NOS. 17-1717, 18-18

In the Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,
Petitioners,
v.
AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,
v.
AMERICAN HUMANIST ASSOCIATION, *et al*.,
Respondents.

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

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully urges this Court to reverse the decision of the Fourth Circuit.

Justice and Freedom Fund ("JFF") is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Bladensburg WWI Memorial originated a century ago with a committee of mothers whose 49 sons had lost their lives in the First World War. These women wanted to honor and preserve the memory of

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

their sacrifice. A local chapter of the American Legion joined them to complete the needed funding, and the "Peace Cross" was constructed between 1919 and 1925 at the end of the National Defense Highway. The soldiers' names are engraved on a plaque, and the words "valor, endurance, courage, and devotion" are inscribed at the base of the monument.

It would be "ironic indeed" if the Constitution were used to erase the memory of soldiers who died to preserve the very liberties it guarantees, merely because a well-recognized image of military sacrifice resembles a religious symbol. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44-45 (2004) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 686 (1984) ("It would be ironic . . . if the inclusion of a single symbol of a particular historic religious event . . . would so 'taint' the city's exhibit as to render it violative of the Establishment Clause."). Neither history nor case law mandates the Fourth Circuit's rigid application of the Establishment Clause. The court ignores the history and context of the Bladensburg WWI Memorial in an opinion that "bristles with hostility" toward religion. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting). This Court has consistently refused to adopt a simplistic, absolutist approach to the Establishment Clause that would undermine its objectives by invalidating every government act that might incidentally confer some benefit on religion. *Lynch*, 465 U.S. at 678. Here, the Memorial was never intended to convey either a *government* message or a *religious* message. The Maryland-National Park Capital Park and Planning Commission took title to the land and assumed

maintenance of the monument solely for purposes of traffic safety. The Commission acted to preserve and honor a commemorative message created decades earlier by private citizens, not to convey or endorse a religious message.

In America, there is a right to select any religious faith—or none. *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) ("the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"). The Constitution protects conscience and mandates tolerance. But the Establishment Clause does not require that the public square be purged of all religious symbolism. Objectors are free to disregard public acknowledgments of the nation's religious heritage but have no iron-clad right to be free of all exposure to such references. Yet Establishment Clause cases have granted "offended observers" standing to challenge perceived government endorsement, and judgments are then based on the imaginations of the nebulous "reasonable observer." This chaotic jurisprudence jeopardizes the freedom of state and local governments to acknowledge religion, accommodate religion, preserve religious liberty, and incorporate a religious symbol into a secular message—such as the commemoration of fallen soldiers. A passive monument does not bind the conscience or coerce support for religion. Eliminating even nominal recognition of the nation's religious heritage is exclusionary and even threatening to Americans who treasure that heritage.

War memorials all across America utilize the cross to symbolize the sacrifice of fallen soldiers, particularly those who served in World War I. Examples include the

Argonne Cross Memorial and the Canadian Cross of Sacrifice in Arlington National Cemetery, the French Cross Monument in the Cypress Hill National Cemetery, the Unknown Soldiers Monument in Prescott National Cemetery, and the Wall of Honor at the Pennsylvania Military Museum. *Buono v. Kempthorne*, 527 F.3d 758, 765 n. 6 (9th Cir. 2008) (O'Scannlion, J., dissenting). The National Park Service manages sites that contain "thousands of privately designed or funded commemorative objects, including the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial." *Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009). All branches of the Nation's service utilize the cross as a symbol to honor and memorialize the sacrifice of America's veterans. The Navy Cross, the Distinguished Service Cross (Army), the Air Force Cross, and the Distinguished Flying Cross are examples of the pervasive use of the cross in military culture.

This Court should preserve the honor the Memorial rightly accords to America's veterans, rather than affirming the Fourth Circuit's strained application of the Establishment Clause. This case is an opportunity to craft an objective test, consistent with the nation's history and tradition, for passive public displays that incorporate religious imagery with no coercion or government intent to proselytize.

ARGUMENT

I. NO ONE HAS AN ABSOLUTE RIGHT TO BE FREE OF OFFENSE IN GENERAL OR RELIGION IN PARTICULAR.

Establishment Clause cases are often built on the sensitivities of the "offended observer"—contrary to basic principles of American freedom. No one can escape offense. The Constitution "would betray its own principles" if it "guarantee[d] citizens a right entirely to avoid ideas with which they disagree." *Elk Grove v. Newdow,* 542 U.S. at 44 (O'Connor, J., concurring). Exposure to unwelcome ideas is the price of preserving American freedoms. Americans must "develop thicker skin" in order "to preserve their civil liberties." David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 245 (2003).

