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 *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONERS

James F. Peterson
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
jpeterson@judicialwatch.org

Meredith L. Di Liberto
1925 Vince Road
Virginia Beach, VA 23464

Counsel for Amicus Curiae

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QUESTIONS PRESENTED

Whether the constitutionality of a passive display incorporating religious symbolism should be assessed under *Lemon v. Kurtzman, Van Orden v. Perry, Town of Greece v. Galloway*, or some other test.

Whether a 93-year-old memorial to the fallen of World War I is unconstitutional merely because it is shaped like a cross.

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INTEREST OF THE *AMICUS CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs to advance its public interest mission and has appeared as *amicus curiae* in this Court on many occasions.

Judicial Watch seeks to participate as *amicus curiae* for two reasons. First, Judicial Watch believes this is an important opportunity for the Court to clarify its Establishment Clause jurisprudence and finally abandon *Lemon v. Kurtzman* and return Establishment Clause precedent to its intended standard of legal coercion. Second, Judicial Watch seeks to highlight the dangerous path this case plays in overt hostility toward religion by the courts.

SUMMARY OF ARGUMENT

Establishment Clause precedent is a tale of irreconcilable judicial decisions and uncertainty, which has produced a sense of exasperation by lawmakers, judges, and individuals alike. Rather than carve out another case-specific holding, the Court can clarify the role of the Establishment Clause

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[1] Petitioners and Respondents granted blanket consent for the filing of *amicus curiae* briefs in this matter. No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than Judicial Watch, Inc. made a monetary contribution intended to fund the preparation and submission of this brief.

in relation to the States and set out an unambiguous legal standard by which Establishment Clause violations can be measured. In doing so, the Court should adopt the solution that most closely mirrors the Framers' intent: to reaffirm that the Establishment Clause was not intended to be an individual right, but merely a restraint on federal power. Should this solution seem too broad or onerous, the Court should, at the very least, adopt the legal coercion standard intended by the Framers. This standard would make it clear that not every offended individual could file suit absent legal coercion.

Adopting a comprehensive and straightforward legal coercion standard in this case quickly and clearly demonstrates that the Memorial is constitutional. In fact, applying any of the possible Establishment Clause tests brings about the same conclusion: the Memorial is constitutional.

ARGUMENT

Perhaps no other constitutional subject matter has caused more confusion and inconsistency than Establishment Clause precedent. This situation can be traced back directly to an act of imprudent interpretation by this Court in *Everson v. Board of Education*, which offhandedly applied the Establishment Clause to the States through the Fourteenth Amendment. The history of the Establishment Clause and plain meaning of the words chosen by the Framers demonstrate that the Clause was intended to restrain federal interference

with religion. There is no indication that the Establishment Clause was intended to be an individual right. This nonchalant shift in applying the Establishment Clause as an individual right and incorporated against the States has created the impossible task of determining how to protect both religion and the individual. This impossible task is manifested clearly in the subsequently unpredictable Establishment Clause precedent. This case is the perfect opportunity for the Court to rectify the error made in Everson and return to a legal standard true to the Framers' intent.

I. *LEMON V. KURTZMAN* HAS CAUSED CONFUSION AND INCONSISTENCY IN ESTABLISHMENT CLAUSE PRECEDENT AND SHOULD BE OVERRULED.

It has long been the tradition of the courts to employ the tool of historical study and discover the meanings of words in its quest to properly interpret the Constitution. *See Waltz v. Tax Commission of New York*, 397 U.S. 664, 681-82 (1970), *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966), *Kansas v. Colorado*, 206 U.S. 46, 91 (1907). With regards to the Establishment Clause, both the history and the language are readily available and offer a clear picture of the original intent of the Establishment Clause and the irreconcilable path taken in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) through *Everson v. Board of Education of the Township of Ewing,* 330 U.S. 1, 15 (1947). This Court has expressed concern about *Lemon*, refrained from

using *Lemon*, and vigorously articulated its limitations. The time has come to overrule *Lemon*.

A. THE FRAMERS INTENDED THE ESTABLISHMENT CLAUSE TO RESTRAIN FEDERAL ESTABLISHMENT OF RELIGION AND NOT AS AN INDIVIDUAL RIGHT.

