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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 THOMAS MORE LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICUS CURIAE IN THIS CASE[1]

Thomas More Law Center is a national, nonprofit public interest law firm based in Ann Arbor, Michigan. It is dedicated to defending America's Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of human life. The Law Center accomplishes these goals on behalf of the citizens of the United States through litigation, education, and related activities. It is important to the Law Center and to the clients it serves in cities and towns across the nation that Americans retain the right to continue to display traditional symbols of our culture and heritage. The removal or destruction of war memorials and other historical displays sanctioned by the appellate court's decision in this case, simply because they contain religious symbols or imagery, exhibits a troubling hostility towards religion not countenanced by the Constitution. Resolution of this matter is of significant interest to the Thomas More Law Center and its clients.

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[1] Counsel of record for each party has filed blanket consent to the filing of *amicus curiae* briefs in this case. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Sup. Ct. R. 37.

SUMMARY OF THE ARGUMENT

The Fourth Circuit's decision sanctioning the destruction of a nearly 100-year old war memorial because a few passing motorists claim to be offended by the memorial's use of the Latin cross evidences a hostility to religion that is prohibited by the First Amendment. Supreme Court precedent is clear that a symbol does not need to lose all religious significance before it can be used in a public display. *Lynch v. Donnelly,* 465 U.S. 668, 687 (1984) (finding a city's public display of a creche "notwithstanding the religious significance of the creche" did not violate the Establishment Clause); *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) ("[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious."); *Salazar v. Buono*, 559 U.S. 700, 718 (2010) (plurality) ("The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm.").

Accordingly, this Court must not permit the destruction of the Bladensburg memorial, simply because it bears the image of a cross. The memorial was erected by private citizens as a war memorial, has always existed as a war memorial, and has been understood by reasonable observers to be a war memorial for over nine decades. To allow it to be destroyed now would be to erase a treasured piece of history and would show disrespect to the memories of soldiers who made the ultimate sacrifice for our country. A decision to alter or destroy the Bladensburg memorial would also deprive future generations the

ability to view and appreciate a community's authentic tribute to its local war heroes.

INTRODUCTION

The Bladensburg memorial honors the sacrifice of forty-nine men from Prince George's County who died while serving the United States in World War I. *Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 874 F.3d 195, 200 (4th Cir. 2017). Shortly after their deaths, local citizens, including the mothers of some of these fallen soldiers, chose to honor their loved ones with a memorial in the shape of a Latin cross. This was an appropriate symbol considering the many thousands of crosses that were used to mark the graves of soldiers killed overseas during the war. *Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 147 F. Supp. 3d 373, 384 (D. Md. 2015) (recognizing "although the construction of a cross can be for a religious purpose, in the period immediately following World War I, it could also be motivated by the 'sea of crosses' marking graves of American servicemen who died overseas.").

It was not until nearly a century later that a lawsuit was filed seeking destruction of this World War I memorial claiming that the community's historic tribute to its local war heroes violates the Establishment Clause. The plaintiffs are passing motorists who assert that the presence of a cross on public land, even one that was erected as a war memorial and has consistently served as a war memorial, offends and excludes them and, therefore, it must be disfigured or demolished. Despite Supreme Court case law that calls for a contrary result, the

Fourth Circuit Court of Appeals agreed with the plaintiffs. This decision will have devastating consequences that will be felt by the entire nation. *Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 891 F.3d 117, 123 (4th Cir. 2018) (Niemeyer, J., dissenting from denial of rehearing en banc) (noting that the panel's decision has "far-reaching and unnecessary consequences" and "needlessly puts at risk hundreds of monuments with similar symbols standing on public ground across the country, such as those in nearby Arlington National Cemetery, where crosses of comparable size stand in commemoration of fallen soldiers").

The Establishment Clause does not require the destruction of historical monuments such as the Bladensburg memorial that pose no threat to religious liberty. Rather, this case is part of "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life" which is "inconsistent with the Constitution." *Lee v. Weisman*, 505 U.S. 577, 598 (1992). This Court must set right the Fourth Circuit's grievous error.

