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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Ilya Shapiro
Counsel of Record
Trevor Burrus
Michael B. Finch
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

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QUESTIONS PRESENTED

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

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

3. Whether, if the *Lemon* test applies, the expenditure of funds for the routine upkeep and maintenance of a cross-shaped war memorial, without more, amounts to an excessive entanglement with religion in violation of the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Cato has never before filed an *amicus* brief in an Establishment Clause case. It does so now to make clear that this provision, properly understood, ensures liberty of conscience but does not require a naked public square. Cato scholars have also lately been working through *stare decisis* doctrine, *see*, *e.g.*, Ilya Shapiro & Aaron Barnes, Janus*: Why It Was Proper (and Necessary) to Overturn Old Precedent*, Cato at Liberty (June 28, 2018), https://bit.ly/2EH3B1S; Brief of the Cato Institute, et al., as *Amici Curiae* in Support of Petitioner, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); Ilya Shapiro & Nicholas Mosvick, *Stare Decisis after Citizens United: When Should Courts Overturn Precedent*, 16 Nexus J. Op. 121 (2010/2011), so it's important to emphasize that *stare decisis* considerations shouldn't stop the Court from moving away from the *Lemon* test.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a memorial cross known as the Peace Cross, dedicated to 49 men of Prince George's County, Maryland, who died in World War I. The Peace Cross, owned by the Maryland-National Capital

[1] Rule 37 statement: All parties lodged blanket consents to the filing of *amicus* briefs. No counsel for any party authored any of this brief; *amicus* alone funded its preparation and submission.

Park and Planning Commission, has stood for 93 years as a monument to these fallen soldiers. Because a cross is a religious symbol associated with Christianity, however, the Respondents sued Maryland to remove it on grounds that it violates the Establishment Clause.

But the Establishment Clause was not written to excise religious statements or symbols. Instead, it was the decree of a people who witnessed religious persecution by the government and wanted to protect individual liberty. The Establishment Clause and Free Exercise Clause are so philosophically intertwined that to remove one would render the other incomplete. The concept of freedom of conscience ties the two together.

James Madison enshrined this principle in the Virginia Declaration of Rights and in the First Amendment. He feared religious compulsion and coercion arising from a state-established religion but was careful to explicitly distinguish its protection from the eradication of religious symbols.

Nearly 200 years after the Bill of Rights was enacted, however, the Court in *Lemon v. Kurtzman*, 403 U.S. 603 (1971), introduced a test that greatly reduced the broad protections of the Establishment Clause. Instead of simply ensuring freedom of conscience, the multi-factor *Lemon* test focuses on nebulous elements that were never part of the Framers' concerns. *See Lemon*, 403 U.S. at 612–613. The *Lemon* test does not conform to the history and tradition of the Constitution, nor to the original public meaning of the First Amendment, and thus should no longer be used to analyze Establishment Clause cases.

Coercive state action violates the Establishment Clause, while non-coercive state action does not. This

Court has an opportunity to clarify that the clause was written to be a shield that protects people of all faiths—or no faith—from the coercive power of state religion. It was not, however, meant to be a sword that strikes at something as innocuous as a memorial cross.

In other words, Madison's simple idea still makes sense today: freedom of conscience is paramount to a free people, but it doesn't require banishing religion from the public square altogether.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE WAS DESIGNED TO PREVENT RELIGIOUS PERSECUTION, NOT TO ERADICATE RELIGIOUS SYMBOLS FROM PUBLIC LIFE

The original meaning of the Establishment Clause, as crafted by those who wrote and ratified the Constitution, was to prevent an official religion that would persecute nonbelievers. The provision was written to secure freedom from religious compulsion, not to remove religious symbols from public life. *See*, *e.g.*, Stephanie H. Barclay, Brady Earley, and Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistic Analysis*, at 5 (Dec. 4, 2018), https://ssrn.com/abstract=3295239 (concluding that "by far the most common characteristic discussed in the context of an establishment of religion involved legal or official designation of a specific church or faith. . . . [G]overnment display of religious symbols was not a particular concern discussed in the context of an establishment.").

In the very first sentence of the Bill of Rights, the Framers enshrined the principle of liberty of con-

science as it applies to religion. As the First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This protection is twofold: Congress can neither establish a national religion (the Establishment Clause) nor infringe on religious practice (the Free Exercise Clause). Together, they provide a robust safeguard against the use the power of government to regulate citizens' consciences.

