remedy the problem included those sought by the plaintiff: (i) removing the arms of the cross "to form ... a[n] obelisk," or (ii) "razing the Cross entirely."

As to the first option described as "removing the arms" — which would constitute the desecration of the cross — in order "to form [an] obelisk," Judge Thacker apparently gave no thought whatsoever to the fact that obelisks are also religious symbols — pagan Egyptian symbols — as made clear by the Encyclopedia Britannica:

> Obelisk, 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.

> [Encyclopedia Britannica, "Obelisk" (emphasis added).]

Apparently, to Judge Thacker, a pagan obelisk is preferable to a cross. However, none of what Judge Thacker postulates is required by the Establishment Clause as envisioned by the Framers.

D. The Constitution Does Not Allow Courts to Purge the Public Square of All Religious Faith and Truth.

As Chief Judge Roger Gregory correctly stated in dissent, the Constitution "does not require the government 'to purge from the public sphere' any reference to religion." AHA at 215 (Gregory, J., dissenting).

Purging all Christian symbols from public lands does not achieve "religious neutrality." Purging Christian symbols from the public square is unmistakably an anti-Christian act. Indeed, thus viewed, "religious neutrality" is an unattainable goal:

> that has been perpetrated upon the American public far too long by a group of disingenuous judges, legal scholars, and lawyer-advocates who wish to impose their philosophy of truth [on those] who do not subscribe to their "secular" worldview. [H.W. Titus, "Public School Chaplains: Constitutional Solution to the School Prayer Controversy," 1 REGENT U. L. REV. 19, 28 (1991).]

Judge Robert Bork explained what the religious and the secular have in common:

> [T]he major belief systems that have replaced religion in our time — *e.g.,* historicism, materialism, scientism — and demonstrates that each of them rests upon premises which the believer must accept on faith. [Robert Bork, Preface, Idols for Destruction at xviii-xix.]

In his book Idols for Destruction, Dr. Herbert Schlossberg concluded:

> Western society, in turning away from Christian faith, has turned to other things. This process is commonly called *secularization*, but that conveys only the negative aspect. The word connotes the **turning away** from the worship of God while ignoring the fact that something is being **turned *to*** in its place.... All such principles that substitute for God exemplify the biblical concept of idol. [Idols at 6 (bold added).]

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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