

No. 18-351

IN THE
Supreme Court of the United States

CITY OF PENSACOLA, FLORIDA, et al.,
Petitioners,

v.

AMANDA KONDRAT'YEV, et al.,
Respondents.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Eleventh Circuit**

**BRIEF OF AMICUS CURIAE FOUNDATION FOR
MORAL LAW IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

Amicus Curiae Foundation for Moral Law (“the Foundation”), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in this case because it believes that the Eleventh Circuit’s opinion departs from a proper understanding of the Establishment Clause.

SUMMARY OF ARGUMENT

Believing that the Constitution should be interpreted strictly according to its plain meaning as understood by its Framers, the Foundation fully endorses the legal and constitutional arguments of the petitioners. Rather than duplicating those arguments, the Foundation will point out that the Establishment Clause does not forbid recognition of the foundational role of Christianity in our history, laws, and culture; and that the design of the National Mall was consciously based on a Latin cross. The Bayview Cross also has a special significance for the military, which the Court should take into account.

¹ Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, 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. The parties were notified of our intent to file this brief more than 10 days before the due date; therefore notice was timely under Rule 37.2(a).

The Foundation also agrees with the petitioners that the issues in this case are similar to those in No. 18-18, *Maryland-National Capital Park & Planning Comm'n v. American Humanist Ass'n*, in which the Foundation has also filed an *amicus* brief. *See also* No. 17-1717, *American Legion v. American Humanist Ass'n*. Because the issues are so similar, this brief is an adaptation of the *amicus* brief we filed in No. 18-18. The Foundation agrees with the petitioners that while this case is worthy of consideration on its own, it would be a good companion case to Nos. 17-1717 and 18-18. The Foundation therefore urges the Court to grant certiorari in this case as well.

ARGUMENT

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

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

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.

“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 (1763-1847) described his experience reading the fourth volume of Blackstone’s *Commentaries* at age 16: “[T]he work inspired me with awe, and I fondly determined to be a lawyer.”⁶ Kent’s four-volume *Commentaries on American Law* earned him the accolade of “the American Blackstone.”⁷ 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.”⁸ On behalf of the New York Court of Chancery (the highest court in New York at that time), Chancellor Kent, upholding a blasphemy 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

⁴ *Id.* Intro. 2:42.

⁵ *Id.*

⁶ Letter from James Kent to Thomas Washington (Oct. 6, 1828), quoted in John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 *Columbia L. Rev.* 547, 552 (1993).

⁷ 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).

⁸ 1 James Kent, *Commentaries on American Law* *2 (Oliver Wendell Holmes, Jr., ed., 1873).

the root of christianity, tends manifestly to the dissolution of civil government.” *People v. Ruggles*, 8 Johns. R. 290 (N.Y. 1811).

Speaking for a unanimous Court, Justice David Brewer, quoting Chancellor Kent’s *Ruggles* decision along with a host of other evidence of America’s Christian foundations, concluded that “[t]hese, 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.” *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892). See Appendix A for an extended quotation from the *Holy Trinity* opinion.

Likewise, 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.⁹

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,*

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

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.¹⁰

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

¹⁰ Senate Judiciary Committee, S. Rep. No. 32-376, at 1, 4 (1853) (emphasis added).

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 descendents.¹¹

¹¹ House Judiciary Committee, *Chaplains in Congress and in the Army and Navy*, H. R. Rep. No. 33-124, at 1, 6, 8-9 (1854).

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.¹²

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

The Foundation believes that one of the major problems in modern Establishment Clause jurisprudence is failing to understand the definition of “religion” as used in the First Amendment. The Virginia Declaration of Rights defined “Religion” as “the duty which we owe to our Creator, and the manner of discharging it[.]” *Virginia Declaration of Rights* para. 16 (June 12, 1776). James Madison, the principal drafter of the First Amendment, used the same definition. James Madison, *Memorial and Remonstrance Against Religious Assessments* para. 1 (June 20, 1785).

This Court took note of this definition of religion in 1879 and also looked to Jefferson’s Bill for Establishing Religious Freedom, stating,

In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

Reynolds v. United States, 98 U.S. 145, 163 (1879).

