No. 20-1800

IN THE

Supreme Court of the United States

Harold Shurtleff, et. al.,
Petitioners,

v.

City of Boston, Massachusetts, et. al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

Brief for *Amicus Curiae*
FOUNDATION FOR MORAL LAW
In Support of Petitioners

John A. Eidsmoe*
**Counsel of Record*
Roy S. Moore
Talmadge Butts
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com
Counsel for *Amicus Curiae*

November 16, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions and Statutes

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae Foundation for Moral Law ("the Foundation") (www.morallaw.org) is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in protecting religious expression against anti-religious discrimination.[1]

SUMMARY OF THE ARGUMENT

Incredibly, Boston the "home of the Puritans" now allows gay pride flags on its city flagpole but prohibits a flag with a cross -- the only flag ever prohibited on its city flagpole. The Foundation contends that the City's Establishment Clause concern is unfounded because the public display of the cross is an unbroken American tradition that predates the adoption of the Constitution.

---

[1] Petitioners and Respondents have been notified of *Amicus's* intent to file this brief. Petitioner has provided blanket consent, and Counsel for Respondent has also provided blanket consent. No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief. Rule 29(a)(4)(E), Fed. R. App. P.

ARGUMENT

I. The Constitution does not forbid recognition of Christianity's foundational influence upon American history, law, and culture.

Commissioner Rooney acknowledged that refusing to fly a "religious" flag served no goal or purpose of the City except "concern for the so-called separation of church and state or the constitution's establishment clause." (App. 157a.) The Foundation will therefore demonstrate in this section of our brief that flying a flag with a religious symbol, in this case a cross, is consistent with American and especially Bostonian history and tradition and does not violate the Establishment Clause of the First Amendment.

The District Court held that the City had a sufficient reason for prohibiting the Christian flag because its display on a public flagpole could lead to a lawsuit against the City on the ground that the display constitutes an establishment of religion. However, any such lawsuits would have no validity because nothing in the First Amendment prohibits the recognition of the effect and influence of Christianity upon this nation. If there is no Establishment Clause problem with the display of the cross flag, then, as the Supreme Court found in *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993), Establishment Clause concerns are not a valid reason for prohibiting the display.

Sir William Blackstone (1723-1780), whose *Commentaries on the Laws of England* may have sold more copies in America than in England,[2] recognized that all valid human law must rest upon the Revealed Law, which is "to be found only in the Holy Scriptures,"[3] and on the Law of Nature, which is "expressly declared so to be by God himself"[4] and which is understandable by human reason.

> Upon these two foundations, the law of nature and the law of revelation depend all human laws; that is to say, no human laws should be suffered to contradict these.[5]

Chancellor James Kent's four-volume *Commentaries on American Law* earned him the accolade of "the American Blackstone."[6] Like Blackstone, Kent (speaking of the law of nations) recognized that the law "deriv[ed] much of its force and dignity" from "the sanction of Divine revelation."[7] On behalf of the New York Court of Chancery, Chancellor Kent, upholding a blasphemy

---

[2] Edmund Burke, *Speech on Conciliation with America* (1775), *quoted in* William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 Vermont L. Rev. 5, 5 (1994).
[3] Sir William Blackstone, *Commentaries on the Laws of England* (Philadelphia: Robert Bell, 1772) Intro. 2:41-42.
[4] *Id.* Intro. 2:42.
[5] *Id.*
[6] Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 Ala. L. Rev. 377, 380 (2009).
[7] 1 James Kent, *Commentaries on American Law* *2 (Oliver Wendell Holmes, Jr., ed., 1873).

conviction, quoted English common-law cases for the proposition that "christianity was parcel of the law, and to cast contumelious reproaches upon it, tended to weaken the foundation of moral obligation, and the efficacy of oaths." Further, "that whatever strikes at the root of christianity, tends manifestly to the dissolution of civil government." *People v. Ruggles,* 8 Johns. R. 290 (N.Y. 1811).

Supreme Court Justice and Harvard Professor Joseph Story (1779-1845), wrote in his influential *Commentaries on the Constitution of the United States* (1833):

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general, if not the universal sentiment was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private right of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.
>
> ....
>
> The real object of the First Amendment was not to countenance, much less to advance,

> Mohammedanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.[8]

Justice Story understood that Christianity is foundational to a proper understanding of law. As he said at Harvard University in 1829, jurisprudence "searches into and expounds the elements of morals and ethics, and the eternal law of nature, illustrated and supported by the eternal law of revelation."[9] He said further in that discourse, "One of the beautiful boasts of our municipal jurisprudence is, that Christianity is a part of the common law, from which it seeks the sanction of its rights, and by which it endeavours to regulate its doctrines. And, notwithstanding the specious objection of one of our distinguished statesmen, the boast is as true as it is beautiful. There never has been a period, in which the common law did not recognize Christianity as lying at its foundations."[10]

---

[8] 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1868, 1871 (1833).