ARGUMENT

I. THE DECISION MADE A CENTURY AGO BY COMMUNITY MEMBERS AND GRIEVING MOTHERS TO CONSTRUCT THE BLADENSBURG MEMORIAL IN THE SHAPE OF A CROSS, MIRRORING THE WHITE CROSSES THAT MARKED AMERICAN GRAVES OVERSEAS, SHOULD NOT BE DISREGARDED NOW.

The forty-nine men whose names appear on the Bladensburg memorial earned their place in history. And the community they tragically left behind, particularly their grieving mothers, earned the right to tell their stories. The stories of our fallen soldiers are immensely cherished and are inseparable from the history of our nation. Their stories should be treasured, not erased to appease an easily-offended few. As Judge Wilkinson aptly recognized in his opinion dissenting from the Fourth Circuit's denial of en banc review, "[t]he present has many good ways of imprinting its values and sensibilities upon society. But to roil needlessly the dead with the controversies of the living does not pay their deeds or their time respect." *Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 891 F.3d 117, 123 (4th Cir. 2018) (Wilkinson, J., dissenting from denial of rehearing en banc).

Historical facts cannot be changed to fit current trends or popular sentiments. The Bladensburg memorial exists as it does today, in the shape of a cross, because that is the choice an earlier generation made to honor men they knew and loved who died in World War I. The Bladensburg memorial was not

created by the government to honor Christ or to endorse Christianity or religion in general; it was created by the families, friends, and neighbors of forty-nine soldiers from Prince George's County who died in World War I. As Chief Judge Gregory correctly recognizes in his dissent from the Fourth Circuit's panel opinion regarding the Bladensburg memorial, "[a] reasonable observer would be aware that the cross is 'not merely a reaffirmation of Christian beliefs,' for it 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 *Buono*, 559 U.S. at 721). And that is precisely how the cross is used in the Bladensburg memorial—to honor and respect the fallen soldiers whose names are engraved on the base of the monument.

The Bladensburg memorial existed for nearly 100-years before any legal challenge was brought forth. This strongly suggests that the surrounding community has overwhelmingly accepted the government's secular commemorative purpose for maintaining the monument, and that a reasonable observer would not perceive the monument as the government's attempt to unconstitutionally endorse religion. *Van Orden v. Perry*, 545 U.S. at 702-04 (Breyer, J., concurring) In *Van Orden v. Perry*, Justice Breyer noted that the display of the Ten Commandments at issue had existed without legal challenge for forty years prior to the filing of the plaintiff's complaint. Justice Breyer observed that:

> those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over non religion, to "engage in" any "religious practic[e]," to "compel" any "religious practic[e]," or to "work deterrence" of any religious belief.

Id. at 702 (quoting *School Dist. of Abington Twp*. *v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (alteration in original)). The same principle applies here to the Bladensburg memorial, whose benign existence spans more than twice the length of time as the display found constitutional in *Van Orden*. This treasured local war memorial should not be disturbed now as part of a modern attempt to erase all traces of religion from society based on false notions of "neutrality" and "tolerance." Erasing history does not further either of those objectives.

A. THE HISTORY AND CONTEXT OF THE BLADENSBURG MEMORIAL CLEARLY REVEALS A COMMEMORATIVE PURPOSE NOT VIOLATIVE OF THE ESTABLISHMENT CLAUSE.

A reasonable observer would understand that the Bladensburg memorial honors local soldiers who died in World War I; it does not impermissibly endorse or establish a favored state religion. The Fourth Circuit acknowledged that "[a] 'reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in

which the religious speech takes place.'" *Am. Humanist Ass'n*, 874 F.3d at 206 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001)). Yet, the panel failed to appropriately account for the history and context of the Latin cross as a symbol of death and sacrifice during World War I, and the significance that symbol acquired particularly to people whose loved ones did not return home and whose physical remains were left overseas.

The district court's opinion cited the American Legion's expert witness report which further verified in regards to the Bladensburg memorial that "the symbolism of the cross is that of individual loss of life, not of the Resurrection [of Jesus Christ]." *Am. Humanist Ass'n*, 874 F.3d at 207 (citation omitted) (alteration in original). The Fourth Circuit averred, however, that although "the Latin cross may generally serve as a symbol of death and memorialization, it only holds value as a symbol of death and resurrection because of its affiliation with the crucifixion of Jesus Christ" and further that "a Latin cross serves not simply as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ." *Am. Humanist Ass'n*, 874 F.3d at 207.