As the foregoing authorities have demonstrated, the Founders did not consider everything having to do with God to be “religion” within the meaning of the First Amendment, but rather “the duty we owe to our Creator and the manner of discharging it.” Thus, an establishment of religion is one that forces a person to perform that duty in violation of his conscience. A passive monument like the cross in this case cannot force anyone to worship or perform any other act in violation of his conscience or propagate teachings (like an established church) through tax dollars. Thus, the cross in this case cannot violate the Establishment Clause because it is not an establishment of religion as the word was understood at the time of the First Amendment’s ratification.

II. The National Mall is based on a grid of a Latin cross.

Based primarily on the 1791 design of Major Pierre Charles L’Enfant that was approved by President Washington, the National Mall is built in the shape of a Latin cross. A 1902 Senate Park Commission Report stated:

Regarding the [Washington] Monument as the center, the Capitol as the base, and the White House as the extremity of one arm of a Latin cross, we have at the head of the composition on the banks of the Potomac a memorial site of the greatest possible dignity, with a second

and only less commanding site at the extremity of the second arm.¹³

If Congress can expressly reference the Latin cross as the basis for the plan for the National Mall, the City of Pensacola can erect a Latin cross reflecting our Christian heritage. Or must we now plow under the National Mall?

III. The cross has special significance for military personnel.

Unlike the Bladensburg Cross, the constitutionality of which is currently before this Court on a petition for writ of certiorari in *Maryland-National Capital Park and Planning Commission and The American Legion v. American Humanist Association*, No. 18-18 (and No. 17-1717), the Pensacola Cross apparently was not erected primarily to honor veterans. However, the Per Curiam Opinion notes that it was used during World War II as a place to pray "for the divine guidance of our nation's leaders" and for faith "to see through the present dark days of war," and

"Over the years, the cross has continued to serve as the location for an annual Easter sunrise program, but it has also been used as a site for remembrance serves on Veteran's and Memorial Days, at which attendees place flowers near the cross in honor of loved ones overseas

¹³ U.S. Senate Committee on the District of Columbia, Senate Rep. No. 166, 57th Congress, 1st Session (1902), at 2.

and in memory of those who died fighting in service of the country."

Kondrat'yev v. City of Pensacola, No. 17-13025, slip op. at 3 (11th Cir. Sep. 7, 2018) (per curiam).

The cross has special significance for military personnel, and this Court should consider that significance.

A. Crosses are common in military cemeteries.

United States military cemeteries overseas commonly have rows of crosses on the graves of those who have died in military service. Military cemeteries within the United States commonly have a simple cross carved into the headstone, military cemeteries also contain much larger crosses.

For example, at Arlington National Cemetery, these crosses include the Argonne Cross, erected "in memory of our men in France 1917-1918" (13 feet tall), the "Cross of Sacrifice" behind the Tomb of the Unknowns, the Canadian Cross of Sacrifice (24 feet tall), the Spanish-American War Nurses Monument (maltese cross), and others.¹⁴

According to the official website of the American Battle Monuments Commission which erected and maintains the overseas military cemeteries:

¹⁴ James Edward Peters, *Arlington National Cemetery: Shrine to America's Heroes* (2008).

Each grave site for the World War I and World War II cemeteries is marked by a headstone of pristine white marble. Headstones of those of the Jewish faith are tapered marble shafts surmounted by a Star of David. Stylized marble Latin crosses mark all others. Annotated on the headstones of the World War I servicemen who could not be identified is: "Here Rests in Honored Glory an American Soldier Known but to God." The words "American Soldier" were changed to "Comrade in Arms" on the headstones of the unidentified of World War II.¹⁵

Although these cemeteries are located overseas, the land is given in perpetuity for the use of the United States Government and is operated by the American Battle Monuments Commission, so there is no reason the Establishment Clause would be less applicable to these cemeteries than to markers within the United States.