[9] Joseph Story, *A Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law at Harvard University, on the Twenty-Fifth Day of August, 1829* (Boston: Hilliard, Gray, Little, and Wilkins, 1829), p. 4.

[10] Story, *Discourse,* pp. 20-21.

Acknowledgement of the formative role of Christianity upon American laws and institutions is entirely consistent with the Establishment Clause of the First Amendment. In 1853, when the constitutionality of the congressional chaplaincy was questioned, the Senate Judiciary Committee undertook an exhaustive study of the background and meaning of the Establishment Clause. The Committee concluded in part:

> The clause speaks of "an establishment of religion." What is meant by that expression? *It referred, without doubt, to that establishment which existed in the mother country, its meaning is to be ascertained by ascertaining what that establishment was. It was the connection with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances. These three particulars constituted that union of church and state of which our ancestors were so justly jealous, and against which they so wisely and carefully provided.*
>
> ....

> Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. They intended, by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy. Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous cause which they commended to His care.[11]

---

[11] Senate Judiciary Committee, S. Rep. No. 32-376, at 1, 4 (1853) (emphasis added).

The same year the House Judiciary Committee conducted a similar study and came to the same conclusion:

> What is an establishment of religion? It must have a creed, defining what a man must believe; it must have rites and ordinances, which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rites; it must have tests for the submissive and penalties for the non-conformist. There never was an established religion without all these.
>
> ....
>
> At the adoption of the Constitution, we believe every State—certainly ten of the thirteen—provided as regularly for the support of the Church as for the support of the government: one, Virginia, had the system of tithes. Down to the Revolution, every colony did sustain religion in some form. It was deemed peculiarly proper that the religion of liberty should be upheld by a free people. Had the people, during the Revolution, had a suspicion of any attempt to war against Christianity, that Revolution would have been strangled in its cradle. At the time of the adoption of the Constitution and the amendments, the universal

> sentiment was that Christianity should be encouraged, not any one sect. Any attempt to level and discard all religion would have been viewed with universal indignation.
>
> ....
>
> But we beg leave to rescue ourselves from the imputation of asserting that religion is not needed to the safety of civil society. It must be considered as the foundation on which the whole structure rests. Laws will not have permanence or power without the sanction of religious sentiment—without a firm belief that there is a Power above us that will reward our virtues and punish our vices. In this age there can be no substitute for Christianity; that, in its general principles, is the great conservative element on which we must rely for the purity and permanence of free institutions. That was the religion of the founders of the republic, and they expected it to remain the religion of their descendants.[12]

In *Church of the Holy Trinity v. United States,* 143 U.S. 457 (1892), this Court concluded that a law which prohibited a church from calling a pastor or priest from outside the United States violated

---

[12] House Judiciary Committee, *Chaplains in Congress and in the Army and Navy*, H. R. Rep. No. 33-124, at 1, 6, 8-9 (1854).

the Free Exercise Clause, because it conflicted with Christianity. After explaining at great length the numerous legal and historical evidences of Christianity's influence upon American law, this Court concluded:

> If we pass beyond these matters to a view of American life, as expressed by its laws, its business, its customs, and its society, we find every where a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a

> volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.

Id. at 471.

These statements by Sir William Blackstone, Chancellor Kent, the Senate and House Judiciary Committees, Justice Brewer, and others are entirely consistent with the Establishment Clause of the First Amendment. This does not mean they favored an official established church. Justice Brewer, the author of the *Holy Trinity* decision, understood that Christianity was not the official religion of the United States. In his 1905 book, *The United States a Christian Nation*, he clarified:

> But in what sense can [the United States] be called a Christian nation? Not in the sense that Christianity is the established religion or the people are compelled in any manner to support it. ... Neither is it Christian in the sense that all its citizens are either in fact or in name Christians. On the contrary, all religions have free scope within its borders. Numbers of our people profess other religions, and many reject all. Nor is it Christian in the sense that a profession of Christianity is a condition of holding office or otherwise engaging in public service, or essential to recognition either politically or socially. In fact,

> the government as a legal organization is independent of all religions.
>
> Nevertheless, we constantly speak of this republic as a Christian nation—in fact, as the leading Christian nation of the world. The popular use of the term certainly has significance.[13]

II. The public display of a cross is an historic and uninterrupted practice that does not violate the Establishment Clause.