The panel's statements regarding the cross and its consequent adoption of an apparent per se rule that free standing crosses on public land are always unconstitutional, cannot be reconciled with this Court's observations in *Salazar v. Buono,* 559 U.S. 700. *Buono* addressed the constitutionality of a land transfer involving government property that contained a World War I veteran's memorial which, like the Bladensburg memorial, was in the shape of a cross. *Buono*, 559 U.S.

at 705 (plurality). The plaintiff in *Buono* sought to enjoin the government from transferring the land on which the cross-shaped memorial stood and to enforce an earlier injunction which required the government to remove the memorial on Establishment Clause grounds. *Id*. at 710. Although procedurally barred from revisiting the Establishment Clause claim that formed the basis of the original injunction in *Buono*, this Court noted that its opinion should not be read to suggest its agreement with the original judgment "some aspects of which may be questionable." *Id.* at 718 (plurality). Critically, this Court recognized it was error to focus "solely on the religious aspects of the cross, divorced from its background and context" particularly because "a Latin cross is not merely a reaffirmation of Christian beliefs." *Id*. at 721 (plurality). Rather, the Latin cross in the context of a World War I memorial "evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." *Id*. The district court followed this rationale and correctly applied it to the Bladensburg memorial cross. *Am. Humanist Ass'n*, 147 F. Supp. 3d at 386 (quoting *Buono*, 559 U.S. at 721 (plurality opinion)). Although *Buono*'s procedural posture made the case "ill suited for announcing categorical rules," the Court's pertinent description of the Latin cross in the context of a World War I memorial is extremely relevant to the instant case, and the Fourth Circuit erred by ignoring it. *Buono*, 559 U.S. at 722 (plurality).

Also of particular importance to the correct resolution of the instant case, is this Court's analysis in *Van Orden v. Perry*, which is not compatible with the

Fourth Circuit panel opinion here. *Van Orden*, 545 U.S. 677. In *Van Orden,* the Court rejected an Establishment Clause challenge concerning "a large granite monument bearing the text of the Ten Commandments located on the grounds of the Texas State Capitol." *Id*. at 700 (Breyer, J., concurring). The Court noted that there are a plethora of religious acknowledgments present in the Nation's Capital and that "a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia." *Id*. at 689 (plurality). This Court further recognized that obviously "the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore has religious significance." *Id*. at 690 (plurality). But what is vitally important and relevant here, is that the Court also recognized that the Ten Commandments "have an undeniable historical meaning and that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Id*. (citing *Lynch*, 465 U.S. at 680, 687; *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *McGowan v. Maryland*, 366 U.S. 420, 437-440 (1961); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 676-678 (1970)). Accordingly, as *Van Orden* and the significant line of cases cited in support of its reasoning attest, the fact that the Bladensburg monument bears the shape of the Latin cross is not outcome determinative in an Establishment Clause challenge. The Fourth Circuit's contrary finding is simply incorrect.

In his concurring opinion in *Van Orden*, Justice Breyer acknowledged that "the Commandments' text undeniably has a religious message, invoking, indeed emphasizing, the Deity" but that "focusing on the text of the Commandments alone cannot conclusively resolve this case." *Van Orden*, 545 U.S. at 700-701 (Breyer, J., concurring). Rather, the constitutional inquiry requires the Court "to consider the context of the display" and examine how the display is used. *Id*. at 701. In reviewing the Establishment Clause challenge to the Bladensburg memorial, the Fourth Circuit failed to heed this Court's admonition in *Van Orden* that the test set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971) is "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds" and instead the Court's "analysis is driven both by the nature of the monument and by our Nation's history." *Van Orden*, 545 U.S. at 686 (plurality).