This protection makes a great deal of sense historically, considering the abuses of powerful state religious institutions that dominated Europe for centuries. This pattern continued even in early America before the Revolution, as colonies like Virginia established religion. The Framers learned that when religious institutions had power over the law, people were not free to live according to their consciences. In a 1774 letter, James Madison wrote of an incident in which "not less than 5 or 6 well-meaning men" were jailed "for publishing their religious Sentiments which in the main are very orthodox." Letter from James Madison to William Bradford, 24 January 1774, *in* The Papers of James Madison, vol. 1, 16 March 1751–16 December 1779, 104–108 (ed. William T. Hutchinson & William M. E. Rachal, 1962). Madison was concerned about state religion setting in motion "that diabolical Hell conceived principle of persecution." *Id.* Indeed, state religion came with criminal penalties for religious infractions, serving as a grave threat to religious freedom in colonial Virginia. In the incident Madison cited, the penalty for expression of views contrary to the Church of England was imprisonment. He thus implored his friend to "pray for Liberty of Conscience to revive among us." *Id.* In Madison's view, government infringement of one's conscience was the chief danger

of state religion—and the only way to restore that liberty was to abolish state religion.

Madison's deep concerns about the establishment of state religion inhibiting free exercise were also reflected in his early writings. He and George Mason played vital roles in drafting the Virginia Declaration of Rights, which was ratified in June 1776, one month before the signing of the Declaration of Independence. Daniel L. Dreisbach, *George Mason's Pursuit of Religious Liberty in Revolutionary Virginia*, The Gunston Gazette, vol. 2, no. 2 (1997). In a document that Mason called "an intellectual guidepost of the American Revolution," Mason and Madison declared that:

> Religion . . . and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience.

Id.

Accordingly, religious institutions can persuade and convince but cannot compel people—through government—to accept belief through force. This framework perfectly mirrors Madison's earlier assertions about the dangers of state religion: when a religious institution can use force, it tramples one's liberty of conscience. Preserving individual liberty of conscience is thus the motivating factor behind a prohibition on the establishment of a state religion.

That principle extended to the drafting of the Constitution. Madison's first draft of the First Amendment, which he introduced in a speech before Congress, provided that:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.

Madison at the First Session of the First Federal Congress, 8 April–29 September 1789, *in* The Papers of James Madison, vol. 12 (ed. Charles F. Hobson and Robert A. Rutland, 1979). The drafting committee then proposed the wording "No religion shall be established by law, nor shall the equal rights of conscience be infringed." The Debates and Proceedings in the Congress of the United States, First Congress, First Session, Volume 1 (J. Gales ed. 1834).

As Madison explained, the proposed amendment meant that "congress [sic] should not establish a religion, and enforce the legal observation of it by law." *Id.* at 758. Thus, the danger of state religion was that people would be forced by law to follow religious doctrine. Just like Virginia's Declaration, the First Amendment focused on defending liberty of conscience.

Of course, the wording of Madison's draft did not make it into the final text of the First Amendment. This was not because his intent was *too favorable* to religion, however, but because it was feared to be *too hostile*. Benjamin Huntington took issue with it because the "building of places of worship" with public funds might be misinterpreted—and prohibited—as "a religious establishment." *Id.* Madison, however, delved into the purpose of the wording: "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* He proposed that if the word "national" were introduced before "religion," it

would clarify that the amendment was directed at the government to prevent religious *compulsion*. *Id.* at 758–759. Even when faced directly with the idea that public funding for church-building could be seen as establishment of religion, Madison explained that the looming specter of "establishment" was one that compelled others to conform to a specific religion by law.

As a compromise, Samuel Livermore offered up a substitute: "Congress shall make no laws touching religion, or infringing the rights of conscience." *Id.* at 759. That broad substitute was narrowed a bit by Fisher Ames, incorporating Madison's concerns about established religion: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.* at 796. This final House version of the Establishment Clause followed Madison's original line and confirms that the Framers intended the prohibition on established religion to secure the freedom of conscience. They did not view the Clause as preventing states from building houses of worship or tearing down religious symbols that happen to be on government property.

Almost 200 years later, Justice Stevens identified the thread that binds the Establishment Clause and Free Exercise Clause: the "underlying principle" behind these First Amendment provisions is the protection of one's "individual freedom of conscience." *Wallace v. Jaffree*, 472 U.S. 38, 53–54 (1985).

II. THE CREATION AND MAINTENANCE OF A WORLD WAR I MEMORIAL CROSS IS NOT AN ESTABLISHMENT OF RELIGION

The lower court erroneously conflated the freedom from religious persecution with a mandate to eradicate faith from public life. The Maryland-National Capital Park and Planning Commission owns and provides maintenance for the Peace Cross, but it did not construct the monument. Even if it had, the Peace Cross is far from an establishment of religion under the First Amendment as originally meant. It jails no one "for publishing their religious Sentiments." Letter from James Madison to William Bradford, 24 Jan. 1774, *supra.* It does not "compel others to conform" to religion; it does not "enforce the legal observation of [religion] by law." The Debates and Proceedings in the Congress of the United States, First Congress, First Session, Volume 1, 758 (J. Gales ed. 1834). In short, it only serves as a monument to honor fallen veterans. This narrow purpose does not even remotely resemble the government encroachment on liberty of conscience that Madison feared.