Again, Establishment Clause concerns are no basis for prohibiting the display of a flag with a cross, because the public display of the cross on flags and by other means is an unbroken American tradition that predates the adoption of the First Amendment.

In *Marsh v. Chambers,* 463 U.S. 783 (1983),[14] this Court upheld the Nebraska Legislature's practice of opening each day with a prayer by a chaplain paid by the State. Noting that legislative

---

[13] David J. Brewer, *The United States a Christian Nation* 12 (1905).

[14] Because the Foundation believes *Lemon v. Kurtzman,* 403 U.S. 602 (1971), is inapplicable to this case, we will not comment on the District Court's *Lemon* analysis except to note that she ignores the modifications of the test in *Agostini v. Felton,* 521 U.S. 203 (1997), and her only illustration of "excessive entanglement" is that "Blowing in the wind, these side-by-side flags could quite literally become entangled." (p. 14).

chaplains and legislative prayers were a common practice in the American colonies and in the states after independence, that the Continental Congress had prayers, and that Congress itself in 1789 instituted congressional chaplains, the Court held that "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent." *Id.* at 790. The Court concluded at 792,

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.

Like legislative chaplains and legislative prayer, the public display of crosses and other arguably religious symbols is an unbroken tradition that predates the First Amendment, and nothing in the language or history of the First Amendment evinces any intent to alter or abolish that tradition. We will examine the history of that tradition.

A. The Explorers

During the era of discovery, the planting of a cross was associated with discovery and claims of ownership. As Dr. Hinsdale explained,

> ...a cross reared on an island or coast would be evidence that it had been visited and appropriated by a Christian navigator. ... John Cabot raised on the shore of North America crosses surmounted by the flag of England and the banner of St. Mark, and Cartier raised crosses crowned with the *fleur de lis* on the shores of the Gulf and River St. Lawrence. St. Lusson stood near a cross at the Saut Ste. Marie when he took possession of the Great Lakes in the name of the redoubtable monarch, Louis XIV of France, as did La Salle when, at the mouth of the Mississippi, he took possession, in the same name, of the vast region that the Mississippi drains.[15]

According to his *Journal,* when Christopher Columbus first landed on what was probably Watling Island October 12, 1492:

> The Admiral took the royal standard, and with the captains went with two banners of the green cross, which the Admiral took in all the ships as a sign, with an F and Y and a crown over each letter, one on either side of the

[15] B.A. Hinsdale, Ph.D., LL.D, *The Right of Discovery,* Ohio Archaeological and Historical Quarterly, II:2 September 1888, pp. 372-73. A parallel to this may be seen in the practice of planting "summit crosses" at the tops of mountains in Europe.

> cross and the other on the other. Having landed, they saw trees very green and much water, and fruits of diverse kinds. The Admiral called to the two captains, and to the others who leaped on shore, and to Rodrigo Sanchez of Segovia, and said that they should bear faithful testimony that he, in the presence of all, had taken, and now took, possession of the said island for the King and for the Queen.[16]

And further:

> As in all parts, whether islands or mainlands, that he visited, the admiral always left a cross; so, on this occasion he went in a boat to the entrance of these havens and found two very large trees on a point of land, one longer than the other. One being placed over the other, made a cross, and he said that a carpenter could not have made it better. He ordered a very large and high cross to be made out of these timbers.
>
> …
>
> The Admiral did not leave the port today, for the same reason: a contrary wind. He set up a great cross on the

[16] *The Journal of Christopher Columbus (During His First Voyage, 1492-93)*, Clements R. Markham, editor (London: 1893), p. 37.

> west side of the entrance, on a very picturesque height, "in sign," he says, "that your Highnesses hold this land for your own, but chiefly as a sign of our Lord Jesus Christ."[17]

Likewise, the Spanish explorer Hernando De Soto erected a cross upon crossing the Mississippi River in 1541:

> They passed the winter of 1541 on the banks of the Yazoo River, in the land of the Chickasaws. In May of that year, they discovered and crossed the Mississippi River, probably not far below Memphis; and there, in the presence of almost twenty thousand Indians, De Soto erected a cross made of a huge pine tree, and around it imposing religious ceremonies were performed.[18]

In 1853 Congress commissioned William Henry Powell to paint *Discovery of the Mississippi by De Soto*. The painting depicts De Soto, his officers and soldiers, and Native Americans, and the raising of a large wooden cross. The painting was placed in

---

[17] *Id.* p. 106.