Nor are crosses unique to American military cemeteries. To promote uniformity in British Commonwealth military cemeteries, the Imperial War Graves Commission (now the Commonwealth War Graves Commission) determined that each military cemetery with more than 400 graves (later

¹⁵ *History*, American Battle Monuments Commission, <https://www.abmc.gov/about-us/history>.

expanded to cemeteries with more than 40 graves)¹⁶ would have one prominent cross, to be called the Cross of Sacrifice. The theme of sacrifice is commonly seen in the symbol.¹⁷

On June 12, 1925 Canadian Prime Minister William Lyon Mackenzie King requested that a Cross of Sacrifice be erected at Arlington National Cemetery in Virginia. President Calvin Coolidge approved the request, and the Cross of Sacrifice was dedicated at Arlington on Armistice Day 1927.¹⁸

B. Military medals demonstrate that the cross is closely associated with the military.

Except for the Congressional Medal of Honor, the highest award a member of the U.S. Army can receive is the Distinguished Service Cross. The award itself is a gold cross with an eagle on the front. It is given "for extreme gallantry and risk of life in

¹⁶ Jacqueline Hucker, *Monuments of the First and Second World Wars*, The Canadian Encyclopedia, <https://www.thecanadianencyclopedia.ca/en/article/monuments-of-the-first-and-second-world-wars>; see also *Remembering Sir Reginald Blomfield*, Commonwealth War Graves Commission, <https://www.cwgc.org/learn/news-and-events/news/2017/12/21/12/38/remembering-sir-reginald-blomfield>.

¹⁷ "War Graves: How the Cemeteries Abroad Will Be Designed," Report to the Imperial War Graves Commission by Lieut.-Colonel Sir Frederick Kenyon, <https://nla.gov.au/nla.obj-52871670/view?partId=nla.obj-105920629>.

¹⁸ Peters, *supra* note 14; cf. Robert M. Poole, *On Hallowed Ground: The Story of Arlington National Cemetery* (Bloomsbury 2009).

actual combat with an armed enemy force."¹⁹ It is the equivalent of the United States Air Force Cross, the Navy Cross (for Navy and Marine personnel), and the Coast Guard Cross.²⁰ The cross emblem for this award reflects the fact that recipients are recognized and rewarded for their willingness to risk their own lives to save the lives of others or to further advance the military mission, and this willingness to sacrifice is commonly set forth in the citation that accompanies the medal. The cross is a fitting symbol of such heroism and self-sacrifice, and it is used by other heroic and self-sacrificing organizations like the International Committee of the Red Cross²¹ and many local fire departments.²²

The cross is used for military medals in other countries as well. The British Commonwealth nations award the Victoria Cross²³, the George Cross²⁴, and other medals. Germany awards the Bundeswehr Cross of Honor for Valor for "An act of gallantry in the face of exceptional danger to life and

¹⁹ *Distinguished Service Cross Law and Legal Definition*, U.S. Legal.com, <https://definitions.uslegal.com/d/distinguished-service-cross>.

²⁰ *Military Awards for Valor – Top 3*, U.S. Department of Defense, <https://valor.defense.gov/description-of-awards>.

²¹ *The Emblems*, International Committee of the Red Cross, <https://www.icrc.org/en/war-and-law/emblem>.

²² Tom Kurski, *A Piece of Fire Service History: The Maltese Cross*, <https://www.fireengineering.com/articles/2007/02/a-piece-of-fire-service-history-the-maltese-cross>.

²³ Ben Johnson, *The History of the Victoria Cross*, Historic UK, <https://www.historic-uk.com/History/UK/HistoryofBritain/The-Victoria-Cross/>

²⁴ *George Cross*, Encyclopedia Britannica, <https://www.britannica.com/topic/George-Cross>

limb while demonstrating staying power and serenity in order to fulfill the military mission in an ethically sound way."²⁵ Military medals in Russia were frequently in the shape of crosses (the St. Catherine Medal, the St. Alexander Nevsky medal, the St. George Medal, the St. Vladimir Medal, and others.²⁶ Cross-shaped medals were eliminated and suppressed by the Communist regime after 1918, but since 1991 the Russian Federation has resumed issuing cross-shaped medals to its military heroes.²⁷

France awards its bravest soldiers the Croix de Guerre (Cross of War),²⁸ Sweden the Grand Cross of the Order of the Sword,²⁹ Norway the King Haakon VII Freedom Cross (aka Cross of Liberty),³⁰ Poland the Order of the Military Cross and the Cross of

²⁵ *Bundeswehr Cross of Honour for Valour*, Revolvly, <https://www.revolvly.com/page/Bundesweher-Cross-of-Honour-for-Valour>.