Historical accounts of the vigorous debates surrounding the ratification of the Constitution, and in particular, the inclusion of the Bill of Rights, show the Framers' concerns regarding the states' protections against federal intrusion as well as individual rights. See *Wallace v. Jaffee*, 472 U.S. 38, 92-92 (1985) (Rehnquist, J., *dissenting*). The language of the so-called "Religion Clauses" was robustly debated. *Id*. (*quoting* 1 Annals of Cong., 424, 434, 729 (1789)). After heated debates between the Federalists and Anti-Federalists, Madison began the difficult task of drafting the Bill of Rights. *See* Munoz, The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation, 8 U. Pa. J. Constitutional L. 585, 619-24 (2006). Madison's first proposal read, "The civil rights of none shall be abridged on account of religious belief, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or in any pretext, infringed." *Id*. at 625 (*quoting* 1 Annals of Cong. 451). Madison was met with two primary concerns. First, that the amendment might be interpreted as abolishing religion. And second, that the amendment was altogether unnecessary because

Congress had no explicit power to establish religion. *Id*. at 626-27. Absent from concerns articulated during these debates was any fear of state involvement in religion or a desire to prohibit such. "Given the textual and logical difficulties posed by incorporation, however, there is no warrant for transforming the meaning of the Establishment Clause without a firm historical foundation." *Town of Greece v. Galloway*, 572 U.S. 565, 607 (2014) (Thomas, J., *concurring*.)

In the end, the language ratified plainly restrained federal establishment of religion. This point is found both in the words chosen and ratified, as well as the history and acceptance of, state establishments. As ratified, the Establishment Clause prohibits Congress from making any law "respecting an establishment of religion." U.S. CONST. amend. I. "Respecting" was language adopted by the joint committee. *See Munoz* at 630. Both the Senate and House versions of the amendment sent to the joint committee stated that "Congress shall *make* no law establishing...." (emphasis added) *Id*. at 628-29. By adding the word "respecting" the joint committee, and subsequently the ratifiers, were making it clear that Congress had no power "with reference to [or] with regard to" religious establishment. *Id*. at 630. "The text and history of the Establishment Clause strongly suggests that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause." *Elk Grove*

Unified School District v. Newdow, 542 U.S. 1, 49-50 (2004) (Thomas, J., *concurring*).

History supports this plain language interpretation of the Establishment Clause. In addition to the public support of religion in the public square at the time of the ratification of the Bill of Rights,[2] at least six States had established churches. *See Galloway*, at 605 (Thomas, J., *concurring*), *see also* McConnell, Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2110 (2003). Had the Framers intended the Establishment Clause to protect individual rights, these state establishments would have been unconstitutional.

In 1875, Congressman James G. Blaine proposed an amendment to the Constitution (the so-called

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[2] The examples of government support for religion in the public square are plentiful including: the Northwest Ordinance of 1787, Washington's Thanksgiving Proclamations of 1789 and 1795, Adams' Days of Fasting and Humiliation of 1798 and 1799, Madison's Thanksgiving Proclamations of 1814 and 1815, President Lincoln's Thanksgiving Proclamations of 1862, 1863, and 1684, an unbroken line of yearly Thanksgiving Proclamations from President Johnson's Thanksgiving Proclamations of 1865 to President Trump in 2018, Executive Orders and official presidential announcements proclaiming Christmas and Thanksgiving as national holidays and releasing federal employees on these religious national holidays, and compensating congressional and military chaplains. These are but a few examples of governmental support for religion in the public square. *See* Pilgrim Hall Museum at http://www.pilgrimhallmuseum.org/-thanksgiving_proclamations.htm; s*ee also Lynch v. Donnelly*, 465 U.S. 668, 676 (1984).

"Blaine Amendment") which, if passed, would have prohibited States from establishing religion. The proposed amendment read: "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund, nor any public land devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations." *See* Munoz at 634-35 (*quoting* H.R. Res. 1, 44th Cong. (1875)); *see also* Fonte, *Zelman v. Simmons-Harris:* Authorizing School Vouchers, Education's Winning Lottery Ticket, 34 Loy. U. Chi. 479, 496-97 (2003). While the amendment did not garner enough votes to pass, the significance of the attempt is worth noting.[3] If the Establishment Clause was an individual right and incorporated against the States, the Blaine Amendment would have been completely unnecessary. Yet, only seven years after the ratification of the Fourteenth Amendment, Congress was debating an amendment whose sole purpose was to restrict state establishments of religion. *See* Munoz, at 635.