[18] Benson Lossing, *Lossing's New History of the United States, From the Discovery of the American Continent to the Present Time* (New York: Gay Brothers & Co., 1881), p. 45

the Capitol Rotunda in 1855, where it remains today.[19]

And in the Southwest, as Friar Marcos began his preliminary journey up Sonora Valley in preparation for Coronado's 1540-42 expedition, "Estevan had planted several large crosses along the way, and soon began to send messengers to the friar, urging the latter to hasten, and promising to wait for him at the edge of the wilderness which lay between them and the country of Cibola."[20]

French explorers also planted crosses. Jacques Cartier exploring what is now eastern Canada, "gathered of the Indians some indistinct account of the countries now contained in the north of Vermont and New York. Rejoining his ships, the winter, rendered frightful by the ravages of the scurvy, was passed where they were anchored. At the approach of spring, a cross was solemnly erected upon land, and on it a shield was suspended which bore the arms of France and an inscription, declaring Francis to be the rightful king of these newfound regions."[21]

---

[19] "Discovery of the Mississippi by De Soto," *Architect of the Capitol, https://www.aoc.gov/art/historic-rotunda-paintings/discovery-mississippi-by-de-soto*

[20] George Parker Winship, *The Coronado Expedition, 1540-1542,* Excerpted from the Fourteenth Annual Report of the Bureau of Ethnology to the Secretary of the Smithsonian Institution, 1892-93,Part 1, p. 358.

[21] George Bancroft, *History of the United States* (Boston: Little, Brown, and Company, 1853), Vol. I, p. 21.

B. The Colonists

The planting of the cross continued among the early colonists. Jamestown settler and early colonial Virginia Governor George Percy described the first landing at Jamestown,

> The foure and twentieth day [of May] wee set up a Crosse at the head of this River, naming it Kings River, where we proclaimed James King of England to have the most right unto it. When wee had finished and set up our Crosse, we shipt our men and made for James Fort.[22]

In 1935 the National Society Daughters of the American Colonists erected a granite cross on Cape Henry in memory of the wooden cross erected by the colonists.[23] In the early days, the Jamestown colony flew the flag of England, a red St. George's Cross on a white background; this was replaced by the Union Jack, which combined the English flag's St. George's Cross with the Scottish flag's diagonal white St. Andrew's Cross on a blue background and

---

[22] *Narratives of Early Virginia: 1606-1625*, Lyon Gardiner Tyler, editor (New York: Charles Scribner's Sons, 1907), pp. 11, 17-18, "Observations Gathered Out of a Discourse of the Plantation of the Southern Colonie in Virginia by the English, 1606 [1607]. Written by the Honorable Gentleman Master George Percy."

[23] "Cape Henry Memorial Cross," https://www.nps.gov /came/cape-henry-memorial-cross.htm. Dating discrepancies are due to the difference between the Julian and Gregorian calendars.

the Irish flag's red saltire (diagonal or St. Andrew's cross) on a white background, symbolizing the union of Great Britain.

In 1634 Leonard Calvert, the first proprietary governor of Maryland, sailed into the Potomac River:

> A cross was planted on an island and the country claimed for Christ and for England. At about forty-seven leagues above the mouth of the river, he found the village of Piscataqua, an Indian settlement nearly opposite Mount Vernon.[24]

The Calvert family used two banners, one with the black and white design of Calvert's father and the other with red and white crosses from his mother's family. Only the former was officially used in colonial days, but in 1904 the State of Maryland adopted a flag that incorporated both designs. Today Maryland's flag features red and white crosses in its lower left and upper right quadrants.[25]

Many of the colonies flew flags with cross designs. The Colony of New Sweden (1638-1655) flew the Swedish Naval Ensign, a gold cross on a blue field. Others flew the Union Jack or variants thereof, which combined the St. George's Cross, the

---

[24] Bancroft, I:246.

[25] "History of the Maryland Flag, ttps://sos.maryland.gov/Pages/Services/Flag-History.aspx.