For the Framing generation, as well as for Justice Stevens in writing for the Court in *Wallace*, the Establishment Clause prevented the government and religious institutions from colluding to inflict the types of abuses that concerned Madison: namely, imprisoning people for expressing their faith. If the realm of religion is "reason and conviction," while the use of "force and violence" violates liberty of conscience, then religious institutions that do not use force and violence do not violate liberty of conscience or jeopardize free exercise. Dreisbach, *George Mason's Pursuit of Religious*

Liberty in Revolutionary Virginia, *supra*. The suggestion that the Establishment Clause is meant to sanitize government from any religious symbols is in fact the opposite of the original public meaning.

The court below cites the danger that "non-Christian residents" may have "unwelcome contact with the Cross" and "wish to have no further contact with it." *Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n*, 874 F.3d 195, 202 (4th Cir. 2017). But indulging these grievances—these hecklers' vetoes—contradicts the very purpose of the Establishment Clause, which was written to protect people from coercion, not to purge religious views from the public square. For example, Justices Thomas and Scalia have explained how the Framers were worried about "coercion of religious orthodoxy and of financial support by force of law and threat of penalty." *Town of Greece v. Galloway*, 572 U.S. 565, 608 (2014) (Thomas, J., concurring) (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)); *id.* ("In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue . . . Dissenting ministers were barred from preaching, and political participation was limited to members of the established church.").

The Fourth Circuit's reading of the Establishment Clause replaces a state religion with a state non-religion; an anti-religious orthodoxy that allows mere offense to serve as grounds for eradicating *symbols* that are not coercing anyone to believe or do anything.

III. THE *LEMON* TEST FAILS THE *STARE DECISIS* ANALYSIS IN *JANUS*, AND SHOULD BE ABANDONED

The *Lemon* Court created a multi-factor test for evaluating an alleged Establishment Clause violation. 403 U.S. at 612–20. In so doing, it substituted a test that is equal parts subjective and inconsistent with original public meaning. The Court should now squeeze *Lemon* out of its jurisprudence—and shouldn't let *stare decisis* considerations stop it from doing so.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. AFSCME,* 138 S. Ct. 2448, 2478 (2018) (citation omitted). In *Janus,* the Court articulated five principles of *stare decisis:* (1) the quality of the reasoning; (2) the workability of the rule; (3) its consistency with other related decisions; (4) developments since the decision; and (5) reliance upon the decision. *Id.* at 2478–82. *Lemon* fails under this analysis.

Lemon is a stylized synthesis of case law, not an exposition of the history and meaning of the Establishment Clause. Its test has been inconsistently applied and the Court has declined to substantially rely on it. It has become clear that the *Lemon* test should be returned to the U.S. Reports and cited no more.

A. The *Lemon* Test Is Unworkable: It Creates More Undefined Terms Than the Establishment Clause and Fosters Inconsistent Precedent

"Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury*

v. Madison, 5 U.S. 137, 177 (1803). While the Establishment Clause has only three key terms—"respecting," "establishment," and "religion"—the *Lemon* test has at least eight terms that require definition (seven if "religion" is not counted): "secular purpose," "primary effect," "advances," "inhibits," "foster" and "excessive entanglement." *Lemon*, 403 U.S. 602, 612–13. The Court did not define any of these terms in *Lemon,* nor has it been able to give uniform application to the terms since creating them. The terms have proved so unworkable the Court has at times declined to even refer to them as "tests," and relegated them to "signposts." *Hunt v. McNair,* 413 U.S. 734, 741 (1973).

The Court has vacillated among using the test as its singular understanding of the Establishment Clause, referencing it without relying upon it, and omitting it from its analysis altogether. *Cf. Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (likening the test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried"). The result is not merely inconsistent jurisprudence, but rulings that appear directly contradictory when dealing with the same subject matter. A moment of silence and meditation is considered an Establishment Clause violation, but only if religiously motivated, *Wallace v. Jaffree,* 472 U.S. 38 (1985), but paid chaplains and congressional prayers are not violations even though they are explicitly religious. *Marsh v. Chambers,* 463 U.S. 783 (1983); *Town of Greece,* 572 U.S. 565. The Court invoked *Lemon* in analyzing *Wallace* but ignored the test completely in *Marsh*. *Lemon* prohibits "advancing" religion and requires a "secular purpose," but gov-

ernments may not fund schools that perform both secular and religious functions. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist,* 410 U.S. 980 (1973). The unworkability of the *Lemon* prongs is not merely an aberration, but the source of continuing mutability of the Court's Establishment Clause jurisprudence. The attractive aspect of the test is not its clarity or incisiveness, but that it can be invoked or avoided at will.

