

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**

**JOINT MOTION OF PETITIONERS FOR DIVIDED ARGUMENT AND
ENLARGEMENT OF ARGUMENT TIME**

Pursuant to Rules 21 and 28.4 of the Rules of this Court, petitioners in No. 17-1717 The American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131 (collectively, “The American Legion”), and petitioner in No. 18-18 the Maryland-National Capital Park and Planning Commission (“the Commission”) respectfully move for divided argument in these

consolidated cases. The American Legion and the Commission each request 15 minutes of argument time, with counsel for the Commission to appear first and counsel for The American Legion to appear second. This division of argument time will ensure that petitioners have their interests fully represented, and that the Court receives a full understanding of the perspectives and arguments of all petitioners. The United States has informed petitioners' counsel that it intends to file a motion for leave to participate in the oral argument as *amicus curiae* supporting petitioners and for 10 minutes of argument time. If the United States so moves, petitioners request that the Court expand the argument time for both sides by 10 minutes and allocate 15 minutes to the Commission, 15 minutes to The American Legion, and 10 minutes to the United States. The United States does not oppose expansion of the argument time or the division sought by this motion, as long as, whatever the Court does, the United States is allotted 10 minutes of argument time. Respondents have informed petitioners' counsel that they consent to this motion.

1. This case presents the question whether the Peace Cross, a 93-year old monument to the 49 residents of Prince George's County who perished in World War I, is unconstitutional solely because it bears the shape of a cross.

2. The Commission is a Maryland state agency that has owned the Peace Cross and has been responsible for its maintenance and preservation since at least 1961. The Commission was named as a defendant in respondents' complaint. The American Legion is a private veterans organization that constructed the Peace

Cross from 1922 to 1925, owned it for more than three decades thereafter, and, when transferring the Peace Cross to the Commission, reserved the right to use the Peace Cross for events to honor veterans. The American Legion has consistently used the Peace Cross as a site for patriotic commemorative events since that time, and intervened as a defendant in the District Court.

3. Petitioners have distinct interests and perspectives concerning the question presented. As a government entity, the Commission seeks to ensure the preservation of a civic monument entrusted to the state, to maintain a site at which members of the community have long gathered to honor veterans and the war dead, and to protect a landmark with historical and aesthetic significance. As a private veterans organization, The American Legion seeks to prevent the destruction of a monument it erected to honor the sacrifices of the fallen, to provide veterans and their families a place to grieve and commemorate, and to ensure that other veterans memorials that similarly use religious symbolism are not declared unconstitutional. Petitioners have been represented by separate counsel throughout this case and continue to be separately represented. Counsel for both The American Legion and the Commission participated in oral argument at the Court of Appeals.

4. Petitioners have also pressed different arguments in this Court in support of the constitutionality of the Peace Cross. The Commission argues that the Peace Cross comports with the Establishment Clause for two independently sufficient reasons: because the purpose and objective meaning of the Cross are secular, and because the monument fits within a longstanding tradition of using the

cross as a symbol of sacrifice and martial valor. *See* Commission Br. 33-53. The Commission contends that the Court need not “decide the fate of the *Lemon* test” to resolve this case. *Id.* at 54 (internal quotation mark omitted). The American Legion, in contrast, argues in reliance on *Town of Greece v. Galloway*, 572 U.S. 565 (2014), that the Court should clarify that coercion, not endorsement, is the proper standard for Establishment Clause claims because only a coercion standard is consistent with the history of the First Amendment and practices accepted by the Framers. American Legion Br. 16-53. The American Legion thus contends that the Peace Cross is constitutional because it is not coercive. *Id.* at 53-57. Although both petitioners agree that the Peace Cross is constitutional regardless of whether the Court applies the analyses set forth in *Town of Greece*, 572 U.S. at 565, *Van Orden v. Perry*, 545 U.S. 677 (2005), or *Lemon v. Kurtzman*, 403 U.S. 602 (1971), petitioners have offered different approaches for resolving the question presented, and will provide different perspectives on the factual and legal issues at stake in the case.

5. This Court has regularly granted motions for divided argument when both a state government party and a private party appeared on the same side of the case. *See, e.g., Tenn. Wine & Spirits Ass’n v. Blair*, 2019 WL 98538 (Jan. 4, 2019) (mem.); *Sturgeon v. Frost*, 139 S. Ct. 357 (2018) (mem.); *Janus v. Am. Fed. of State, Cty., & Municipal Employees, Council 31*, 138 S. Ct. 974 (2018) (mem.); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 466 (2017) (mem.); *Util Air Reg. Grp. v. EPA*, 135 S. Ct. 1541 (2015) (mem.); *Oneok, Inc. v. Learjet, Inc.*, 135

S. Ct. 884 (2014) (mem.). The Court has also granted divided argument and enlarged the time for argument where a state entity, a non-state party, and the United States all supported the same disposition. *See, e.g., Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 566 (2015) (mem.) (granting motion for 3-way divided argument and enlarging time to 40 minutes per side); *Bush v. Vera*, 516 U.S. 911 (1995) (same).

In Establishment Clause cases, in particular, the Court has always heard from the affected government entity in every case for at least the last half century. *See, e.g., Van Orden*, 545 U.S. 677; *McCreary Cty v. ACLU*, 545 U.S. 844 (2005); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983). Accordingly, it has repeatedly granted divided argument where a private entity also has a strong interest in the practice or display under challenge, ensuring that the Court has the benefit of both the governmental and private perspective. *See Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 991 (1988); *Kendrick v. Bowen*, 484 U.S. 1041 (1988). For such reasons, divided argument is appropriate here.

6. The United States has informed petitioners' counsel that it intends to file a motion to participate in oral argument as *amicus curiae* and for 10 minutes of argument time. In the event that the United States so moves, petitioners request that the Court enlarge oral argument to 40 minutes for each side, and grant 15 minutes to the Commission, 15 minutes to The American Legion, and 10 minutes to the Solicitor General. That division of time would be consistent with prior cases in

which the Court has divided argument between three parties. *See Friedrichs*, 135 S. Ct. 566; *Vera*, 516 U.S. 911. It would also ensure that the Court receives a full and deliberate presentation of the important issues that this case presents, which is especially important here in light of the extensive factual record, the centuries of historical evidence relied on by each party, and the different arguments in support of reversal pressed by the Commission, The American Legion, and the United States.

For the foregoing reasons, petitioners jointly request that the Court divide oral argument time equally between them, with counsel for the Commission presenting first and counsel for The American Legion presenting second. If the United States seeks to participate in oral argument, petitioners request that the Court enlarge oral argument time by 10 minutes and grant 15 minutes to the Commission, 15 minutes to The American Legion, and 10 minutes to the Solicitor General.

Respectfully submitted,

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