St. Andrew's Cross, and the St. Patrick Saltire. The Russian Naval Ensign, a blue St. Andrew's Cross on a white field, flew over the Russian Ft. Ross in California 1812-1841. Crosses were less common in colonial New England because the Puritans associated the cross with graven images, but the New England Ensign in use 1693-1711 had a red cross on a white field in the upper left corner. When Governor Edmund Andros temporarily united Massachusetts Bay, New Hampshire, Connecticut, Rhode Island, New Haven, and New York into the Dominion of New England in 1687, he adopted a flag with a burgundy cross on a white background and a crown in the center.[26]

In colonial times, before churches were established, a cross was often erected to mark a spot where people could gather for worship or for other purposes. If a church was built later, the cross often remained, in or near the churchyard or the cemetery.[27] An outside cross was a regular

---

[26] "Historical Flags of Our Ancestors," http://www.loeser.us /flags/colonies.html. At least six states – Alabama, Florida, Hawai'i, Maryland, Mississippi , and New Mexico – have a form of cross in their flags today, as do many municipalities.

[27] *The Churchyard Cross,* The Churchman's Family Magazine, June 1863, pp. 587-97. "The universal custom of erecting churchyard crosses, arose, however, not so much out of an imitation of the old Saxon oratory crosses, as out of the general feeling which led the mediaeval Christians to erect crosses in all their public places. But not there only was the cross set up. At each entrance to a village or town, in the market-places, at the intersections of cross streets, by the roadsides, even on barren hill tops and in waste moorlands, the cross was erected; so that it was not only when a man went to worship that he was reminded of his faith by its

feature of the Spanish missions of the Southwest in the 1700s and 1800s.[28]

C. The Americans of the 1800s

The tradition of crosses in public places continued into the 1800s and beyond. Around 1671 the French missionary Father Jacques Marquette and the French Canadian explorer Louis Joliet traveled to the Great Lakes region to convert Native Americans to Christianity and to find a river to the Pacific Ocean. Marquette died near Ludington, Michigan on May 18, 1675, and in 1955 a cross was erected on the place where he is believed to have died.[29]

In 1830 the Slovenian "snowshoe priest" Father Frederic Baraga came to northern Minnesota to minister to the Ottawa and Ojibwe tribes. Grateful for safe passage across Lake Superior, Father (later Bishop) Baraga erected a small wooden cross at the mouth of the Cross River, later replaced by a

---

outward sign; but he could not travel along the high road, he could not enter a village, he could not buy or sell in the market, without being remind of Him whose standard was thus set up in the land, and whose soldier he had himself been made, when that same sign was marked upon his own forehead." (587-88).

[28] "Serra Cross Park at Grant Park, Ventura, California," http://www.serracrosspark.com/gallery.html

[29] "Father Marquette 1637-1675;" http://geo.msu.edu/extra/geogmich/father_marquette.htm; "Pere Marquette Cross Monument Under Fire as Community Considers Fate," *Muskegon News* January 8, 2018, https://www.mlive.com/news/muskegon/index.ssf/2018/01/pere_marquette_cross_monument.html.

granite cross and plaque which still stands near Schroeder, MN.[30]

The Foundation invites the Court's attention to Addendum II ("Cross Displays on Public Property") of the Appellants' Opening Brief in the *Kondrat'yev v. City of Pensacola*, 903 F.3d 1169 (11th Cir. 2018), in which Appellants identify public crosses by name, date of placement, location, and photographs.[31] In his concurring opinion in the *Pensacola* case, Judge Newsom mentions some of the crosses cited in Appellants' Brief above, and also adds:

> Though not (exactly) first in time chronologically, an interesting place to begin what is necessarily an abbreviated historical survey is with the "Father Millet Cross," which currently stands in Fort Niagara State Park in upstate New York. The current cross was erected in the 1920s

---

[30] "Father Baragas Cross," https://www.chateauleveaux.com /area-info-father-baragas-cross.htm. The author of this brief visited the Baragas Cross March 27, 2015. The land on which the cross is located is now owned by a local church but was public domain when Father Baraga erected the cross.

[31] Cited and fully documented in Brief of Appellants, Addendum II, pp. 1-38, *Kondrat'yev v. City of Pensacola,* 903 F.3d 1169 (11th Cir. 2018) (No. 17-13025). The fact that several of these crosses have recently been transferred from public to private ownership because of pressure from misguided separationists, in no way changes the fact that those crosses were erected as part of an unbroken tradition of the public display of the cross.

on what was originally federal land. Notably, though, it was put there to replace a wooden cross that had been placed in the same spot by a Jesuit priest - Father Pierre Millet -- in 1688, when the territory was under French control. Father Millet was part of a rescue party that had managed to save the remnant of a frontier detachment ravaged by cold, disease, and starvation. On April 16, 1688 -- Good Friday -- Father Millet celebrated Mass, and built a wooden cross, which he dedicated to God's mercy for the survivors.