The nature of the Bladensburg memorial obviously reflects that it is a tribute to the community's fallen soldiers who died during World War I and whose names are engraved on the memorial itself. Clearly, the memorial is a tribute to these dead soldiers. The district court correctly observed, "[t]he [Bladensburg] Monument's secular commemorative purpose is reinforced by the plaque, the American Legion's seal, and the words 'valor,' 'endurance,' 'courage,' and 'devotion' written on it [and] [n]one of these features contains any religious reference." *Am. Humanist Ass'n*, 147 F. Supp. 3d. at 384-385. Additionally, as the American Legion points out in its petition for certiorari, during the last 90 years, "the Bladensburg community has responded to the Memorial by surrounding it with

additional monuments to those lost in the Nation's conflicts." Pet. at 7 citing Pet. App. 57a-58a. After reviewing the evidence, the district court rightly observed that "the record amply demonstrates that the construction and maintenance of the Monument 'was not an attempt to set the imprimatur of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers.'" *Id*. quoting *Buono*, 559 U.S. at 715 (plurality opinion)). The Fourth Circuit was wrong to reject the district court's well-supported factual and legal finding on this issue.

Judgment surrounding religious display cases should not be based on a judge's "personal judgment" but rather, "it must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring). Significantly,

> "[t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact."

Id. at 704 (quoting *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring)). Applying these principles, it is abundantly clear that the Bladensburg memorial does not pose any danger to religious liberty. It is a stationary historic monument honoring forty-nine local war heroes. It does not "involve the state in religious exercises" nor does it have any "meaningful or practical

impact" favoring religion. *Am. Humanist Ass'n*, 874 F.3d at 222 (Gregory, J., dissenting) (noting that the government maintains the Bladensburg memorial "within a state park and a median in between intersecting highways that must be well lit for public safety reasons [and] [t]here is no evidence that the Commission consults with any churches or religious organizations to determine who may access the Memorial for events.").

The destruction of this treasured piece of history will not further any interest meant to be protected by the Establishment Clause. Instead, it will likely increase the very divisiveness that the Religion Clauses of the First Amendment seek to avoid. *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring).

B. DESTROYING THE BLADENSBURG MEMORIAL WILL DEPRIVE FUTURE GENERATIONS OF A CHERISHED PIECE OF HISTORY.

The Bladensburg memorial not only preserves the memory of people who had a noteworthy role in history, the monument is itself a part of history. It is a physical reminder of the manner in which a community rallied together in grief to pay homage to the sacrifice made by their sons, brothers, friends, and neighbors. As a mother of one of the men honored by the monument wrote in a letter to a U.S. Senator in 1920, "the chief reason I feel so deeply in the matter my son, Wm. F. Redmen lost his life in France and because of that I feel that our memorial cross is, in a way, his grave stone." Pet. App. 102a. Thus, the Bladensburg memorial should be treated with a sense of reverence and respect that acknowledges its commemorative purpose. Much

like an actual gravestone, the Bladensburg memorial provides a visible record of the heroic deaths of the men whose names are etched into it. Preserving the memory of these men and their sacrifice was crucial to the generation that knew them. The Bladensburg community was so invested in honoring their fallen soldiers with the monument, also known as the Peace Cross, that it raised funds towards its construction and joined together using picks and shovels to level the ground for the dedication ceremony.[2] That the Bladensburg memorial does not appear in a graveyard or in a museum does not make it any less treasured as a physical piece of history worth maintaining for future generations.

The Second Circuit addressed the importance of preserving history in *Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227 (2d Cir. 2014) when it rejected a claim that the inclusion in the National September 11 Memorial and Museum of a cross from Ground Zero violated the Establishment Clause. The cross at issue was made of an "intersecting steel column and cross beam [that] was found inside the rubble of 6 World Trade Center on the evening of September 13, 2011." *Id.* at 236. The Ground Zero cross was located inside the museum with a textual explanation that acknowledged "[i]ndividuals of many faiths and belief systems saw the cross as a symbol of hope, faith, and healing." *Id.* at 237. The textual explanation also included the following quote from Richard Sheirer, the

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[2] Anne Marimow & Michael Ruane, A World War I cross under siege. Wash. Post, Sept. 21, 2018, https://www.washingtonpost.com/graphics/2018/local/maryland-peace-cross/?noredirect=on

former Commissioner of New York City's Office of Emergency Management speaking in 2010 about the Cross at Ground Zero:

> It didn't matter what religion you were, what faith you believed in . . . It was life, it was survival, it was the future. . . . I would say that it represents the human spirit. That it represents good over evil. That it represents how people will care for each other at the worst moment in their life. How people can put aside their differences for the greater good.