No one has an absolute right to be free from exposure to religion. The Religion Clauses guarantee the right to be free of government coercion but not the right to avoid religion altogether. The First Amendment itself endorses religion. Decades ago, this Court found "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson,* 343 U.S. 306, 313-314 (1952). Religious expression stands at "the core of the type of speech that the First Amendment was designed to protect." *See Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 760 (1995). The Framers would certainly consider it a "bitter irony that the religious values they designed those Clauses to *protect* have now become so distasteful to this Court that if they constitute

anything more than a subordinate motive for government action they will invalidate it." *McCreary County v. ACLU,* 545 U.S. 844, 902-903 (2005) (Scalia, J., dissenting).

The irony is inescapable: Anything that smacks of religion must acquire a secular component, or lose its meaning through rote repetition, to survive the Establishment Clause. Religious displays must be buried among secular symbols (*Van Orden v. Perry*, 545 U.S. 677, 704 (2005); *Lynch*, 465 U.S. at 679-680). Religious holidays must acquire a secular appeal. Religious phrases—"In God We Trust" or "under God" —must "los[e] through rote repetition any significant religious content." *Lynch,* 465 U.S. at 716-717 (Brennan, J., dissenting); *Marsh v. Chambers,* 463 U.S. 783, 818 (1983) (Brennan, J., dissenting) (suggesting that these mottos are constitutional because "they have lost any true religious significance"); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 631 (1989) (O'Connor, J., concurring) (longstanding practices such as legislative prayer have "largely lost their religious significance over time"). The Framers would hardly recognize the Constitution they drafted. Under this modern logic, phrases like "in God we trust" or "under God" would have initially been unconstitutional "because they had not yet been rendered meaningless by repetitive use." *Sherman v. Community Consolidated School District 21 of Wheeling Township,* 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring). Regardless of the merits of this development, the Latin cross *has* acquired an established secondary meaning—military sacrifice—and that is the meaning obviously intended and

conveyed by the Memorial. Yet the Fourth Circuit found an Establishment Clause violation.

It is in this confused context that the "offended observer" is granted standing to challenge a display that "involves no coercion" and causes "no injury" other than "offense at seeing the monument" while passing by. *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring). Respondents are persons who "faced multiple instances of unwelcome contact with the Cross." *Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 874 F.3d 195, 202 (4th Cir. 2017). Quoting itself, the Fourth Circuit found that "unwelcome direct contact with a religious display that appears to be endorsed by the state" is adequate for standing. *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997). Unless religious artifacts are hidden from public view, none are safe from the wrath of the offended observer. *See, e.g., ACLU v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1983) (Latin cross was clearly visible from "the porch of [plaintiff's] summer cabin" and the roadway he used to reach it). The offended observer's "injury" is far removed from the "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*" that characterized historical establishments. *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting). Offense is not tantamount to coercion.

Under the endorsement test, an "offended observer's" lawsuit is litigated through the lens of a hypothetical "reasonable observer" whose perception may be neither be accurate nor reasonable. This observer is an imaginary construct "of indeterminate religious affiliation" who supposedly "knows all the

facts and circumstances surrounding a challenged display." *Van Orden*, 545 U.S. at 696 (Thomas, J., concurring). Yet the description and level of knowledge shift from case to case. It is not—or at least should not be—"*any* person who could find an endorsement of religion" or "*some* reasonable person" who *might* be offended or "*might* think the State endorses religion." *Am. Humanist Ass'n*, 874 F.3d at 218 (Gregory, J., dissenting), quoting *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring) (internal quotation marks omitted). The Fourth Circuit fashions an observer who "ignores certain elements of the Memorial," "reaches unreasonable conclusions," and confuses highway maintenance with forbidden religious entanglement. *Am. Humanist Ass'n*, 874 F.3d at 218 (Gregory, J., dissenting). It is troubling that a constitutional violation hinges on "an observer's potentially mistaken belief that the government has violated the Constitution, rather than on whether the government has *in fact* done so." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 1004 n. 7 (2011) (Thomas, J., dissenting from denial of certiorari). The legitimacy of the government's action easily turns on the "*misperception* of an imaginary observer." *McCreary,* 545 U.S. at 901 (2005) (Scalia, J., dissenting).