In 1925, President Calvin Coolidge set aside a 320-square-foot section of Fort Niagara Military Reservation "for the erection of another cross commemorative of the cross erected and blessed by Father Millet[]." ...The Father Millet Cross was originally designated as a national monument and administered by the federal government; ownership was transferred to the State of New York in 1949.

To be sure, the Father Millet Cross was originally constructed on land that the United States didn't control (at least definitively) until after the War of 1812. But its history shows

> that the erection of crosses as memorials is a practice that dates back centuries, and that for a long time now, we -- we Americans, I mean -- have been commemorating the role that religion has played in our history through the placement and maintenance of cross monuments.
>
> In fact, President Coolidge's proclamation was part of a tradition – in this country specifically – that stretches back much farther.[32]

And the tradition continues. The Trylon of Freedom Monument outside the E. Barrett Prettyman United States Courthouse in Washington, D.C., depicts, at the top of the southwest side, religious liberty symbolized by a cross and the Ten Commandments.

Under the *Marsh v. Chambers* analysis, as amplified by *Van Orden v. Perry,* 545 U.S. 677 (2005), and *Town of Greece v. Galloway,* 134 S.Ct. 1811 (2014), the long, uninterrupted tradition of crosses in public places must be considered in determining the meaning of the Establishment

---

[32] *Kondrat'yev v. City of Pensacola,* No. 17-13025, pp. 23-24 (Newsom, J., concurring in result). Judge Newsom did not apply a *Marsh v. Chambers* to the *Pensacola* case because he believed the three-judge panel was precluded from doing so by *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983). This Court, of course, is not bound by *Rabun*.

Clause. As Judge Kennedy wrote in *Greece,* "[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" 134 S.Ct. at 1819 (citations omitted). The public display of crosses was a common practice long before and long after 1789, and nothing in the language or history of the First Amendment indicates any intent to change that practice.

Furthermore, this Court has recently upheld the public display of the Bladensburg Cross in *American Legion v. American Humanist Association,* 588 U.S. ___ (2019). The Foundation cites this history and tradition, not only to establish that flying the Christian flag does not constitute an establishment of religion, but also to demonstrate the absurdity of blatant discrimination against Christian symbols in a city with a history like that of Boston. This constitutes content discrimination and viewpoint discrimination in violation of the Free Exercise and Free Speech Clauses of the First Amendment, and, as we will demonstrate below, the City's defense that the flags on the city flagpole are government speech is without merit. This Court has forbidden such discrimination against religion in *Trinity Lutheran Church v. Comer,* 582 U.S. ___ (2017), and in *Espinoza v. Montana Department of Revenue,* 591 U.S. ___ (2020).

III. The First Circuit erred in holding that the flag display constitutes government speech.

The First Circuit held that Petitioners' First Amendment claims are precluded by the conclusion that the City's decision to allow or disallow flags on City Hall Plaza constitutes government speech. Citing *Walker v. Texas Division, Sons of Confederate Veterans, Inc.,* 135 S.Ct. 2239 (2015) and *Pleasant Grove City, Utah v. Summum,* 555 U.S. 460 (2009), the First Circuit concluded that a three-part test applies in determining what constitutes government speech: (1) whether the government has traditionally used the message or conduct at issue to speak to the public; (2) whether the facility is closely identified in the public mind with the governmental unit that owns it; and (3) whether government has effectively controlled the messages in the facility by exercising final approving authority over their selection. The First Circuit concluded that each of these factors weighs heavily in favor of the conclusion that the flag displaces in City Hall Park are government speech.

The Foundation believes the First Circuit's analysis of this issue is fallacious because:

(1) The City has not traditionally used the City Hall Park flagpoles to speak to the public. At most, the official City flag flies from the flagpole only part of the time.

