Nos. 17-1717, 18-18

In the Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION , *et al.*,

Respondents.

MARYLAND–NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION , *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR HISTORIANS AND LEGAL SCHOLARS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

STEVEN K. GREEN
Willamette University
900 State Street, S.E.
Salem, Oregon 97301

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Cases—continued

Other Authorities

Other Authorities—continued

Other Authorities—continued

INTERESTS OF THE *AMICI* CURIAE[1]

Amici are historians and legal scholars who specialize in constitutional history and religious freedom. They have substantial expertise in the history of the Establishment Clause and related issues. *Amici* therefore have a professional interest in the proper disposition of those issues and believe the Court should decide this case based on a complete and accurate understanding of the historical record.

Amici include:

- Alan E. Brownstein, Professor of Law Emeritus, UC Davis School of Law
- Jon Butler, Ph.D., Howard R. Lamar Professor of History, Emeritus, Yale University
- Erwin Chemerinsky, Dean, School of Law, University of California, Berkeley
- Caroline Mala Corbin, Professor of Law, University of Miami
- Paul Finkelman, Ph.D., President William McKinley Distinguished Professor of Law, Emeritus, Albany Law School
- Ronald B. Flowers, Ph.D., John F. Weatherly Emeritus Professor of Religion, Texas Christian University

---

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have submitted blanket consents to the filing of *amicus* briefs in this case.

- Frederick Mark Gedicks, Guy Anderson Chair & Professor of Law, Brigham Young University Law School
- Sarah Barringer Gordon, Ph.D., Arlin M Adams Professor of Constitutional Law & Professor of History, University of Pennsylvania
- Steven K. Green, J.D., Ph.D., Fred H. Paulus Professor of Law and Director of the Center for Religion, Law and Democracy, Willamette University
- Leslie Griffin, Ph.D., J.D., C. William S. Boyd Professor of Law, University of Nevada, Law Vegas
- Marci Hamilton, Robert A. Fox Leadership Program Professor of Practice, Senior Resident Fellow in the Program for Research on Religion, University of Pennsylvania
- Franklin Lambert, Ph.D., Professor of History Emeritus, Purdue University
- Ira C. Lupu, F. Elwood and Eleanor Davis Professor Emeritus of Law, George Washington University
- Mark Douglas McGarvie, Ph.D., Visiting Research Scholar, Institute of Bill of Rights Law, Marshall-Wythe School of Law, College of William and Mary
- John Ragosta, Ph.D., Independent Scholar
- Jack N. Rakove, Ph.D., Coe Professor of History and American Studies, Professor of Political Science, Stanford University

- Frank S. Ravitch, Professor of Law & Walter H. Stowers Chair in Law and Religion, Michigan State University College of Law
- David Sehat, Ph.D., Associate Professor of History, Georgia State University
- Robert Tuttle, Ph.D., J.D., David R. and Sherry Kirschner Berz Research Professor of Law and Religion, George Washington University
- Laurence H. Tribe, Carl M. Loeb University Professor and Professor of Constitutional Law, Harvard Law School
- Laura S. Underkuffler, S.J. DuPratt White Professor of Law, Cornell University
- Laurence H. Winer, Ph.D., J.D., Professor of Law and Faculty Fellow, Arizona State University

INTRODUCTION AND SUMMARY OF ARGUMENT

Invoking history, petitioners and the United States insist that the First Amendment's Establishment Clause is directed only at government action that *coerces* "religious belief or adherence" (U.S. Br. 10)—a test that would permit government display of even the most sectarian religious imagery. But this argument misstates the views of the Constitution's Framers and would improperly truncate the purpose of the Establishment Clause. In fact, the Framers—notably including Madison and Jefferson, who had a central role in the formulation of the Establishment Clause—thought that any governmental use of reli-

gious language or imagery should be nonsectarian and inclusive.

A. Although the Framers understood that religion was central to the social and cultural life of the new republic, they also firmly believed that religion should be a force to unite, not divide, the Nation. They recognized that religious pluralism was the hallmark of the new United States, and were well aware of the corrosive effect that religious disputes and preferences had produced both in Europe and in their home colonies. They also understood, as this Court has explained, that "sectarianism" is "often the flashpoint for religious animosity." *Lee* v. *Weisman*, 505 U.S. 577, 588 (1992). Because of this, the Framers were particularly concerned about governmental action and speech that had the potential to exclude members of the political community based on religious views, thus potentially fracturing the Nation along religious lines and violating individual rights of conscience.

B. Consequently, in the context of official governmental speech directed to the public, the Framers were deeply suspicious of sectarian religious language; they were careful to ensure that such speech united rather than divided. The words that the Framers used in the Nation's founding documents, presidential addresses, and proclamations—that is, speech directed at the public, analogous in that respect to the display at issue in this case—demonstrate the Framers' belief that such religious language should be universal and nonsectarian. To be sure, the early Presidents did not shy from religious rhetoric, but the public religious speech of Presidents Washington, Jefferson, and Madison re-

flects an overriding concern that religion should unite the Nation. These Framers sought "to find a civil vocabulary that could encompass all people, regardless of their faith." Meyerson, *Endowed by Our Creator: The Birth of Religious Freedom in America* 12 (2012).