A *reasonable* observer of the Memorial should know its context and history and that the Latin cross is "often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Am. Humanist Ass'n*, 874 F.3d at 218 (Gregory, J., dissenting), quoting *Salazar v. Buono*, 559 U.S. 700, 721 (2010). Yet the Fourth Circuit adopts a rigid per se rule that would exclude all cross-shaped

displays, regardless of history, context, or established secondary meaning.

This Court has repeatedly rejected the proposition that a "heckler's veto" trumps all other observers. *Elk Grove v. Newdow*, 542 U.S. at 35 (O'Connor, J., concurring). "There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion." *Pinette,* 515 U.S. at 780. The "offended observer's" subjective injury easily morphs into the "hecker's veto" this Court has rejected. Where decades have passed without objection, a belated complaint suggests the presence of a "hecker's veto."

- The creche at issue in *Lynch* failed to generate political friction or divisiveness in the 40-year history of Pawtucket's Christmas celebration. *Lynch,* 465 U.S. at 684.
- The Ten Commandments monuments in *Van Orden* and *Pleasant Grove City* stood without challenge or controversy for 40 years before a single objection was raised. *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring); *Pleasant Grove City*, 555 U.S. at 483 (Scalia, J., concurring).
- The Sunrise Rock memorial in *Buono* had stood for over seven decades. *Salazar v. Buono*, 559 U.S. at 716.

The Fourth Circuit essentially allows the "heckler's veto" of an imaginary observer to trump *more than nine decades* of peaceful history surrounding the Memorial.

II. THE GOVERNMENT IS NOT *ADVOCATING* A MESSAGE OF ITS OWN.

In 1961, the Commission took title to the memorial monument and the land—not to advocate a government message or endorse religion, but to ensure safety in the middle of a busy traffic intersection. *Am. Humanist Ass'n*, 874 F.3d at 201.

Even if there were a government message, and even if that message implicated religion, the government may acknowledge and accommodate religion. Examples abound—military and prison chaplaincies, the national motto and anthem, the Pledge, and various religious proclamations. In some contexts, the government may "speak" using a display with religious text or meaning as part of a broader message—without violating the Establishment Clause. Government museums, art exhibits, libraries, and holiday displays all include religious items without endorsing religious beliefs. The benefit to any one faith or religion is too "indirect, remote, or incidental" to be considered impermissible endorsement or advancement. *Lynch,* 465 U.S. at 683. Such "government speech" leaves Americans as free as they were before.

The Establishment Clause "does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring). The Fourth Circuit ruling violates this principle. It is time to reign in the runaway Establishment Clause jurisprudence that stifles religious expression and creates the very hostility the Clause was intended to prevent. Removing or mutilating the Memorial, merely because of its outward similarity to a religious symbol, would be a

draconian solution dishonoring to the veterans it seeks to honor and hostile to religion.

A. This case is not about a *government* message.

"[I]t is important to distinguish between governmental *authorization* . . . and governmental *advocacy*." Emily Fitch, *An Inconsistent Truth: The Various Establishment Clause Tests As Applied in the Context of Public Displays of (Allegedly) "Religious" Symbols and Their Applicability Today*, 34 N. Ill. U. L. Rev. 431, 455 (2014). The Memorial is a passive display that creates no obligation even to acknowledge it. The Commission does not advocate or endorse a message by preserving the Memorial and authorizing its continued presence on public land. The monument does not convey a *government* message—and the message it does communicate is not *religious*, but rather commemorative.

The distinction between government and private speech may be helpful, because the First Amendment protects private religious expression but restricts government speech. *Bd. of Ed. of Westside v. Mergens,* 496 U.S. 226, 250 (1990); *Santa Fe,* 530 U.S. at 302. In *Van Orden*, the Establishment Clause challenge was rejected even though "all the Justices agreed that government speech was at issue." *Pleasant Grove City*, 555 U.S. at 483 (Scalia, J., concurring). That case did not require "a finding that the monument was only 'private' speech." *Id*. Instead, the plurality identified both historical meaning *and* religious significance. Similarly, the Latin cross is a Christian symbol that has acquired a secondary meaning as a war memorial. This Court need not find the Memorial's message

"private" in order to find it constitutional, nor does its shape mandate invalidation as "government" speech endorsing religion.