Both the plain meaning of the language and the historical context of the Establishment Clause clearly demonstrate that the Framers intended the Clause to be a restriction on federal interference with and establishment of religion and not an individual right.

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[3] The Blaine Amendment passed the House but fell shy of passing the Senate with a vote of 28-16 and 27 abstaining. *See* Fonte at Footnote 119.

The *Everson* Court never examined the history or plain language of the Establishment Clause. Instead, the Court simply declared that "the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state actions abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause." *Everson*, 330 U.S. 15. The problem is, the Court did not give *any* reasons.

B. EVEN IF THE ESTABLISHMENT CLAUSE IS APPLIED TO THE STATES, THE FRAMERS INTENDED ESTABLISHMENT CLAUSE VIOLATIONS TO BE REVIEWED WITH A STANDARD OF LEGAL COERCION.

Rectifying the fundamental constitutional error made in *Everson* and disincorporating the Establishment Clause would overturn more than seventy years of precedent. *See Munoz* at 632. Should the Court determine that our legal system has become too dependent on an incorporated Establishment Clause, a solution can be found that would bring Establishment Clause jurisprudence closer to the Framers' intent. Overruling *Lemon* and applying a legal coercion standard would be in line with the Framers' intent and it would result in a consistent application of the law.

The current state of Establishment Clause precedent is without any consistent standard or test

for litigating violations[4]. Courts apply the *Lemon* test,[5] or ignore the *Lemon* test,[6] or apply the "endorsement test,"[7] or a version of the "endorsement test,"[8] the *Van Orden* test[9], or a combination of these tests, or an outright rejection of all.[10] The result of this judicial chaos is the hollowing of the intent of the Establishment Clause to such a degree that three purportedly offended atheists can take their offense all the way to the U.S. Supreme Court over making eye contact with a 93-year-old war memorial.

The solution to the judicial chaos is simple: create a uniform standard of review for Establishment Clause violations that reflects the intent of the

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[4] A perfect snapshot of this inconsistency is March 2, 2005. On that day this Court issued two Establishment Clause decisions regarding passive displays of the Ten Commandments. *See Van Orden v. Perry*, 545 U.S. 77 (2005) and *McCreary v. ACLU*, 545 U.S. 844 (2005). One used *Lemon* and concluded the display was unconstitutional while the other disregarded *Lemon* and concluded the display was constitutional.

[5] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (the infamous three-prong test requiring a secular purpose, no advancement nor inhibition of religion, and no excessive government entanglement).

[6] *See e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 791 (1983) (no mention of *Lemon* in the majority opinion and reflected primarily on the "unique history" of legislative prayer).

[7] *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J. concurring) (primary focus being on whether the government was communicating a religious message).

[8] *See e.g., McCreary v. ACLU*, 545 U.S. 844, 859-60 (2005) (combining the *Lemon* and endorsement tests)

[9] *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (focusing on the history and nature of a display).

[10] *Lee v. Weisman*, 505 U.S. 577 (1992) (rejected requests to reconsider *Lemon* and then neglected its use).

Clause. As previously stated in Section I.A., that intent was to prohibit federal establishment of religion. Therefore, only governmental actions that legally coerce an individual to participate in or refrain from religious action would create a cause of action. This would complement the Free Exercise Clause rather than cause conflict.[11] As such, "[e]very acknowledgement of religion would not give rise to an Establishment Clause claim, courts would not act as theological commissions, judging the meaning of religious matters. Most important, our precedent would be capable of consistent and coherent application." *Van Orden* at 697 (Thomas, J., *concurring*).

II. UNDER ANY ESTABLISHMENT CLAUSE STANDARD OR TEST, THE MEMORIAL IS CONSTITUTIONAL.

As alleged Establishment Clause violation before the Court is one surrounding a 93-three-year-old World War I ("WWI") war memorial ("Memorial") in the shape of a cross. The Memorial, which honors forty-nine men from the local community who gave their lives in the cause of freedom during WWI, is located at the intersection of Maryland Route 450 and U.S. Route 1 in Bladensburg, Maryland. *Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*,147 F. Supp. 3d 373, 376 (D. Md., Nov. 30, 2015). Begun and built as a private venture to honor the local heroes, the ownership of the

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[11] *See e.g.*, *Engel v. Vitale*, 370 U.S. 412, 430 (1962) (the individual right to pray was rejected by a perceived establishment of religion).