C. The Latin cross that is at issue here falls well outside this tradition of universal and inclusive language: it is perhaps the most recognizably sectarian religious symbol in our society. It is, of course, the preeminent symbol of Western Christianity; it does not reflect the religious traditions of Orthodox Christians of Eastern Rite denominations, let alone those of non-Christians. The religious significance of a Latin cross placed at a burial site, or at a memorial site that commemorates those who lost their lives in war, therefore is undeniable. Placement of such a symbol on government property is not religiously inclusive and departs from the Framers' respect for the Nation's religious pluralism.

D. The Court should not adopt the "coercion" test for the resolution of Establishment Clause claims that petitioners and the United States advance in an effort to save the Memorial Cross. It is certainly true that preventing government compulsion of religious belief or practice was *one* important goal of colonial-era efforts to disestablish religion, and of the Establishment Clause itself. But the Framers also had broader concerns: they sought to avoid non-coercive religious preferences and other governmental efforts to influence religion that could provoke animosity between faiths. Petitioners' coercion test takes no account of this key goal of the Establishment Clause.

ARGUMENT

I. Despite Their Personal Religious Differences, The Nation's Founders Were United In The Belief That Any Government Affirmations Of Religion Should Be Inclusive And Nonsectarian.

The Solicitor General notes that construction of the Establishment Clause "has long been guided by 'what history reveals was the contemporaneous understanding of its guarantees'" (U.S. Br. 13 (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984))), and goes on to observe that "[t]he founding generation generally saw no Establishment Clause problem with 'official acknowledgment * * * of the role of religion in American life.'" U.S. Br. 19 (quoting *Lynch*, 465 U.S. at 67. We agree with both of these propositions. But the Solicitor General errs in his conclusions because his presentation of the relevant constitutional history is misleadingly incomplete. Although it is true that the Nation's founding documents and the Framers' public statements refer generally to a "Creator" or "Almighty Being," these statements intentionally were kept nonsectarian: they avoided any identifiably Christian references, let alone language or imagery associated with a particular Christian denomination. The arguments offered by petitioners and the Solicitor General take no account of this tradition favoring religious inclusion and pluralism.

A. The Founders were committed to religious pluralism.

The people who served in the Continental Congress, drafted the Constitution, and served in the First Congress came from States with differing religious compositions and church-state arrangements.

They represented States that had never maintained formal religious establishments as colonies (Pennsylvania, New Jersey, Delaware, and Rhode Island); had quickly abolished their colonial establishments upon drafting their first constitutions (New York and North Carolina); had subsequently abolished its establishment amid much controversy (Virginia); had sought to maintain establishments that were moribund (Maryland and Georgia); or had enthusiastically reaffirmed their church-state arrangements (South Carolina, Massachusetts, and New Hampshire).[2]

Religious pluralism was the de facto reality of the new Nation. In New England, Congregationalism dominated, although Baptists and Quakers were numerous; in the southern states, the Anglican/Episcopalian church remained strong, but was losing ground to Baptists, Presbyterians, Moravians, and Quakers. In the mid-Atlantic, no denomination was dominant: there were Presbyterians, Quakers, Lutherans, Moravians, and German Pietists. New York was also a polyglot of faiths: Dutch Reformed, Presbyterian, Anglican/Episcopalian, Quaker, and Lutheran. Methodism would become a force during the latter part of the Founding period and emerged as the Nation's largest denomination in a few decades. Finally, a small but growing number of Catholics resided in New York and Maryland, while Jewish

---

[2] Thomas J. Curry, *The First Freedoms: Church and State in American to the Passage of the First Amendment* 134-192 (1986). South Carolina declared Protestantism to be the established religion but did not provide any mechanism for its financial support. Connecticut also maintained a religious establishment until 1818 under its colonial charter.

communities existed in Newport, Rhode Island; Charleston, South Carolina; and Savannah, Georgia. In their own religious affiliations, the various delegates and members of Congress reflected this religious pluralism, a situation that was unmatched in any other nation at that time.[3]

In addition, the majority of the Founders were learned men who, regardless of their opinions about religious establishments, appreciated the sordid history of church-state arrangements in Europe. They were familiar with the wars of religion, the history of religious persecution, and the corrosive effect that state patronage had on religion. Many had witnessed or experienced in their home colonies how religious preferences had excluded religious dissenters from enjoying the full fruits of citizenship. The Founders thus "viewed issues of religion and politics through a prism that was very critical of Christianity's abuses. * * *. The Founders thought that people should be free to seek religious truth guided only by reason and the dictates of their consciences."[4]

As a result, one issue regarding religion upon which all of the Founders agreed—rationalists, latitudinarians, and evangelicals alike—was that the new Nation must not simply avoid religious dissention, but embrace policies that were religiously inclusive. This commitment to religious inclusion reflected both practical and philosophical considerations.

---

[3] See generally Roger Finke & Rodney Stark, *The Churching of America, 1776-1990* (1992).

[4] Frank Lambert, *The Founding Fathers and the Place of Religion in America* 161-162 (2003).