Id. (emphasis omitted). The *Am. Atheists, Inc.* plaintiffs claimed that the Port Authority impermissibly promoted Christianity by displaying the cross in the museum "unaccompanied by some item acknowledging that atheists were among the victims and rescuers on September 11." *Id.* at 233. The Second Circuit noted that "[t]he Cross at Ground Zero . . . came to be viewed not simply as a Christian symbol, but also as a symbol of hope and healing for all persons." *Id.* at 234. The Court rejected the contention that "because the historical significance of this particular column and cross-beam is a tangible illustration of the role faith played for many persons in the aftermath of the September 11 attacks, [the government's] actual purpose in displaying the artifact must be religious rather than secular." *Id.* at 239. The Second Circuit recognized that "providing an accurate historical account of events" is a valid secular purpose. *Id.* at 241.

Similarly here, the government's motive for maintaining the Bladensburg memorial, the only motive that matters for Establishment Clause

purposes, is quite obviously secular—maintaining traffic safety and preserving a historic war monument. *Am. Humanist Ass'n,* 874 F.3d at 206. Whether or not private citizens were motivated by religious considerations in the aftermath of World War I, when they chose the Latin cross as the shape for the memorial, is only relevant as it forms part of the complete historical picture.

War memorials that involve religious imagery are a vital thread in the historical tapestry of our national heritage. Removing, altering, or destroying them leaves future generations with an incomplete picture of the past—one devoid of the richness and vibrancy that accompanies truthful storytelling. "[I]t is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind." *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring). As Justice Jackson observed in *Illinois v. ex rel. McCollum*, "The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything that gives meaning to life, is saturated with religious influences[.]" *Id*.

Human beings are complex creatures motivated and inspired by an array factors, but to pretend that religion plays no role in shaping society or American history willfully neglects the truth. And as this Court has repeatedly recognized, "the Establishment Clause "does not oblige government to avoid any public acknowledgment of religion's role in society." *Buono*, 559 U.S. at 718-19 (plurality); *Lynch*, 465 U.S. at 674 ("[t]here is an unbroken history of official acknowledgment by all three branches of government

of the role of religion in American life from at least 1789"); *Van Orden*, 545 U.S. at 686 (plurality). Further, this Court has also "long recognized that an accurate account of human history frequently requires reference to religion: 'The history of man is inseparable from the history of religion.'" *Am. Atheists, Inc.*, 760 F.3d at 239 (quoting *Engel v. Vitale*, 370 U.S. 421, 434 (1962)).

Providing an honest account of history, even if that history involves an account of people being influenced or inspired by religion, does not violate the Establishment Clause. Thus, even if religion played a role in the private builders' decision to utilize the shape of a cross for the Bladensburg memorial, the Establishment Clause does not compel the government to tear the monument down or to disfigure it. The memorial is a cherished piece of history documenting the enormous loss wrought by World War I, and a community's sincere efforts to honor their fallen soldiers. Consequently, it should be preserved for future generations.

II. DESECRATING A NEARLY 100-YEAR OLD WAR MEMORIAL SIMPLY BECAUSE IT BEARS THE SHAPE OF A CROSS DEMONSTRATES A HOSTILITY TOWARD RELIGION THAT IS PROHIBITED BY THE FIRST AMENDMENT'S RELIGION CLAUSES.

The Fourth Circuit's decision shows a hostility to religion not countenanced by the First Amendment. The Constitution does not permit mandating "a civic religion that stifles any but the most generic reference to the sacred any more than it permits prescribing a religious orthodoxy." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014); *Lee*, 505 U.S. at 627 (Souter,

J., concurring) ("That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account.") Contrary to what the panel's holding regarding the Bladensburg memorial implies, "the Establishment Clause does not compel the government to purge from the public sphere all that in anyway partakes of the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) (citing *Marsh*, 463 U.S. 783). Such a position is "inconsistent with our national traditions" and "would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id*. (citing *Lemon*, 403 U.S. at 614; *Lynch*, 465 U.S. at 672-678).