²⁶ Robert Werlich, *Russian Orders, Decorations and Medals Including Those of Imperial Russia, the Provisional Government, the Civil War and the Soviet Union* (1981), available at goo.gl/Lv9iC4.

²⁷ *Id.*; *Russian Imperial Orders*, Digital Library, <http://numismatics.org/digitallibrary/ark:/53695/nnan111388>; *The Russian Federation: Order of St. George*, Medals of the World, www.medals.org.uk/russia/rf/rf004.htm.

²⁸ *Croix de Guerre*, Encyclopedia Britannica, <https://www.britannica.com/topic/Croix-de-Guerre>.

²⁹ *Sweden: The Royal Order of the Sword*, Medals of the World, <http://www.medals.org.uk/sweden/sweden002.htm>.

³⁰ *Kingdom of Norway: King Haakon VII's Cross of Liberty*, Medals of the World, www.medals.org.uk/norway/norway006.htm.

Merit with Swords (Gold, Silver, and Bronze),³¹ and similar cross-shaped medals are awarded in military forces throughout the Western world.

The reason is self-evident. As General Douglas MacArthur said in his Farewell Address at West Point, "The soldier, above all other men, is required to practice the greatest act of religious training -- sacrifice."³² It is entirely appropriate that such sacrifice be recognized with the symbol of the cross -- the sacrifice of the soldier for others on the battlefield is in some sense a reflection of the sacrifice of Jesus for others on the cross. "Greater love hath no man than this, that a man lay down his life for his friends." (*John* 15:13).

IV. This decision cries out for appellate review, as do the judges who wrote it.

Out of respect for this Court, for past precedent, and for their restrained role as judges, the judges of the Eleventh Circuit have concluded that they are bound by precedent to affirm the lower court. But they have clearly stated that they consider those precedents to be mistaken and they have virtually begged this Court to grant certiorari, clarify or overrule these precedents, and reversed the District Court in this case.

³¹ *Orders and Decorations*, President of the Republic of Poland, www.president.pl/en/president/competences/orders-and-decorations/

³² General Douglas MacArthur, Farewell Address, United States Military Academy, West Point, New York, May 12, 1962.

The Per Curiam Opinion of the panel says in its opening paragraph, "Having concluded that we are bound by existing Circuit precedent, we find ourselves constrained to affirm." *Kondrat'yev v. City of Pensacola*, No. 17-13025, slip op. at 2 (11th Cir. Sep. 7, 2018) (per curiam). Repeatedly, the Per Curiam Opinion uses the term "constrained" or "bound," and concludes by saying "our hands are tied." *See, e.g., id.* at 2, 5, & 10.

In his opinion concurring in the judgment, Judge Newsom begins by saying, "Reluctantly, I agree that our existing precedent -- and in particular, *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) -- requires us to affirm the district court's decision...." *Id.* at 11 (Newsom, J., concurring in judgment). Concerning *Rabun*, he says, "under our prior-panel-precedent rule, it seems clear enough to me that we -- by which I mean the three of us -- are stuck with it." *Id.* But he adds, "Having said that, it's equally clear to me that *Rabun* is wrong." *Id.* at 12. The remainder of his opinion reads like a dissent, although of course he feels bound to concur in the result. He says, "It's hard to imagine an Establishment Clause analysis more squarely at odds with *Rabun's* than the one that Justice Kennedy inaugurated in *Allegheny* and then cemented in *Greece*." *Id.* at 22.

Likewise Judge Royal, concurring in the judgment, opens by saying, "Good law -- *stare decisis* -- sometimes leads good judges to follow bad law and write the wrong order. That happened in this case."