First, the Founders believed that any religious preferences would divide the Nation and that religious faction was a chief source of political strife. In the *Federalist*, James Madison referred more than once to the dangers posed by religious faction and strife to the new republic. "A zeal for different opinions concerning religion * * * [has] divided mankind into parties, inflamed them with mutual animosity, and rendered them more to vex and oppress each other than to co-operate[] for the common good." The Federalist No. 10 (James Madison). And in his *Memorial and Remonstrance*, Madison expressed opposition to the proposed Virginia assessment bill on the ground that it would "destroy the moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced amongst its several sects." Tolerant governments, he believed, must avoid "animosities and jealousies" and seek "to extinguish religious discord."[5]

Second, the Founders' embrace of religious pluralism and rejection of religious divisiveness was based on widely shared philosophical principles. The Founders' commitment to free religious conscience required them to respect different religious faiths and avoid religious conflict.

George Washington had a particular disdain for religious divisiveness and sought throughout his military and political career to promote religious inclusion and pluralism. While serving as Commander-in-

---

[5] Madison, "Memorial and Remonstrance," ¶ 11, in *The Founders' Constitution* (Philip K. Kurland & Ralph Lerner ed. 1987), vol. 5, document 43. See also The Federalist Nos. 52, 57 (James Madison).

Chief of the Continental Army, Washington imposed strict rules prohibiting opprobrium of any religious faith among his soldiers. He prohibited the celebration of Guy Fawkes Day in the Army, although it was popular among colonial Protestants. He also expressly instructed then-Colonel Benedict Arnold in his 1775 invasion of Canada to prevent American troops from showing any disrespect for Roman Catholicism during the expedition, directing Arnold "to avoid all Disrespect to or Contempt for the Religion of the Country and its Ceremonies":

> As the Contempt of the Religion of a Country by ridiculing any of its Ceremonies or affronting its Ministers or Votaries had ever been deeply resented, you are to be particularly careful to restrain every Officer and Soldier from such Imprudence and Folly and to punish every instance of it.[6]

Later, early in his Presidency, Washington reaffirmed the values of religious pluralism and toleration and expressed his disapproval of religious conflict when he responded to twenty-nine congratulatory letters sent by various religious bodies. As he replied to a group of clergy from Philadelphia, he "view[ed] with unspeakable pleasure, that harmony and brotherly love which characterize the Clergy of different denominations."[7] Thus Washington, among other Founders, appreciated the threat to political stability presented by religious divisiveness. "Reli-

---

[6] Paul F. Boller, Jr., *George Washington and Religion* 124-126 (1963).

[7] Washington's responses are contained in the Appendix to Boller, *George Washington and Religion*.

gious controversies are always productive of more acrimony and irreconcilable hatreds than those which spring from any other cause," he wrote a friend in 1792. He believed that each individual deserved to be treated as an equal member of society and that "every man, conducting himself as a good citizen * * * ought to be protected in worshiping the Deity according to the dictates of his own conscience."[8]

Madison also wrote extensively about the value of religious pluralism. In his *Memorial and Remonstrance*, he emphasized that all people were entitled to "an equal title to the free exercise of Religion according to the dictates of Conscience." In that document and in the *Federalist*, he warned about the tendency of religious majorities to impose their will on religious minorities. See The Federalist No. 51 (James Madison). Later in life, Madison criticized presidential proclamations concerning religion as being religiously exclusive and inconsistent with the Nation's respect for pluralism. "In a nation composed of various sects, some alienated widely from others, and where no agreement could take place through the [practice of Christian proclamations], the interposition of the [majority] is doubly wrong."[9] Madison likewise believed that the government lacked jurisdiction or "agency" to use religion for its own purposes. Religious proclamations "impl[ied] a religious

---

[8] Michael I. Meyerson, *Endowed by Our Creator: The Birth of Religious Freedom in America* 187, 252-252 (2012); Reply to the United Baptist Churches in Virginia, May 1789, in Boller, *George Washington and Religion*, 170.

[9] Elizabeth Fleet, "Madison's 'Detached Memoranda," 4 *William and Mary Quarterly* 534-568 (1946).

agency," he wrote, which was "no part of the trust delegated to political rulers."[10]

B. The Founders believed that any governmental use of religious language or imagery should be inclusive and nonsectarian.

Coming out of an era that had been marked by religious strife, and therefore favoring religious inclusion and pluralism, the Founders were careful to ensure that government use of religious language would unite, not divide. They recognized the complicated relationship between religion and government, and the concomitant need to limit the uses of language so as not to alienate religious minorities or offend the principle of religious inclusion. Accordingly, they would have been highly skeptical of any governmental use of overtly religious symbolism[11] and were careful to employ general, nonsectarian language when they referred to religion in their documents and declarations.

The Nation's founding documents show a keen interest in avoiding sectarian religious language, including by omitting references to Christ and other Christian figures. The Declaration of Independence

---

[10] *Id.* at 560.