The Religion Clauses of the First Amendment seek to "assure the fullest possible scope of religious liberty and tolerance for all." *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring). "They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike." *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring) (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 717-729 (2002) (Breyer, J., dissenting)). But requiring the destruction or disfigurement of a historic World War I memorial because it is in the shape of a cross does not show tolerance—quite the opposite. *Buono,* 559 U.S. at 726 (Alito, J., concurring in part and concurring in the judgment) (noting that demolition of a World War I monument in the shape of the Latin cross would "have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage.").

This Court in *Schempp*, warned against embracing an "untutored devotion to the concept of neutrality," as the Fourth Circuit has done in the Bladensburg case, because it can lead to "results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring); *see Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 845-846 (1995) (warning against the "risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires.").

The Fourth Circuit's ban on free standing crosses does not comport with this Court's permissive treatment of other forms of symbolic expression. In *Town of Greece v. Galloway*, this Court held that legislative prayer, which had been practiced by Congress "since the framing of the Constitution," was permitted by the Establishment Clause. *Town of Greece*, 134 S. Ct. at 1818. In so holding, the Court described legislative prayer as "symbolic expression" that is "a 'tolerable acknowledgment of beliefs widely held,' rather than a first, treacherous step toward establishment of a state church." *Id.* quoting *Marsh*, 463 U.S. at 792 (internal citation omitted). Justice Brennan disagreed with this description of legislative prayer in *Marsh*, but acknowledged in his dissenting opinion in *Marsh* that the Court has "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*, 463

U.S. at 810-811 (Brennan, J., dissenting). One of the examples Justice Brennan gives is that "certainly, the text of Abraham Lincoln's Second Inaugural Address which is inscribed on the wall of the Lincoln Memorial need not be purged of its profound theological content." *Id*. Similarly, in the case of the Bladensburg memorial, the Latin cross employed has obvious historical significance in the context of a World War I monument, and the cross need not be purged of its theological significance in order to survive destruction under the Establishment Clause.

In another recent case currently seeking review by this Court, plaintiffs who, like the plaintiffs in Bladensburg, are represented by or are members of the American Humanist Association, sought removal of a long-standing Latin cross from a public park. *Kondrat'Yev v. City of Pensacola*, 903 F.3d 1169 (11th Cir. 2018) (per curiam). The Eleventh Circuit panel stated regretfully "our hands are tied" by existing precedent in the Circuit that required removal of the cross at issue. *Id*. at 1174. But two of the three judges issued concurring opinions expressing strong disagreement with the precedent that controlled the case. *Id*. Judge Royal made a persuasive argument based upon an in depth historical analysis, that the Eleventh Circuit's Establishment Clause framework needs correction. Judge Royal concluded in relevant part that "[p]lacing a cross in a public park that many people have enjoyed for decades, that stands mute and motionless, that oppresses no one, that requires nothing of anyone, and that commands nothing does not violate the Establishment Clause." *Id*. at 1196 (Royal, District Judge, concurring). The same is true of the Bladensburg memorial, and this Court should

definitively say so, thereby providing direction to lower courts addressing challenges to similar passive displays on public property.

The Fourth Circuit erred by condemning the Bladensburg memorial for destruction despite its obvious historical significance and the government's plainly secular purpose for maintaining it. Allowing a historic war memorial to be destroyed to quell some momentary discomfort plaintiffs feel when they drive past the Bladensburg monument would do real and lasting harm to this country; it would send a message of disrespect to our fallen soldiers and their families, and it would deprive future generations of a treasured piece of history. Such a brooding and pervasive devotion to the secular is inconsistent with the Constitution and our national heritage. Consequently, this Court should correct the fundamentally flawed Establishment Clause analysis that unnecessarily threatens the country's longstanding monuments.

CONCLUSION

The Court should reverse the decision of the Fourth Circuit Court of Appeals and allow the Bladensburg memorial to continue to exist in its current form.

Respectfully submitted,

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