Id. at 29 (Royal, J., concurring in judgment). He calls *Rabun* "a case that was wrongly decided, and even if it was not wrongly decided in 1983, it has been eclipsed by recent Supreme Court cases...." *Id.*

Also, the District Court used language in its opinion that suggested that it, too, ruled as it did only because it felt bound by precedent and hoped to be reversed or overruled. The Court stated,

All this to say, the historical record indicates that the Founding Fathers did not intend for the Establishment Clause to ban crosses and religious symbols from public property. Indeed, "the enlightened patriots who framed our constitution" [*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824)] would have most likely found this lawsuit absurd. And if I were deciding this case on a blank slate, I would agree and grant the plaintiffs no relief. But, alas, that is not what we have here.

Kondrat'yev v. City of Pensacola, No. 3:16- cv-00915-RV-CJK, slip op. at 6 (N.D. Fla. June 19, 2017). And the District Court concluded, "Count me among those who hope the Supreme Court will one day revisit and reconsider its Establishment Clause jurisprudence, but my duty is to enforce the law as it now stands." *Id.* at 22.

The Foundation has never seen a case in which judges have so severely criticized a precedent they

felt compelled to follow and in which they so clearly call for appellate review. They virtually make the case for granting certiorari, demonstrating that this decision conflicts with recent decisions of this Court. Judge Royal points to numerous similar crosses in public places throughout the United States, thus demonstrating that this is a nationwide issue that affects far more people than only the citizens of Pensacola. The decision, and even the judges who wrote it, cry out for review.

The Petitioners have requested *en banc* review by the full Eleventh Circuit, and that request is pending. However, similar Fourth Circuit cases involving the Bladensburg (MD) Cross, *The American Legion v. American Humanist Ass'n* and *Maryland-National Capital Park & Planning Comm'n v. American Humanist Ass'n*, Nos. 17-1717 and 18-18, are before this Court on a petition for certiorari.³³ In

³³ In our *amicus* brief in the Bladensburg Cross case, the Foundation argued that the cross has substantial military significance because it represents sacrifice for others, because crosses are commonly found in military cemeteries, and because crosses form some of the highest military medals such as the Distinguished Service Cross. The Bladensburg Cross was erected in 1925 to honor World War I veterans. Although the Pensacola Cross was not erected to honor veterans, the Per Curiam Opinion notes that it was used during World War II as a place to pray "for the divine guidance of our nation's leaders" and for faith "to see through the present dark days of war," and

"Over the years, the cross has continued to serve as the location for an annual Easter sunrise program, but it has also been used as a site for remembrance serves on Veteran's and Memorial Days, at which attendees place flowers near the

the interest of judicial economy as well as to ensure a consistent result, it would be appropriate for this Court to grant certiorari in both cases and consider them together.

CONCLUSION

On October 12, 1492, Christopher Columbus landed and planted a cross on what was probably Watling Island off the coast of Florida.³⁴ Throughout the following century, Spanish explorers such as Ponce de Leon and Hernando de Soto carried the cross on their expeditions through Florida.³⁵

Columbus and the conquistadors are controversial today, but their historical and cultural significance for Florida, and that of the cross they carried, is undeniable and significant. It is impossible to understand Florida history and culture without an understanding of the Spanish explorations, of the

cross in honor of loved ones overseas and in memory of those who died fighting in service of the country."

The Foundation therefore believes the section of our Bladensburg brief detailing the military significance of the cross is relevant to this case, and we therefore direct your attention to Section II, pp. 10 - 14, of our brief in No. 18-18.

³⁴ Christopher Columbus, Letter to Sovereigns, 1493; Samuel Eliot Morison, *Journals & Other Documents on the Life & Voyages of Christopher Columbus* (Heritage Press, 1963), 133; John Eidsmoe, *Columbus and Cortez, Conquerors for Christ* (New Leaf 1992), 79-146.

³⁵ Charles Hudson, *Knights of Spain, Warriors of the Sun: Hernando de Soto and the South's Ancient Chiefdoms* (University of Georgia Press 1997).