(2) Assuming the reasonable observer test, as set forth in *Capitol Square v. Pinette,* 515 U.S. 753, 779-80), is applicable to this case, the First Circuit has misapplied it as though the "reasonable observer" were simply a passerby who happens to see the flag with a cross. But the test actually contemplates a reasonable informed observer who has knowledge of the "history and ubiquity" of the specific display, or, as Justice O'Connor said in her concurring opinion in *Wallace v. Jaffree,* 470 U.S. 38, 69-70 (1985) (O'Connor, J. concurring), who has knowledge of "the text, legislative history, and implementation of the statute."[33] A reasonable observer would therefore be aware that the City sometimes flies the City flag on that specific flagpole but sometimes allows flags of private organizations to be flown, especially when that organization is holding an event in the City Park. A reasonable observer would also be aware that the City has never refused to allow the flying of any flag for any organization, until Shurtleff and Constitution Camp asked to fly their flag with the cross. A reasonable observer would therefore infer from the City's refusal to allow this flag that the

[33] Timothy Paul Malacrida, "Refining the Reasonable Observer," *Seton Hall eRepository@Seton Hall,* May 1, 2013, https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1359&context=student_sc

City has singled out Christian flags for hostility and discrimination.

(3) The City has not effectively controlled the messages on flags flying on that flagpole by exercising final authority over the decision to allow or disallow the flag. In fact, so far as the record shows, the City has never refused to allow any flag until the current case. Furthermore, the City has never had a policy governing the decision to allow or disallow a flag. The closest the City can come to producing a policy is Commissioner Rooney's statement that "[t]he City of Boston maintains a policy and practice of respectfully refraining from flying non-secular flags on the City Hall flagpoles." The First Circuit concluded that the lack of a policy is "irrelevant" to this determination. It may not be determinative, but it is certainly relevant, because if Rooney's statement can be considered a statement of policy, the policy is that the pole may display flags representing "anything except religion."

Furthermore, Commissioner Rooney's statement to Shurtleff that the "City would be willing to consider a request to fly a non-religious flag, should your organization elect to offer one," only accentuates the City's discrimination against Christianity. Although he may not have intended

to do so, Rooney's statement constitutes subtle pressure on Shurtleff to compromise or water down the religious message of his organization, to make it more acceptable to the City.

As the First Circuit stated, the City's flag flies on this flagpole "except when temporarily replaced by another flag upon the request of a third-party person or organization," often in connection with a proposed third-party event to take place at a City-owned venue. If the City had solicited third-party flags, that might be an argument that this is government expression. But as the First Circuit said, private individuals and organizations solicit the City, not the other way around. This strongly suggests that the third-party flags constitute the expression of those organizations, not the City.

Furthermore, the City has in the past allowed the pole to display flags of the Chinese Progressive Association,[34] the LGBT rainbow flag, the transgender rights flag, the Juneteenth flag, the

---

[34] According to its website, https://www.cpaboston.org/, the Chinese Progressive Association works to "combine participatory issue-based organizing with broad-based voter education and registration, expand our local political base, organize for election reform and voting rights, and build coalitions with other disenfranchised communities," and also works for "environmental justice" by "fighting for green jobs, community education, climate resilience, transit justice, microgrid technology and air quality protection." Kaori Tsukada, in a 2009 study for Stanford University titled "The Interaction Between Service and Organizing: Two Housing Campaigns by the Chinese Progressive Association," https://www.marxists.org/history/erol/ncm-1a/iwk-cpa, traces the Marxist origins and activities of the CPA.

EMS flag, the Malcolm X flag, the Murder Victims Flag (peace walk), and that of the Bunker Hill Association. It is hard to believe that the City of Boston is officially adopting the speech of each of these organizations -- several of which would be highly controversial among Boston citizens – as the official government expression of the City.

IV. The flagpole constitutes a designated forum in which content- and viewpoint-based discrimination are prohibited.

Because third-party flags on the flagpole do not constitute government expression, they are subject to forum analysis. By its past conduct, the City has made the flagpole a designated public forum. Private individuals and organizations have been allowed to place flags on the flagpole, and the City's printable application guidelines for using the flagpole and other facilities state that the City "seeks to accommodate all applicants seeking to take advantage of the City of Boston's public forums." (App. 136a-140a). By calling the flagpole a "public forum" and by stating their intent to "accommodate all applicants," the City has clearly designated the flagpole a public forum. And the City's action of approving 284 applications and not denying a single application over the twelve years prior to Shurtleff's application, further demonstrates that the City has treated the flagpole as a designated public forum.[35]

---

[35] Some discussions of forum analysis include a "limited forum," sometimes instead of and sometimes in addition to a designated forum. The precise limits of a limited forum have

As this Court recognized in *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. ___ at 1885, "restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited."