Memorial and the land on which it stands was transferred to Maryland-National Capital Park and Planning Commission ("Commission") in 1960. *Id*. at 378. The reason for this transfer is a settled factual matter. "[T]he Commission's sole purpose for acquiring the land in the 1960's was … [f]or highway expansion, traffic safety, protection of the Legion's residual property interests, [and] historic preservation." *Id*. at 382.[12] The Respondents' injury is one of "unwelcome direct contact" with the Memorial. Specifically, Respondents drive past the Memorial and don't like the shape of it.

A. THE MEMORIAL IS CONSTITUTIONAL UNDER THE LEGAL COERCION STANDARD.

The Court should apply the aforementioned legal coercion standard as articulated by Justice Thomas in *Galloway* to this case. The Memorial requires no action, no allegiance, and no assent. In fact, the Memorial requires nothing at all. Respondents face no religious coercion, no penalty, nor force of law. *See Gallowa*y at 608 (Thomas, J., *concurring*). Respondents do not so much as face "subtle coercive pressure." *Id.* at 610. They claim "unwelcome direct contact," which is something even shy of offense which this Court has deemed insufficient as a cause of action. "Offense, however, does not equate to coercion. Adults often encounter speech they find

[12] On appeal, Respondents did not challenge the District Court's finding that the Commission's purpose was secular. *Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 874 F.3d 195, 218 (4th Cir. 2017) (Gregory, J., *dissenting).*

disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views. . . ." *Galloway* at 589. *See* also *Newdow* at 44 (O'Connor, J., concurring in judgment). Respondents have not faced any form of legal coercion with regard to the Memorial and the Fourth Circuit should be reversed.

B. THE MEMORIAL IS CONSTITUTIONAL UNDER THE *VAN ORDEN* TEST.

In *Van Orden*, the Court rejected the Lemon test as "not useful in dealing with the sort of passive monument that Texas erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history." *Van Orden* at 686. Given the similar nature of the passivity of the Memorial, analysis under *Van Orden* is appropriate.[13] In applying *Van Orden* to the Memorial, it is clear that both the nature of the Memorial and our Nation's history of using similar memorials to honor its war dead, support the constitutionality of the Memorial.

While the lower courts refer to the Memorial in different terms and highlight different aspects, there is no factual debate about the physical description of the Memorial. The Memorial is a forty-foot

[13] The Fourth Circuit acknowledged *Van Orden* and pledged "due consideration given to the factors outlined in *Van Orden.*" However, the Fourth Circuit's opinion is completely devoid of any real analysis of *Van Orden* as it occupies just two small paragraphs. *Am. Humanist Ass'n*, 874 F.3d at 206, 208.

monument in the form of a Latin-style cross. *See Am. Humanist*, 874 F.3d at 201. The American Legion's symbol is near the center on both the front and back sides. On the cross are the words "VALOR," "ENDURANCE," "COURAGE," and "DEVOTION," inscribed – one on each side – above the pedestal. *See* Appellant's Petition for Writ of Certiorari at 5 (June 25, 2018). The pedestal itself contains a large plaque which reads "DEDICATED TO THE HEROES OF PRINCE GEORGE'S COUNTY, MARYLAND WHO LOST THEIR LIVES IN THE GREAT WAR FOR THE LIBERTY OF THE WORLD." *Id.* Under this dedication are the names of the forty-nine men to whom the Memorial is dedicated. *Id.*, *see also* Appendix ("App.") at 2a. The Memorial's construction was completed in 1925. *Am. Humanist*, 874 F.3d at 201. At the time of completion, the Memorial was located at the end of the National Defense Highway. App. Pet at 6, *see also* App. at 6a. As time passed and the traffic flow increased, the Memorial came to be on the median of an intersection which is now Maryland Route 450 and U.S. Route 1. *Am. Humanist*, 147 F. Supp. 3d at 376. The Memorial has become a part of a larger commemorative undertaking called "Veterans Memorial Park." *See* App. Pet. at 7-8. As noted by Petitioners, this Park includes memorials and monuments honoring veterans from all major armed conflicts and September 11th, including two 38-foot-tall statues of an American and British soldier facing off across the Anacostia River. *Id.*[14]