[11] Evidence of the official use of religious symbols during the Founding period is very limited. The Continental Congress never adopted Thomas Jefferson's and Benjamin Franklin's recommendation of a scene from Exodus for the Nation's Great Seal; the image of the "all seeing eye" in the Seal is an ancient symbol that predates Christianity and would likely have been recognized by members of the founding generation as a Masonic symbol. See Douglas Keister, *Stories In Stone: A Field Guide to Cemetery Symbolism and Iconography* 191 (2004).

and Constitution both eschew references to the Christian religion. The use of inclusive religious language can be seen in the Declaration of Independence's immortal phrase, "they are endowed by their Creator, with certain unalienable rights." This language rejects affiliation with particular religious sects, and can be seen to reflect an Enlightenment-influenced rationalist view of the relationship between God and political society. The Constitution goes even further by entirely failing to reference a diety, and then by prohibiting any religious test for federal office-holding, a clear affirmation of religious pluralism. This was a deliberate choice made by the Framers, which was opposed at the Convention by Luther Martin and a handful of others.[12]

At the state level, the documents crafted by Jefferson and Madison—whose views are central to an understanding of the Establishment Clause—show a similar sensitivity to religious inclusion and resistance to the use of sectarian language. Jefferson's original draft of the Virginia Statute for Establishing Religious Freedom, a state precursor to the federal Establishment Clause, declared in its Preamble that "Almighty God hath created the mind free" and that governmental penalties for religious beliefs "are a departure from the plan of the holy author of our religion." A proposal to change the sentence to read "a departure from the plan of Jesus Christ, the holy author of our religion,"[13] was rejected by the legisla-

---

[12] See Luther Martin, "Genuine Information," in *Founders' Constitution*, vol. 4, document 18.

[13] Jefferson, "Autobiography," in *Founders' Constitution*, vol. 5, document 45.

ture. Both Madison and Jefferson perceived a fundamental difference between the original language and the proposed amendment: the original language was universal, but the amendment was exclusionary, particularly of non-Christians. Madison believed that the phrase "Jesus Christ, the holy author of our religion" would "imply a restriction of the liberty defined in the Bill, to those professing his religion only."[14] And Jefferson wrote that the legislature's decision to omit that phrase from the final statute demonstrated an intent "to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination."[15]

More generally, and even outside of official documents, the Founders were careful to avoid aligning the new Nation with a particular religious sect. With the exception of John Adams, those who became President carefully chose their language so as to limit references to any particular religion, including Christianity in general. The Founders thus "strove to find a civil vocabulary that could encompass all people, regardless of their faith."[16]

As President, George Washington was scrupulous in his use of only general religious language and studiously avoided all sectarian terms, including distinct Christian references; his First Inaugural Address established a practice of government officials

---

[14] "Madison's Detached Memoranda," 554–60.

[15] Jefferson, "Autobiography," in *Founders' Constitution*, vol. 5, document 45.

[16] Michael I. Meyerson, *Endowed by Our Creator: The Birth of Religious Freedom in America* 12 (2012).

using only inclusive religious language. An early draft of the address, written by Washington's secretary David Humphreys, was rejected and completely rewritten by Madison. Humphreys had wanted Washington to use explicitly Christian language, referring to "the blessed Religion revealed in the word of God,"[17] but the final address, which contains much religious imagery, includes nothing that is uniquely Christian. Instead, Washington used inclusive language, stating that it would be "peculiarly improper to omit in this first official Act, my fervent supplications to that Almighty Being who rules over the Universe."[18]

When Washington issued his Thanksgiving Day proclamation on October 3, 1789, he again avoided denominational language but continued his practice of employing inclusive religious references. He spoke of "the providence of Almighty God" and recommended that people "offer[] our prayers and supplications to the great Lord and Ruler of Nations." He used an almost identical phrase in his proclamation on January 1, 1795, inviting people to "render their sincere and hearty thanks to the Great Ruler of Nations."[19]

Jefferson and Madison continued Washington's precedent by using religious language only in the most inclusive manner, with the former referring to "an overriding Providence" in his First Inaugural

---

[17] H. Adams, *Life and Writings of Sparks* 2:211.

[18] "Compilation of the Messages and Papers of the Presidents" (James D. Richardson, ed. 1897) 1:44.

[19] *Papers of George Washington: Presidential Series* (W.W. Abott et al. eds.), "Thanksgiving Proclamation," Oct. 3, 1789, 4:131-32.

Address, and Madison mentioning "the guardianship and guidance of that Almighty Being" in his First Inaugural Address. As is famously known, Jefferson refused to issue any religious proclamations as president. During his tenure, Madison issued four proclamations for prayer and humiliation—all during the War of 1812—but again employed nonsectarian language in each: "Almighty God," "Sovereign of the Universe," "Almighty Power," "Great Parent," "Holy and Omniscient Being," "Great Disposer of Events," and "Divine Author." As Madison communicated in a letter upon leaving office, "I was always careful to make the Proclamations absolutely indiscriminate."[20]

Among the Presidents of the founding generation, only John Adams deviated from this tradition, employing Christian-specific language in his Inaugural Address and in two presidential proclamations—and he came to regret having done so. In his first proclamation in 1798, Adams urged people to "acknowledge before God the[ir] manifold sins and transgressions * * * beseeching him * * * through the Redeemer of the world, freely to remit all of our offenses."[21] (Without mentioning Adams by name, Madison later criticized this "deviation from the strict principle in the Executive Proclamations of fasts and festivals" for having "lost sight of the equality of all religious sects in the eye of the Constitution.") After losing to Thomas Jefferson in the 1800 presidential election, Adams blamed his defeat on his

---

[20] Madison to Edward Livingston, July 10, 1822, in *Founders' Constitution*, vol. 5, document 66.