This Court's decision in *Pleasant Grove City*, which hinged on the distinction between government and private speech, was litigated "in the shadow" of the Establishment Clause. *Pleasant Grove City*, 555 U.S. at 482 (Scalia, J., concurring); *see id*. at 486 (Souter, J., concurring) ("litigated . . . with one eye on the Establishment Clause"). Although the Establishment Clause was not expressly at issue, it lurked beneath the surface and sparked comments from several concurring Justices. *Pleasant Grove City* warrants brief discussion to consider how monuments convey meaning and to clarify that it does not mandate a per se rule that would invalidate *all* monuments on government land with religious imagery (Sections IIB and III, infra).

B. A monument on public land does not necessarily represent the government's own message.

Monuments and other displays do not convey meaning in the same way as the written or spoken word. Interpretation can lead to unpredictable results, especially in cases of religious symbolism. Under existing precedent, a creche, a menorah, a Ten Commandments display, or a cross on public property "violates the Establishment Clause, except when it does not." *Utah Highway Patrol*, 565 U.S. at 1001, 1002, 1003 (Thomas dissenting from denial of certiorari).

Monuments on government land are generally presumed to be government speech, including those commissioned and financed by the government, or received as a donation and displayed to the public. *Pleasant Grove City*, 555 U.S. at 470-471. But in certain contexts—"[s]ectarian identifications on markers in Arlington Cemetery come to mind"—there is a common understanding that a display with religious symbolism does not represent the government's chosen view. *Id*. at 487 (Souter, J., concurring). "And to recognize that is to forgo any categorical rule at this point." *Id*. The Fourth Circuit disregards the ubiquity of the Latin cross as a time-honored war memorial symbol.

No one denies the place of the cross in the Christian religion. But a monument may convey more than one message, and the message perceived—by a government donee or a "reasonable observer"—may not coincide with the one intended by the sculptor or donor. The Ten Commandments monument in Van Orden "ha[d] a dual significance, partaking of both religion and government." *Van Orden*, 545 U.S. at 692. This mixed-message phenomenon is particularly pronounced where the monument contains no text. *Pleasant Grove City*. 555 U.S. at 475. Even when a monument "features the written word" it may "be interpreted by different observers in a variety of ways." *Id*. at 474. It may not be possible to identify any single message a structure conveys; the creator's intent may be quite different from the understanding of a government entity that later takes title. *Id*. at 476. The message "may also be altered by the subsequent addition of other monuments in the same vicinity" or the meaning may simply change over time. *Id*. at 477.

A striking illustration of mixed messages is this Court's opinion in *Pinette*, 515 U.S. 753. The state could not exclude a Klu Klux Klan cross a from holiday display on Establishment Clause grounds. In his concurring opinion, Justice Thomas highlights the chasm between the Christian use of the cross and the way the KKK "appropriated one of the most sacred of religious symbols as a symbol of hate." *Id*. at 770-771 (Thomas, J., concurring). *See Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 626-627 (9th Cir. 1996) (O'Scannlain, J., concurring) ("ironically" the will of voters who approved a cross for "a benign purpose" is overruled, while the KKK received constitutional protection for its "message of hate"). The KKK hijacked one of Christianity's primary symbols for hateful purposes. In contrast, military culture has appropriated the cross for honorable use as a universal symbol of sacrifice. When properly viewed in context, the military cross is no more an endorsement of religion than the KKK's cross.

Speech classification was the central issue in *Pleasant Grove City*. Was the donated monument the government's own expression, or the donor's private speech? *Pleasant Grove City*, 555 U.S. at 467. The public-private speech distinction is not at issue here, but it is a helpful to understanding that when the government accepts a donated monument, it does not necessarily endorse the intended message of the donor or creator. *Id*. at 476-477. Officials in *Pleasant Grove City* incorporated the donated Ten Commandments monument into a message about the city's history. Similarly, the Memorial now stands in Veterans Memorial Park and contributes to its commemorative message along with other monuments. Moreover, it

was neither commissioned nor financed by the government, and the Commission took title for purposes of traffic safety—not to communicate a government message.

C. The government may acknowledge the nation's religious heritage—including Christianity.

This case is not about a religious message. But even if it were, federal and state governments may acknowledge the religious beliefs and history of the American people. *Lynch,* 465 U.S. at 674 ("unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789"); *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 212-213 (1963) ("the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him"); *Engel v. Vitale*, 370 U.S. 421, 434 (1962) ("The history of man is inseparable from the history of religion."); *Zorach v. Clauson*, 343 U.S. at 313 ("We are a religious people whose institutions presuppose a Supreme Being."). The Establishment Clause does not mandate "eradication of all religious symbols in the public realm" nor does it "oblige government to avoid any public acknowledgment of religion's role in society." *Salazar v. Buono*, 559 U.S. at 718-719.