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[14] The Circuit Court incorrectly stated that "no other monument in the area is taller than ten feet." *Am. Humanist*, 874 F.3d at 202. In addition to the two 38-foot-soldier statues, "Undaunted in Battle" is 20 feet in height. *See*

The Circuit Court concluded that the shape of the Memorial, the lack of secular features, and the size and location made the Memorial a "violative display." *Am. Humanist*, 874 F.3d at 206-09. This unnecessarily narrow analysis completely discounted the fact that the Memorial predated most of the current surroundings. The Memorial was not originally located on an intersection. This narrow view also ignored the fact that dispersing the added monuments and memorials was dictated by the space available, not a nefarious plan to evangelize. Had the County added the "Undaunted in Battle" monument, the WWII Honor Roll Memorial, and Veterans Memorial to the intersection, it would have created a visual impairment for motorists. The monuments and memorials are necessarily spaced out given the limitations of the land. The Memorial was not placed in the intersection alone to create a "conspicuous display" as the Circuit Court speculated. *Am. Humanist*, 874 F.3d at 209.

In *Van Orden*, this Court did not require the presence of "secular features" on the Ten Commandments display to conclude the display was constitutional. Rather, this Court acknowledged the religious nature of the Ten Commandments as well as the role the Ten Commandments has had in law and government. *Van Orden*, 545 U.S. 690-92. "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Id.* at 690. The Circuit Court's holding disregards this point completely. The

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https://www.capitalgazette.com/lifestyle/ph-ac-cn-memorial-battle-of-bladensburg-0821-20140818-story.html

weathering of the American Legion symbols or dedication plaque are inapplicable to the constitutionality of the Memorial because the cross itself is an easily identified symbol both of Christianity and death and sacrifice. The Memorial does not **need** secular elements because, like the Ten Commandments display in *Van Orden*, it represents two equally important ideas.

In its decision, the Circuit Court concluded that the Memorial was different from the *Van Orden* Ten Commandments because the Ten Commandments was "well known as being tied to our Nation's history and government." *Am. Humanist*, 874 F.3d at 208. In order to reach this conclusion, the Circuit Court decreed that the cross as a symbol was just too religious. *Id.* at 207. It discounted the use of the cross as a symbol of death and sacrifice, specifically, veteran sacrifice. *Id.* Harkening back to the *Everson* debacle, the Circuit Court proclaimed the crosses commemorating millions of U.S. veterans who sacrificed their lives overseas to be "of no moment." *Id.* at 207-08; *see also* American Battle Monuments Commission "Commemorative Sites Booklet" found at www.abmc.gov/sites/default/files/publications/EN_997_020_ABMC-Commemorative-Sites-Booklet-MAR2018_508.pdf. The audacity of such a statement – discounting the lives of those who secured our freedom by removing the freedom to honor them – is staggering.

In addition to the effrontery of such a statement, the Circuit Court is factually incorrect about the history of the cross's use. From almost the moment

the first settlers landed in America, the cross has been present.[15] The particular use of the cross as a symbol of veteran sacrifice dates back at least as far as the Revolutionary War. Examples of this can be seen in Yorktown, Virginia, Cypress Hill, New York, and New Canaan, Connecticut.[16] *See* App. at 13a-15a. And use of the cross in a military commemorative fashion did not end with the Revolutionary War but has continued to be used. Examples of this can be seen in Arlington, VA and Fort Stanton, New Mexico. *See* App. at 16a-18a.

Even in a temporary fashion, the cross has become synonymous with veteran sacrifice as can be seen throughout the country as small white crosses are put up during significant military holidays such as Memorial Day and Veterans Day. *See* App. at 19a-23a.[17] The cross also plays a significant symbolic role in military honors and awards. The Distinguished Service Cross, the Navy Cross, the Air Force Cross, and the Distinguished Flying Cross all contain a cross. All are high personal awards worn by members of the Armed Forces while in uniform. The

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[15] *See e.g.*, the Cape Henry Memorial in Fort Story, Virginia which commemorates the 1607 landing. http://nsdac.org/work-of-the-society/historical/markers/cape-henry-cross/. App. at 12a.