[21] Proclamation for a National Fast, March 23, 1798, in *Works of John Adams* (Charles Francis Adams ed.) (1854), 9:169-170.

religious proclamations, telling Benjamin Rush that "[t]he National Fast recommended by me turned me out of office." Too late to salvage his political career, Adams concluded: "Nothing is more dreaded than the National Government meddling with Religion."[22]

II. The Latin Cross Is A Profoundly Religious Christian Symbol.

Against this background, petitioners and the United States defend the display of a 40-foot tall Latin cross that is maintained by the state on public land. Of key importance here, this "Memorial Cross" cannot be regarded as a general and universal invocation of "God" or as a nondenominational "recogni[tion of] '[r]eligion, morality, and knowledge'" (U.S. Br. 20 (citation omitted)): the Latin cross, the preeminent symbol of Christianity, is perhaps the most recognizably sectarian religious symbol familiar to our society. The Framers of the Establishment Clause would have regarded such a sectarian display as inconsistent with the Constitution's commitment to pluralism and religious inclusion.

"From its earliest times, Christianity was distinguished as being *religio crucis*—the religion of the cross." The cross represents "a central object of Christian faith: the passion of Jesus, symbolized and epitomized by his death on the cross."[23] As a result,

---

[22] Madison to Edward Livingston; John Adams to Benjamin Rush, June 12, 1812, in *The Sacred Rights of Conscience*, ed. Daniel L. Dreisbach and Mark David Hall (Indianapolis: Liberty Fund, 2009), 518-519.

[23] Richard Viladesau, *The Beauty of the Cross: The Passion of Christ in Theology and the Arts, from the Catacombs to the Eve of the Renaissance* 7 (2006).

no "symbol [is] more closely associated with a religion than the cross is with Christianity."[24] Courts have uniformly, and properly, reached the unsurprising conclusion that the cross is a sacred Christian symbol with great religious significance. The cross "represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity." *Ellis* v. *City of La Mesa,* 990 F.2d 1518, 1525 (9th Cir. 1993).[25]

The Latin cross is not simply a religious symbol; it is a sectarian symbol associated with particular branches of Christianity. Through the mid-nineteenth century in the United States, only Catholic churches were adorned with crosses, either crucifixes or Latin crosses. Protestant churches generally did not display crosses, as Protestants associated such adornment with Catholicism. Over time, to be sure, Protestant use of the Latin cross on and inside buildings became more common, though Protestants declined to adopt the crucifix out of a belief that it

---

[24] Douglas Keister, *Stories In Stone: A Field Guide to Cemetery Symbolism and Iconography* 172 (2004).

[25] See*, e.g., Gonzales* v. *North Twp.,* 4 F.3d 1412, 1418 (7th Cir. 1993); *Harris* v. *City of Zion,* 927 F.2d 1401, 1403 (7th Cir. 1991); *Friedman* v. *Board of Cty. Comm'rs,* 781 F.2d 777, 781 n.3 (10th Cir. 1985); *ACLU of Ga.* v. *Rabun Cty. Chamber of Commerce, Inc.,* 698 F.2d 1098, 1110 (11th Cir. 1983); *ACLU* v. *City of Stow,* 29 F. Supp. 2d 845, 852 (N.D. Ohio 1998); *Mendelson* v. *City of St. Cloud,* 719 F. Supp. 1065, 1069 (M.D. Fla. 1989); *ACLU of Miss.* v. *Mississippi State Gen. Servs. Admin.,* 652 F. Supp. 380, 382 (S.D. Miss. 1987); *Libin* v. *Town of Greenwich,* 625 F. Supp. 393, 398 (D. Conn. 1985); *Greater Houston Chapter of ACLU* v. *Eckels,* 589 F. Supp. 222, 234 (S.D. Tex. 1984).

failed to signify Jesus' resurrection.[26] But even then, the Latin cross is particular to Western Christianity; Orthodox Christians of Eastern Rite denominations—Russian Orthodox, Ukrainian Orthodox, Greek Orthodox, Serbian Orthodox—employ crosses with multiple crossbeams. Other variations include the Greek cross, the Celtic cross, the St. Andrew's Cross, and the Maltese cross, to name only some.[27] As a result, the Latin cross is not a universal religious symbol or universal even within Christianity. For the millions of non-Catholic and non-Protestant Americans—Orthodox, Unitarian/Universalists, Jews, Muslims, Hindus, Buddhists, Sikhs—the cross is a sectarian symbol that excludes them.