The Fourth Circuit admits that the "semi-secular history" of the Memorial "does not clearly support one party over the other." *Am. Humanist Ass'n*, 874 F.3d at 208. Nevertheless, the outcome hinges on its observation that the Latin cross is exclusively a *Christian* symbol, unlike the Ten Commandments or

the more generic motto "In God We Trust." *Id.* at 207-208. Indeed, it might "be deemed offensive to Christians" to hold otherwise. *Id*. at 207 n. 9. The court also noted "the American Legion's affiliation with Christianity." *Id*. at 209. But as the dissent points out, the majority ruling inevitably "would lead to per se findings that all large crosses are unconstitutional despite any amount of secular history and context." *Id.* at 219 (Gregory, J., dissenting).

In addition to its "secular history and context," the cross could be viewed as a permissible acknowledgment of religion. Government acknowledgment may encompass the reality that this nation has deep roots in Christianity. America was long regarded "a Christian nation." *Church of Holy Trinity* v. *United States,* 143 U.S. 457, 471 (1892). "Th[e] first congressional prayer was emphatically *Christian*." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1833 (Alito, J., concurring). This Court once recognized Christianity "as a part of the common law of England" and "a part of the public law of Pennsylvania." *Vidal v. Phila*., 43 U.S. 127, 183 (1844). Governments may acknowledge the facts of history without compelling anyone to affirm or support Christian doctrine.

The legal battles surrounding legislative invocations reflect the Christian roots of America and support the constitutionality of acknowledging those roots. In *Marsh v. Chambers*, the chaplain who served the Nebraska legislature for sixteen years was a Presbyterian pastor. Even the dissent "recognized that government cannot, without adopting a decidedly *anti*-religious point of view, be forbidden to recognize the religious beliefs and practices of the American people

as an aspect of our history and culture." *Marsh v. Chambers,* 463 U.S. at 810-811 (Stevens, J., dissenting). More recently, the Town of Greece was sued due to allegations that a reasonable observer would perceive a preference for *Christian* prayers. *Town of Greece*, 134 S. Ct. at 1817-1818. This Court found legislative prayer to be a "tolerable acknowledgement of beliefs widely held." *Id*. at 1818, quoting *Marsh*, 463 U.S. at 792. The same is true here.

Another example of tolerable acknowledgment is the Ground Zero cross discovered in the World Trade Center debris, now displayed at the National September 11 Memorial and Museum to tell the story of its use by "[i]ndividuals of many faiths and belief systems . . . as a symbol of hope, faith, and healing." *Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227, 240 (2d Cir. 2014). In context, the cross was found to be "plainly historical rather than theological." *Id*. The government's selection of artifacts to display was admittedly "a form of government speech." *Id*. at 246. But as in this case, the government acknowledged an item that originated with the expression and beliefs of its citizens. The Memorial acknowledges the deep religious convictions—and the respect shown to fallen soldiers—that have characterized America since its founding. And the key words attached to the monument—"valor," "endurance," "courage," and "devotion"—are hardly unique to any one religious tradition.

D. The government may accommodate religion.

This case might also be viewed through the lens of accommodation. The Commission's preservation of traffic safety at the Memorial's location is not the sort of activity "motivated wholly by religious considerations" that this Court should invalidate. *Lynch,* 465 U.S. at 680. On the contrary, there is no religious motivation. Even so, the Commission's involvement with the monument, accommodating a longstanding memorial message, parallels government accommodation for religious expression.

In a long line of unbroken authority, this Court affirms that the Constitution "mandates accommodation" and "forbids hostility" toward religion. *Lynch,* 465 U.S. at 673. In spite of other distinctions and nuances, landmark Establishment Clauses cases over the past sixty years are consistent on this point: *Salazar*, 559 U.S. at 719 ("The Constitution . . . leaves room to accommodate divergent values within a constitutionally permissible framework."); *Elk Grove v. Newdow*, 542 U.S. at 35-36 (eradicating references to religious heritage would sever ties to a history that sustains this Nation even today); *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970) (highlighting "benevolent neutrality" with neither "sponsorship" nor "interference"); *Zorach v. Clauson*, 343 U.S. at 312-313 (rigid approach would be "hostile, suspicious, and even unfriendly"); *McCollum v. Board of Education*, 333 U.S. 203, 256 (1948) (rejecting "rigid interpretation").