[16] Yorktown and Cypress Hills are cemeteries while New Canaan is an example of a cross-shaped veterans memorial on a town green. *See* App. at 13a-15a.

[17] Even in a non-military use, the simple cross is the most frequently used symbol by family members and friends of those killed in traffic accidents. Often times the crosses are erected on government property but would not be seen as an endorsement of a particular creed or religion but a symbol of the loss of a loved one.

Distinguished Service Cross was instituted in 1918, the Navy Cross in 1919, the Distinguished Flying Cross in 1926, and the Air Force Cross in 1964 – the Air Force Cross being after *Everson*. *See* https://valor.defense.gov/description-of-awards/; *see also* https://visitpearlharbor.org/medals-honor-highly-regarded-medals-military/; https://www.medalsofamerica.com/distinguished-flying-cross.

As seen through the *Van Orden* lens, the Memorial is every bit as constitutional as the Ten Commandments display. The cross, while an unabashedly religious symbol, has an additional long-standing historical use in military memorials and awards in this country. Under *Van Orden*, the Circuit Court's decision must be reversed.

C. EVEN UNDER THE UNWORKABLE *LEMON* TEST, THE MEMORIAL IS CONSITUTIONAL.

While *Amicus* reiterates the need to overrule *Lemon v. Kurtzman* for the sake of saving the integrity of the Establishment Clause, not even the *Lemon* test can dispute the constitutionality of the Memorial. Decided in 1971, the Court articulated a three-prong test for analyzing state statutes providing aid to church-related schools. *Lemon* at 612-13. Under *Lemon*, a court considers whether the offending government action (1) had a secular purpose; (2) did not advance, nor inhibit religion as its primary purpose; and (3) did not foster excessive government entanglement. *Id.* Just two years after *Lemon*, the Court referred to the three-prong analysis

as offering only "helpful signposts." *Hunt v. McNair*, 413 U.S. 734, 741 (1975). *See also Meek v. Pittenger*, 421 U.S. 349, 359 (1975) (*Lemon*'s test provided only "guidelines").

The Fourth Circuit relied primarily on *Lemon* in its analysis and injected its own bias in order to fit its square peg into a round hole. The Fourth Circuit concluded that the Memorial violated the Establishment Clause for three reasons. First, it concluded that a "reasonable observer would fairly understand the Cross to have the primary effect of endorsing religion." *Am. Humanist*, 874 F.3d at 210. Second, the Fourth Circuit concludes that the Commission's use of funds to maintain and restore the Memorial is an excessive entanglement. *Id.* at 212. And third, it concluded that the Commission's displaying the Memorial "in a manner that dominates its surroundings and not only overwhelms all the other monuments at the park, but also excludes all other religious tenets" was an excessive entanglement. *Id.* The Fourth Circuit's analysis is erroneous on all counts.

The primary examination involved in the second *Lemon* prong has become known as the "endorsement test." *See Lemon* at 612. The inquiry is whether, to an objective observer, the government action could be viewed as endorsing religion. *See Santa Fe Independent School District v. Doe*, 530 U.S. 290, 308 (2000). The "objective (or reasonable) observer" is "not just an 'ordinary individual' but [an individual] aware of the history and context of the community and forum in which the religious display appears."

Am. Humanists, 874 F.3d at 210. As this Court concluded in *Good News Club*,

> [T]he endorsement inquiry in *not about the perceptions of particular individuals* or saving isolated nonadherents from… discomfort…. It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and the forum in which the religious [speech takes place].

Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001) (emphasis in original).