Although the Latin cross can serve as a symbol of death and memorialization, it holds value as a symbol of death and resurrection only *because* of its association with the crucifixion of Jesus Christ.[28] The religious significance of placing a cross at a burial site therefore is undeniable. A cross on a grave symbolizes not only the deceased individual's sacrifice but also his or her religious beliefs.[29]

Like religious markers at gravesites placed according to individual religious beliefs and decisions,

---

[26] Ryan K. Smith, *Gothic Arches, Latin Crosses: Anti-Catholicism and American Church Designs of the Nineteenth Century* 51-82 (2006).

[27] George Willard Benson, *The Cross: Its History and Symbolism* 11-16 (1976), 11-16, 61; F. R. Webber, *Church Symbolism* 99-132 (1938) (detailing that there are approximately fifty varieties of the cross used throughout Christendom).

[28] Viladesau, *The Beauty of the Cross*, 20-22.

[29] Keister, *Stories In Stone*, 143, 172-179.

a cross at a memorial site that commemorates the deaths of those who gave their lives in war is religious in meaning. But unlike religious markers at gravesites that are associated only with the deceased, a freestanding Latin cross at a memorial site transmits more than an individualized message. It is a collective association of death and sacrifice with one particular religious belief, to the exclusion of other beliefs. All of those who sacrificed their lives are now associated with one particular religious symbol, the Latin cross, regardless of whether they were Protestant or Catholic, of some other Christian tradition, of some non-Christian faith tradition, or held no faith at all. A Latin cross on government property therefore is not religiously inclusive, and its display does not respect the Nation's religious pluralism as the Founders would have desired.

III. The Analytical Test Proposed By Petitioners And Their *Amici* For Reviewing Government Religious Symbolism Is Inconsistent With The Founders' Views About Religious Pluralism.

In nevertheless defending the Memorial Cross, the American Legion petitioners and their *amici* urge the Court to abandon the analytical legal standards that it has applied for more than fifty years (*i.e.*, the "Lemon" and "Endorsement" tests) and, in their place, adopt a test that asks whether the plaintiffs were coerced in their religious beliefs. See Pet. American Legion Br. 16-51; U.S. Br. 15-25. The undersigned *amic*i, historians and legal scholars who have extensively studied the origin and purposes of the First Amendment religion clauses, urge the Court to reject this request as inconsistent with the

Founders' greater goal that the religion clauses enhance religious pluralism. Petitioners' proposed coercion test would frustrate that goal.

A. A coercion test does not adequately address the broader purposes of the Establishment Clause.

Petitioners and their *amici* argue at length that people of the Founding period agreed that "'compulsion' was regarded as 'the essence of an establishment' when the First Amendment was ratified." U.S. Br. 19. The undersigned *amici* agree that preventing government compulsion with respect to religious matters—*e.g.*, protecting rights of conscience and the free exercise thereof—was *a* central impulse to disestablishing religion between 1776 and 1833. In 1774, James Madison witnessed first-hand the imprisonment of Baptist preachers in Virginia for their conscientious refusal to obtain licenses to preach and operate meetinghouses. Throughout New England, during the colonial period and into the nineteenth century, religious dissenters were imprisoned and faced distraint of property for failing to secure licenses or pay assessments that supported the majority denomination (Congregationalism).[30] It should therefore not be surprising that many of the concerns expressed in Jefferson's *Notes on Virginia*, his *Bill for Establishing Religious Freedom*, and Madison's

[30] Thomas E. Buckley, *Church and State in Revolutionary Virginia, 1776-1787*, at 8-37 (1977); William G. McLoughlin, *New England Dissent, 1630-1833,* at 2: 789-1185 (1971).

Memorial and Remonstrance related to the evils of religious compulsion.[31]

Religious compulsion (at least in the sense of imposing affirmative penalties on nonbelievers), however, was not the only indicium of religious establishments or the only evil that the Founders sought to address through disestablishment. One common aspect of the Anglican establishment involved religious preferences. Under the British Test and Corporations Acts, only communicants in the Church of England could hold public office or matriculate to Oxford and Cambridge universities, a practice condemned by leading Whig writers Joseph Priestly and James Burgh. All the American colonies imposed similar religious preferences for public office-holding, a practice that leading members of the founding generation increasingly decried.[32]

---

[31] See *Notes on Virginia* ("What has been the effect of coercion? To make one half the world fools, and the other half hypocrites."), http://notes.scholarslab.org/milestones/religion.html; Bill for Establishing Religious Freedom ("That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical"), in *Founders' Constitution*, vol. 5, document 37; Memorial and Remonstrance ¶ 8 (religious establishments "have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny."), in *Founders' Constitution*, vol. 5, document 43.

[32] See Benjamin Franklin to Richard Price, Oct. 9, 1780, in *Founders' Constitution*, vol. 4, document 5; Trench Coxe, "An Examination of the Constitution" (1787), *id*., vol. 4, document 12; Daniel L. Dreisbach, "The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban," 38 *Journal of Church and State* (1996): 261-295.