B. The Court's Reasoning in *Lemon* Was Based on Minimal Precedent and Little Historical Analysis

The *Lemon* Court did not begin by analyzing the text of the Establishment Clause. In a single paragraph the Court acknowledged, "we can only dimly perceive the lines of demarcation in this extraordinary area of constitutional law. The language of the Religion Clauses of the First Amendment is, at best, opaque." *Lemon*, 403 U.S. at 612. Considering the wealth of original documents, transcripts of debates, and early congressional acts, it is strange that the Court did not choose to strengthen its analysis by consulting even one source from the time in which the clause was written. The Court declined to consult the many texts at its disposal, including the writings of Madison, commentaries by Joseph Story, debates in the House, Senate, or state ratifying conventions for the Bill of Rights, state constitutions, and the actions of the early Congress, including the Northwest Ordinance of 1789. *Lemon*'s reasoning was particularly lackluster considering that original public meaning and history are key tools of interpretation.

Instead of consulting the history of the text, the Court looked solely to itself, stating, "Every analysis in

this area must begin with consideration of the cumulative criteria developed by the Court over many years." *Lemon,* 403 U.S. at 612. But the precedents the Court looked to can hardly be considered criteria developed over "many" years. The Court based the bulk of its analysis on then-recent cases, focusing on two that were no more than three years old, *Waltz v. Tax Comm'n,* 397 U.S. 664 (1970) and *Bd. of Educ. v Allen,* 392 U.S. 236 (1968). But neither *Waltz* nor *Allen* focused on original source material. *Waltz* zig-zagged between examples of what violated the prohibition on establishment of religion and the difficulty of wrestling with what that term meant. 397 U.S. at 668. *Allen* was no better, citing at times a purpose-based analysis and at other times an effects-based test, with little regard for the differences between formally establishing a church and the democratic, non-coercive expressions of a religious people. 392 U.S. at 242–44.

The *Lemon* Court's reasoning was no better than the tools it used—beginning with unmoored case law instead of the Establishment Clause's text or history.

C. The Court Has Been Rightly Declining to Rely on *Lemon*, Which Minimizes Any Reliance Society or Courts Place on It

As Justice Scalia described in his *Lamb's Chapel* concurrence, the Court has been killing and resurrecting the *Lemon* test at will. 508 U.S. at 399. But the trend has been one of increasing avoidance. The Court seems not to have applied it with any force since 2005 and has begun looking more closely at the history and text to interpret the boundaries of the Establishment Clause. *See generally, Town of Greece,* 572 U.S. 565.

Societal changes also warrant discarding *Lemon* under *Janus*'s "later developments" factor. *Janus*, 138 S. Ct. at 2478–82. Government's relationship with religion has changed since the Founding; it has become less entangled with religion without *Lemon's* muddled wording. Massachusetts and other states no longer have state-sponsored religions. Nor did any state approach anything like Rome under Constantine or the Church of England under Henry VIII. It is unlikely that any state today would favor using the coercive power of government to compel assent to, or worship in, a religious establishment. Nor is coercion evident in the facts of this case. But coercion would be an obvious Establishment Clause violation even without *Lemon,* as the Court recognized in *Town of Greece*: "Courts remain free however to review the pattern of prayers over time to determine whether they comport with the tradition . . . or whether coercion is a real and substantial likelihood." 572 U.S. at 590.

The fact that religion remains an ever-present force in American life may militate even more for discarding *Lemon*. *Lemon*'s safeguards have not clarified the relationship between church and state in America but have rather confounded it. The fact that so many cases since *Lemon* have declined to use the test belies any claim that the public has come to rely on it.

Not only has government's relationship with religion changed, but society itself has become more pluralistic. Many religions are afforded monuments on public land: the Library of Congress contains statues of Moses and depictions of Greek gods; the Capitol contains a statue of a Franciscan monk; the postal service released forever-stamps featuring the Arabic script for

"holiday" during Christmas, and the Sixth Circuit concluded that a Buddhist friendship bell was equally welcome in the public sphere. *Brooks v. City of Oak Ridge,* 222 F.3d 259, 264–67 (6th Cir. 2000). These examples show that America's religious landscape has become more diverse since the Founding. This development has been naturally reflected in state and local governments' accommodating myriad religions.

The *Lemon* test, on the other hand, has led to inconsistent and unpredictable precedent, and an exclusion of religion from the public sphere to an extent inconsistent with the history and practice of the First Amendment. The Court should kill this ghoul once and for all and adopt a test more consistent with the tradition of religious pluralism the Founders facilitated.

CONCLUSION

This case provides an opportunity for the Court to clarify that the Establishment Clause was written to prevent religious persecution, not to be a weapon against religious symbols. For the foregoing reasons, and those stated by the petitioners, the Court should reverse the decision below.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
Michael B. Finch
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

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