In what can only be logically perceived as a bias against religion, the Fourth Circuit concludes that while a reasonable observer would know the history of dedication to the WWI veterans, the reasonable observer would "*more importantly*… know… that the private organizers pledged devotion to faith in God, and that the same observer knows that Christian-only religious activities have taken place at the Cross." *Am. Humanists*, 874 F.3d at 210 (emphasis added). By emphasizing the actions of the original *private* organizers and three religious services conducted in its more than ninety-year lifespan, and deemphasizing the purpose and nature of the Memorial, the Circuit Court reinvents the "reasonable observer" standard. The Memorial was undisputedly erected as a war memorial and has remained a war memorial for more than ninety years. In fact, it has become a part of Veterans Memorial Park consisting of memorials to local veterans of

WWII, Korea, and Vietnam, a September 11th memorial walkway and garden, and a War of 1812 memorial. *Am. Humanists*, 147 F. Supp. 3d at 378-79. Several other memorials and monuments are being installed. *Id*. The site has been used primarily for military commemoration ceremonies for Memorial Day and Veterans Day.[18]

The original private organizers' religious devotion is not, and never has been, incorporated into the Memorial. What private citizens devoted themselves to has *never* been recognized as an Establishment Clause cause of action as it not does involve governmental action. The Fourth Circuit erred in concluding that a reasonable observer would view the Memorial as a governmental endorsement of religion, rather than a war memorial.

The primary examination involved in the third *Lemon* prong is whether the government action will foster "excessive government entanglement" with religion. *Lemon*, 403 at 613. Courts look for government action that "is 'comprehensive, discriminating, and continuing state surveillance of religious exercise.'" *Lambeth v. Bd. of Comm'rs,* 407 F.3d 266, 273 (4th Cir. 2005) (*cert. denied*, 2005 U.S. LEXIS 8388 (2005). In accordance with the legal transfer of title to the Memorial and property, Petitioners have been responsible for the

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[18] Public prayers during the Memorial Day and Veteran's Day ceremonies are not violations of the Establishment Clause. *See Galloway*, 572 U.S. 565; *see also Newdow v. Roberts*, 603 F.3d 1002, 1019-21 (D.C. Cir. 2011) (Kavanaugh, J., concurring in the judgement) (*cert. denied*, 563 U.S. 1001 (2011)).

maintenance of the Memorial. The Circuit Court focuses on the funds spent as evidence of excessive entanglement. *Am. Humanists*, 874 F.3d at 211. However, because the Memorial is not itself an endorsement of religion, funds spent on maintenance and repair by Petitioners are not an excessive entanglement. Respondents did not challenge the secular purpose of the Memorial. *Id.* at 218 (Gregory, J., dissenting). It logically follows that if the purpose is secular, the funds cannot be for the purpose of "continuing state surveillance of religious exercise." The Fourth Circuit erred in finding that funds spent on the Memorial are an excessive entanglement because the Memorial is not an endorsement of religion.

Lastly, the Circuit Court concluded the Petitioners creates an excessive entanglement by "displaying the hallmark symbol of Christianity in a manner that dominates its surroundings and not only overwhelms all other monuments at the park, but also excludes all other religious tenets." *Am. Humanists*, 874 F.3d at 212.[19] The Circuit Court found the Memorial "aggrandizes the Latin cross in a manner that says to any reasonable observer that the Commission either places Christianity above other faiths, views being American and Christian as one in the same, or both." *Id.* Here again we have evidence of anti-religious bias. In order for the Circuit Court's conclusion to be accurate, the reasonable observer needs to have forgotten the history of the Memorial, the

[19] No evidence has been offered by the Circuit Court or Respondents that "other religious tenets" have requested to be included in Park and excluded.

unchallenged purpose of the Memorial, and the geographical limitations of the Memorial as situated at an intersection. Veteran's Memorial Park is necessarily spread out due to the challenge of being located on and near a busy intersection. Additionally, the Memorial was erected more than ninety years ago – prior to the highway expansions and prior to the occurrence of other wars memorialized in the Park. The Memorial's size was not dictated by the Commission. The location was not dictated by the Commission. There is simply no evidence of excessive government entanglement. Even under *Lemon*, the Fourth Circuit's decision must be reversed.

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that this Court reverse the decision of the Fourth Circuit Court of Appeals, overrule *Lemon v. Kurtzman*, and return Establishment Clause precedent to the standard intended by the Framers, that of legal coercion. Amicus respectfully requests that the Fourth Circuit Court of Appeal's decision be reversed and the Memorial declared constitutional.

Respectfully submitted,

James F. Peterson
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
jpeterson@judicialwatch.org

Meredith L. Di Liberto
1925 Vince Road
Virginia Beach, VA 23464

Counsel for Amicus Curiae

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