Moreover, in the southern colonies with Anglican establishments, only established clergy could perform certain quasi-legal functions such as baptisms, marriages, and funerals, or supervise guardianships and estates. This preferential status of Anglican clergy was a source of discord among Presbyterians and Baptists, leading them to support disestablishment.[33] And in New York, the chief controversy that led to disestablishment in 1777 involved efforts by the Church of England to seize control of Kings College (now, Columbia University) by excluding participation by Presbyterians and Dutch Reformed. Lawyer William Livingston, through his *Independent Reflector*, charged that unless the college's charter "will admit Persons of all protestant Denominations, upon a perfect Parity as to Privileges, it will itself be greatly prejudiced, and prove a Nursery of Animosity, Dissension and Disorder." Consequently, religious favoritism, even when it did not impose affirmative obligations and establish directly coercive practices, was anathema for many people of the Founding generation.[34] And surely, petitioners and the Solicitor General agree that state action of this sort is inconsistent with the Establishment Clause—even though it does not "require[e] religious observance or support, sanction[] nonadherence, or control[] the inner workings of the church." U.S. Br. 15.

---

[33] Curry, *The First Freedoms*, 104-133; Rhys Isaac, *The Transformation of Virginia, 1740-1790*, at 146-157 (1982).

[34] Patricia U. Bonomi, *Under the Cope of Heaven: Religion, Society, and Politics in Colonial America* 177-180 (1986); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. Rev. 1385, 1477-1480 (2004).

Similarly, the writings of Jefferson and Madison reveal concerns about matters other than coercion. Writing in his Bill for Establishing Religious Freedom, Jefferson decried "all attempts to influence" religious opinions by civil officials. Later, in explaining his refusal to issue religious proclamations that carried no compulsive element, Jefferson wrote that he did "not believe that it [was] for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines."[35] Madison's concerns also extended beyond preventing religious coercion; he argued that civil magistrates were incompetent to judge religious truth, and that for them to "employ Religion as an engine of civil policy" was "an arrogant pretention" and "an unhallowed perversion of the means of salvation." Madison instead called for a regime of "equal conditions" in which there would be no religious preferences.[36] Writing later in life in his *Detached Memoranda*, Madison condemned the practice of presidential religious proclamations, even those that did not carry any element of compulsion. Such practices had the "tendency * * * to narrow the recommendations to the standard of the predominant sect," thus leaving minority sects "alienated widely from others."[37]

Finally, as addressed above, Jefferson and Madison considered the government's mere exercise of authority in religious matters to be a violation of natu-

---

[35] Bill for Establishing Religious Freedom; Jefferson to Samuel Miller, Jan. 23, 1808, in *The Works of Thomas Jefferson* 11: 7-9 (Paul Leicester Ford ed. 1904-1905).

[36] *Memorial and Remonstrance*, ¶¶ 4, 5.

[37] Detached Memoranda.

ral rights and something to be prevented even in the absence of any element of compulsion. As Jefferson wrote, "the opinions of men are not the object of civil government, nor under its jurisdiction." And Madison declared that religion was "exempt from the authority" of government, also insisting that civil magistrates lacked "jurisdiction" over religious matters.[38] Madison made the same point in his *Detached Memoranda* regarding presidential religious proclamations: "Although recommendations only, they imply a religious agency, making no part of the trust delegated to political rulers."[39] In this context, it is not correct to suggest that Madison's concerns were limited to preventing "compelled religious belief or adherence." U.S. Br. 16.

The Solicitor General recognizes that Madison was "the leading architect of the religion clauses of the First Amendment." U.S. Br. 18 (citing *Hosanna-Tabor Evangelical Lutheran Church* v. *EEOC*, 565 U.S. 171, 184 (2012)). The undersigned *amici* heartily agree, but urge the Court to consider the full record of Madison (and Jefferson) to appreciate the breath of their understanding about the values protected by disestablishment. An analytical test that concentrates solely on religious coercion or compulsion would not address these additional concerns that informed disestablishment.

And consider the practices that would be permissible under a coercion test, as it is articulated by the American Legion petitioners and the Solicitor General. Imagine that the U.S. government annually

---

[38] Notes on Virginia; Memorial and Remonstrance, ¶ 2.

[39] Detached Memoranda.

sent a letter to everyone in the country respectfully urging the recipients to join the Lutheran church; or that the President directed that a Latin cross be prominently displayed in every U.S. government building; or that Congress required every federal judge to open each session of court with the statement: "We acknowledge the sacrifice of Jesus Christ on the cross. We draw strength from his resurrection. Blessed are you who has raised up the Lord Jesus."[40] In none of these cases "are observers being made to espouse religious belief, to engage in religious observance, or to provide financial support targeted to any particular religion," and all therefore would pass the proposed coercion test. U.S. Br. 21. But all of these acts would run profoundly counter to the Framers' model of religious inclusion and pluralism.