Clearly, excluding religious flags is content discrimination. And the City's content discrimination cannot satisfy any level of scrutiny, let alone strict scrutiny, because the Commissioner Rooney has acknowledged that the only City interest was avoiding an Establishment Clause violation, and we have clearly demonstrated that no Establishment Clause violation occurs with the raising of a religious flag in a designated public forum.

But the Foundation maintains that excluding religious flags is also viewpoint discrimination. As this Court recognized in *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 112, n. 4 (2001), "Religion is the viewpoint from which ideas are conveyed....[We] see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys." Issues of vital importance may be addressed from a variety of viewpoints. Excluding the religious viewpoint is viewpoint discrimination.

Because the flagpole cannot be considered government expression, it is a designated forum.

---

not yet been determined, but clearly a limited forum cannot be limited to "anything but religion."

Excluding religious flags from the flagpole is content discrimination and viewpoint discrimination, both of which are prohibited in a designated forum by the Free Exercise and Free Speech Clauses of the First Amendment and by the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

John Winthrop, the founding Governor of Massachusetts Bay Colony, declared upon its founding in 1630:

> Thus stands the cause betweene God and us. We are entered into Covenant with Him for this worke. Wee haue taken out a commission. The Lord hath given us leave to drawe our own articles. Wee haue professed to enterprise these and those accounts, upon these and those ends. Wee have hereupon besought Him of favour and blessing. Now if the Lord shall please to heare us, and bring us in peace to the place we desire, then hath hee ratified this covenant and sealed our Commission, and will expect a strict performance of the articles contained in it; but if wee shall neglect the observation of these articles which are the ends wee have propounded, and, dissembling with our God, shall fall to embrace this present world and

prosecute our carnall intentions, seeking greate things for ourselves and our posterity, the Lord will surely breake out in wrathe against us; be revenged of such a [sinful] people and make us knowe the price of the breache of such a covenant.

...

The Lord will be our God, and delight to dwell among us, as his oune people, and will command a blessing upon us in all our wayes. Soe that wee shall see much more of his wisdome, power, goodness and truthe, than formerly wee haue been acquainted with. Wee shall finde that the God of Israell is among us, when ten of us shall be able to resist a thousand of our enemies; when hee shall make us a prayse and glory that men shall say of succeeding plantations, "the Lord make it likely that of *New England*." For wee must consider that wee shall be as a citty upon a hill. The eies of all people are uppon us. Soe that if wee shall deale falsely with our God in this worke wee haue undertaken, and soe cause him to withdrawe his present help from us, wee shall be made a story and a by-word through the world. Wee shall open the mouthes of enemies to speake evill of the wayes of God, and

> all professors for God's sake. Wee shall shame the faces of many of God's worthy servants, and cause theire prayers to be turned into curses upon us till wee be consumed out of the good land whither wee are a goeing.
>
> ...
>
> Therefore lett us choose life that wee, and our seede may liue, by obeyeing His voyce and cleaveing to Him, for Hee is our life and our prosperity. [36]

Samuel Adams, often called the "Father of the American Revolution," while serving as Governor of Massachusetts, issued a fasting proclamation on March 27, 1797, in which he declared:

> And as it is our duty to extend our wishes to the happiness of the great family of man, I conceive that we cannot better express ourselves than by humbly supplicating the Supreme Ruler of the world that the rod of tyrants may be broken into pieces, and the oppressed made free; that wars may cease in all the earth, and that the confusions that are and have been among the nations may be overruled

---

[36] John Winthrop, "A Model of Christian Charity, reprinted in *The Journal of John Winthrop 1630-1649* ed. Richard S. Dunn and Laetitia Yeadle (Harvard University Press, 1996) 9-10 [original spellings preserved].

> by promoting and speedily bringing on that holy and happy period when the kingdom of our Lord and Saviour Jesus Christ may be everywhere established, and all people everywhere willingly bow to the septre of Him who is Prince of Peace.[37]

If Governors Winthrop and Adams could see that Boston now honors all sorts of ideas and lifestyles including gay pride but prohibits a flag with a cross, what would they think of the colony and state they founded and governed?

Respectfully submitted,
s/ John Eidsmoe
John Eidsmoe
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
Tel: (334) 262-1245
eidsmoeja@juno.com
Counsel for Amicus Curiae

[37] Samuel Adams, Fast Proclamation, March 20, 1797; quoted in William V. Wells, *The Life and Public Services of Samuel Adams*[1865] II:365-66.