Spanish settlements, and of the Christian civilization they planted with the cross. Symbols are vitally important for an understanding of history and culture, and they should not be removed or changed by judicial fiat.

Ironically, the cross, which has inspired Americans with the planting of the Jamestown Cross in 1607³⁶ and beyond, is now the most censored symbol in America. This Court should grant certiorari and protect the Pensacola Cross as an exemplar of America's Christian heritage.

Respectfully submitted,

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³⁶ George Percy, *Jamestown: 1607, The First Months*, Nationalhumanitiescenter.org, <https://goo.gl/xXbnC7>

APPENDIX A

Church of the Holy Trinity v. United States,
143 U.S. 457, 465-71 (1892)

[N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his sail westward, is from “Ferdinand and Isabella, by the grace of God, king and queen of Castile,” etc., and recites that “it is hoped that by God’s assistance some of the continents and islands in the ocean will be discovered,” etc. The first colonial grant, that made to Sir Walter Raleigh in 1584, was from “Elizabeth, by the grace of God, of England, Fraunce and Ireland, queene, defender of the faith,” etc.; and the grant authorizing him to enact statutes of the government of the proposed colony provided that “they be not against the true Christian faith nowe professed in the Church of England.” The first charter of Virginia, granted by King James I in 1606, after reciting the application of certain parties for a charter, commenced the grant in these words: “We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time

bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government; DO, by these our Letters-Patents, graciously accept of, and agree to, their humble and well-intended Desires.”

Language of similar import may be found in the subsequent charters of that colony, from the same king, in 1609 and 1611; and the same is true of the various charters granted to the other colonies. In language more or less emphatic is the establishment of the Christian religion declared to be one of the purposes of the grant. The celebrated compact made by the pilgrims in the Mayflower, 1620, recites: “Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of Virginia; Do by these Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid.”

The fundamental orders of Connecticut, under which a provisional government was instituted in 1638-39, commence with this declaration: “Forasmuch as it hath pleased the Almighty God by the wise disposition of his diuine prudence so to Order and dispose of things that we the Inhabitants and Residents of Windsor, Hartford, and Wethersfield are now cohabiting and dwelling in and vppon the River of Conectecotte and the Lands thereunto adioyneing; And well knowing where a

people are gathered together the word of God requires that to mayntayne the peace and vnion of such a people there should be an orderly and decent Gouverment established according to God, to order and dispose of the affayres of the people at all seasons as occation shall require; doe therefore assotiate and conioyne our selues to be as one Publike State or Comonwelth; and doe, for our selues and our Successors and such as shall be adioyned to vs att any tyme hereafter, enter into Combination and Confederation together, to mayntayne and presearue the liberty and purity of the gospell of our Lord Jesus wch we now prfesse, as also the disciplyne of the Churches, wch according to the truth of the said gospell is now practised amongst vs.”

In the charter of privileges granted by William Penn to the province of Pennsylvania, in 1701, it is recited: “Because no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship; And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine Knowledge, Faith, and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare,” etc.

....

If we examine the constitutions of the various states, we find in them a constant recognition of

religious obligations. Every constitution of every one of the 44 states contains language which, either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its influence in all human affairs is essential to the well-being of the community. This recognition may be in the preamble, such as is found in the constitution of Illinois, 1870: "We, the people of the state of Illinois, grateful to Almighty God for the civil, political, and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations," etc.

....

Or by article 22 of the constitution of Delaware, (1776,) which required all officers, besides an oath of allegiance, to make and subscribe the following declaration: "I, A. B., do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration."

....

There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this

truth the question has seldom been presented to the courts, yet we find that in *Updegraph v. Com.*, 11 Serg. & R. 394, 400, it was decided that, "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; ... not Christianity with an established church and tithes and spiritual courts, but Christianity with liberty of conscience to all men." ... And in the famous case of *Vidal v. Girard's Ex'rs*, 2 How. 127, 198, this court, while sustaining the will of Mr. Girard, with its provision for the creation of a college into which no minister should be permitted to enter, observed: "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania."

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

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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.