In *Salazar v. Buono*, Congress faced a dilemma with similarities to this case. Faced with an injunction requiring the removal of the Sunrise Rock cross, the

government could not lawfully maintain it—"but it could not remove the cross without conveying disrespect for those the cross was seen as honoring." *Salazar v. Buono*, 559 U.S. at 716. Congress passed a land-transfer statute "true to the spirit of practical accommodation that has made the United States a Nation of unparalleled pluralism and religious tolerance." *Id*. at 724 (Alito, J., concurring). Demolition of the monument would have likely been perceived as government hostility toward the nation's religious heritage, rather than the neutrality the Constitution demands. *Id*. at 726. Here, mutilation or demolition of the Memorial would convey extreme disrespect for the veterans it was erected to honor. There was no Establishment Clause issue when it stood on private land, supported by private funds. When the Commission took title in the interests of traffic safety, that action accommodated a commemorative message that had been part of the Bladensburg community for four decades.

Many Establishment Clause challenges could be averted "if the Court would return to the views of the Framers and adopt coercion as the touchstone for our Establishment Clause inquiry." *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring). The Memorial does not coerce anyone to affirm a religious doctrine or engage in a religious exercise—and its clear purpose is unrelated to religion. Removing it would constitute the very hostility the Constitution prohibits.

Moreover, the government may provide general public benefits to the entire community. It is "obviously not the purpose of the First Amendment" to cut off religious activities from general public services—such

as public streets and sidewalks—unrelated to religious function. *Everson v. Board of Education of Ewing*, 330 U. S. 1, 18 (1947); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2027 (2017) (Breyer, J., concurring) (finding "no significant difference" between *Everson* and *Trinity Lutheran*). Nor does such action even remotely constitute the forbidden "entanglement" of *Lemon v. Kurzman*, 403 U.S. 602 (1974). This case, like *Trinity Lutheran*, involves expenditures for public safety, not religious advocacy. In *Trinity Lutheran*, it was playground safety, and in this case, traffic safety at a busy intersection. The government "merely maintain[s] a monument within a state park and a median in between intersecting highways that must be well lit for public safety reasons." *Am. Humanist Ass'n*, 874 F.3d at 222 (Gregory, C. J., dissenting). Even if the Memorial did convey a religious message, the government could provide traffic safety in the surrounding area.

III. THE GOVERNMENT PRESERVES AND RESPECTS A COMMEMORATIVE MESSAGE CREATED BY PRIVATE CITIZENS.

The Memorial was originally constructed by *private* organizers—families of the fallen soldiers, later joined by the American Legion—using *private* funds, on *private* land, to convey the organizers' commemorative message. The Commission preserved that message *40 years later* by taking title in order to provide for traffic safety in the area.

Any reasonable observer with even a cursory knowledge of the Memorial's 90-year history would

understand that "while the monument sits on public land, it did not sprout from the minds of [government] officials and was not funded from [government] coffers." *Card v. City of Everett*, 520 F.3d 1009, 1020 (9th Cir. 2008). The message "sprouted" from the minds of the mothers who wanted to honor the 49 men who had sacrificed their lives in the recent war. The Memorial's placement was "part of the concurrent creation of the National Defense Highway to commemorate the soldiers of World War I, not as a means of endorsing religion." *Am. Humanist Ass'n*, 874 F.3d at 219 (Gregory, J., dissenting). Its history dates back an entire century. It was in 1918 that private citizens began to raise money for its construction. Several years later, in 1922, they ran short of funds and the American Legion—a private organization—assumed responsibility. *Am. Humanist Ass'n*, 874 F.3d at 200. Over the years, events have been hosted to celebrate Memorial Day, Veterans Day, the Fourth of July, and September 11th remembrances. Religious services were only held (if at all) three times in 1931. *Id*. at 217 (Gregory, C. J., dissenting). At that time—thirty years before the Commission became involved—the Memorial was still located on private land.