B. A coercion test is unworkable because there is no consensus on the meaning of coercion.

1. Moreover, coercion is an inadequate test for evaluating Establishment Clause wrongs because there has never been a consensus on the meaning of compulsion in this context—as is evident from this Court's own decisions. Compare *Lee* v. *Weisman*, 505 U.S. 577, 593-596 (1992), with *id.* at 637-644 (Scalia, J., dissenting). No agreement existed at the time of the Founding, either. Apologists for the forced assessment systems in New England, for example, insisted that their arrangements did not coerce the religious beliefs of dissenters. Defending the Connecticut establishment in 1795, jurist Zephaniah Swift

---

[40] *Town of Greece* v. *Galloway*, No. 12-696, Arg. Tr. 3-4 (Kagan, J.).

wrote that "[e]very Christian may believe, worship, and support in such manner as he thinks right, and if he does not feel disposed to join public worship he may stay at home as he pleases without any inconvenience but the payment of his taxes to support public worship in the located society where he lives. * * * In point of principle there is no coercion."[41]

Expressing a similar view of coercion, New Hampshire Chief Justice Jedediah Smith declared in an 1803 decision:

> A religious establishment is where the State prescribes a formulary of faith and worship for the rule and government of all the subjects. Here the State do [*sic*] neither. It is left to each town and parish, not to prescribe rules of faith or doctrine for the members of the corporation but barely to elect a teacher of religion and morality for the society, who is to be maintained at the expense of the whole. * * *
>
> [I]t is true an individual member of the corporation would sometimes be compelled to pay towards the support of a teacher of a different denomination from his own, but still the conscience would be left free. He need not believe as the teacher or the majority believe. * * * His conscience is free, his civil rights unimpaired. * * * It is his misfortune that * * * he happens to be in the minority.[42]

---

[41] Zephaniah Swift, *System of the Laws in Connecticut* 1:146 (1795).

[42] *Muzzy* v. *Wilkins*, 1 Smith's (N.H.) 1, 12-13 (1803).

For both Swift and Smith, this form of religious compulsion was not constitutionally infirm; they defined coercion from the perspective of the imposer, rather than from that of the compelled. Baptists, Universalists, and other dissenters clearly disagreed with these assessments. Use of a coercion test therefore would require the Court to develop a novel and ahistorical standard that would invite inconsistent application and leave unsettled precisely what sorts of government action are impermissible—the very evils that petitioners say they want to avoid.

2. Perhaps anticipating some of these problems, petitioners' *amicus* Becket Fund for Religious Liberty advances a test that looks to "historic characteristics" of an established religion. Becket Fund Br. 4. As noted above, we fully agree that the constitutional history bears strongly on the proper resolution of Establishment Clause questions (indeed, for the reasons we have explained, we believe that the Framers' insistence on inclusion and pluralism largely resolves this case). But the Beckett Fund is incorrect in suggesting that history offers a mechanical test "that is not hard to apply" and that provides easily derived answers in every such case. *Ibid.*

For one thing, many of the current constitutional issues arising under the First Amendment would have been inconceivable to members of the founding generation: consider, to name just a few such issues, internet pornography, violent video games, and animal "crush" videos. So too, the Establishment Clause was written decades before the development of the Nation's public education system and at least a century before the rise of the modern welfare state. How does a historical practices test address Bible reading

in public schools, public vouchers for religious schooling, or federal grants to religious social service agencies to conduct family planning services?[43] The Becket Fund suggests that all we need do to resolve such issues is decide "whether the government's actions share the historic characteristics of an 'establishment of religion' at the time of the founding" (*ibid.*), but answering that question often will require a court to make indeterminate and highly debatable judgments that measure eighteenth century apples against twenty-first century oranges.

There is, moreover, reason to doubt the validity of the template that the Becket Fund would use as the basis for the development of historical analogies, even on its own terms. Pointing to law review articles, the Becket Fund reports that colonial-era establishments of religion "shared six common characteristics" against which modern governmental acts may be measured. Becket Fund Br. 14; see *id.* at 4. But notwithstanding the seeming precision of this contention, there is in fact no consensus among modern-day scholars as to the historical meaning of disestablishment, as is evidenced by the plethora of scholarly and popular works on church and state.

This divergence of views is not surprising: on many points,

> the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. The ambiguity of history is understandable if we recall

---

[43] See generally *Abington Twp. Sch. Dist.* v. *Schempp*, 374 U.S. 203 (1963); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002); *Bowen* v. *Kendrick*, 487 U.S. 589 (1988).

> the nature of the problems uppermost in the thinking of the statesmen who fashioned the religious guarantees; they were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed.

Abington Twp. Sch. Dist. v. *Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring). (In this regard, we note that all six elements of the Becket Fund test would permit the hypothetical government actions outlined above: government letters urging the recipients to join the Lutheran church; display of the Latin cross in every U.S. government building; and the opening of court with an invocation of Jesus Christ's sacrifice.)

Of course, this does not mean that historical events have no bearing on issues like the one in this case; they can inform and illuminate the answers to constitutional questions. As Philip Kurland once commented, history "should provide the perimeters within which the choice of meaning may be made."[44] But a one-size-fits-all "historical practices" test—especially one that takes no account of the Framers' demand for inclusion and religious pluralism—often will not provide the right answers to the novel and complex Establishment Clause questions that will arise in the years to come.

CONCLUSION

The decision of the court of appeals should be affirmed.

---

[44] Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm & Mary L. Rev. 839, 842 (1986).

Respectfully submitted.

STEVEN K. GREEN
Willamette University
900 State Street, S.E.
Salem, Oregon 97301

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld
@mayerbrown.com

Counsel for Amici Curiae

JANUARY 2019