The origins of the Memorial are reminiscent of Sunrise Rock in *Salazar v. Buono* where, "[i]n 1934, private citizens placed a Latin cross on a rock outcropping in a remote section of the Mojave Desert." *Salazar v. Buono*, 559 U.S. at 705-706. Their purpose, "to honor American soldiers who fell in World War I" (*id*. at 706), is virtually identical to that of the Memorial's organizers. As in Bladensburg, "the cross was not placed on Sunrise Rock to promote a Christian

message" or "to set the *imprimatur* of the state on a particular creed" but "simply to honor our Nation's fallen soldiers." *Id*. at 715.

The Tenth Circuit faced a challenge similar to this case in *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095 (10th Cir. 2010). The Utah Highway Patrol Association ("UHPA"), a *private* nonprofit organization, initiated a plan to honor fallen troopers with 12-foot high memorial crosses. *Id*. at 1111. Crosses were initially placed on *private* land, with the consent of each fallen officer's family. Later, UHPA obtained consent from the state to place some of them on public property where motorists would be reminded of the troopers' sacrifices. *Id*. at 1112. The memorial crosses are *privately* funded, owned, and maintained by UHPA. *Id*. Nevertheless, the court concluded they were a *government* endorsement of Christianity, rejecting the possibility they could be "UHPA's private speech, not the expression of the state of Utah." *Id*. at 1114. This conclusion was supposedly mandated by *Pleasant Grove City* (*id*.)—but that case, unlike either *Duncan* or the case before this Court, involved a Free Speech claim. In *Pleasant Grove City* this Court did not establish a rigid, per se rule that *every* monument standing on public property is *always* government speech. On the contrary, after a lengthy discussion about how monuments convey meaning, this Court observed that the government "does not necessarily endorse the specific meaning that any particular donor sees." *Pleasant Grove City*, 555 U.S. at 476-477. While this Court did not speak directly to the Establishment Clause challenge lurking in the background, there were hints that the Ten Commandments monument could have survived such a challenge, as in *Van Orden*. *Id*. at 482 (Scalia, J.,

concurring) ("The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire.").

In a nation governed by representatives of the people, it is unsurprising that the government would acknowledge, respect, and accommodate the sentiments of the people. Government actions and speech often intersect the beliefs of private citizens. Here, the Commission has shown respect for the private organizers and those they sought to honor. The Bladensburg WWI Memorial is not a government creation and does not "speak" for any government entity. Contextual and historical elements support the monument's commemorative message. The monument was designed by private citizens, not to convey a religious message but to stand as a tribute to the men who died to preserve American *liberty*—including *religious* liberty. Ironically, this includes the liberty of the American Humanist Association members and other like-minded citizens to reject religion.

IV. THIS COURT SHOULD CRAFT A TEST TO BRING CLARITY TO CASES INVOLVING RELIGIOUS SYMBOLISM ON PUBLIC PROPERTY.

Many monuments stand in national public parks across the nation. Often these were privately financed and/or donated by private parties. *Pleasant Grove City*, 555 U.S. at 471. These monuments, including many honoring war heroes, are part of American history and tradition. Other passive displays, some permanent and others temporary, appear at various times and places. Holiday and historical themes are common, sometimes in or near government buildings. Cases have been

litigated in this Court over many decades, with little clarity or consistency. This case offers an opportunity to illuminate this Court's Establishment Clause jurisprudence, particularly with respect to passive displays incorporating religious symbolism.

A good test should be objective. It should focus on whether a government action *actually* violates the Establishment Clause, judged in light of American history and tradition, rather than the subjective complaints of the "offended observer" or the perception of the ill-defined "reasonable observer" passing by. The "reasonable observer" of recent cases is "increasingly hostile to religious symbols in the public sphere." *Duncan*, 637 F.3d at 1101 (Kelly, J., dissenting from denial of rehearing en banc). This malleable imaginary person may be "biased, replete with foibles, and prone to mistake" and thus easily manipulated to reach desired results. *Id*. at 1108 (Gorsuch, J., dissenting from denial of rehearing en banc). The combination of "offended" and "reasonable" observers is lethal, leading to blatant hostility to all things religious in the public square—a result never contemplated by the Constitution's Framers. In cases like *Duncan*, courts dare to presume unconstitutionality based on what a poorly defined observer might mistakenly think. *Id*. That approach should be jettisoned and replaced with a return to coercion as "the touchstone" of the inquiry. *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring).

CONCLUSION

This Court should reverse the decision of the Fourth Circuit and hold that the Bladensburg WWI Memorial is constitutional.

Respectfully submitted,

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