

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

THE AMERICAN LEGION, ET AL.,)
 Petitioners,)
 v.) No. 17-1717
AMERICAN HUMANIST ASSOCIATION,)
ET AL.,)
 Respondents.)
 and)
MARYLAND-NATIONAL CAPITAL PARK)
AND PLANNING COMMISSION,)
 Petitioner,)
 v.) No. 18-18
AMERICAN HUMANIST ASSOCIATION,)
ET AL.,)
 Respondents.)

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15 ET AL.,)

16 Respondents.)

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18

19 Washington, D.C.

20 Wednesday, February 27, 2019

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22 The above-entitled matter came on for

23 oral argument before the Supreme Court of the

24 United States at 10:21 a.m.

25

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11 on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:21 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 17-1717, the
5 American Legion versus the American Humanist
6 Association, and Number 18-18, the consolidated
7 case, Maryland-National Capital Park and
8 Planning Commission versus the American
9 Humanist Association.

10 Mr. Katyal.

11 ORAL ARGUMENT OF NEAL K. KATYAL
12 ON BEHALF OF THE PETITIONER IN CASE NO. 18-18

13 MR. KATYAL: Thank you, Mr. Chief
14 Justice, and may it please the Court:

15 There are four important facts about
16 the memorial at issue, the Peace Cross, that
17 explain why it should not be dismembered or
18 destroyed.

19 First, families and the Legion built
20 it 93 years ago to commemorate 49 brave souls
21 who gave their lives in World War I, and it has
22 stood for -- since that time without challenge.

23 Second, it's no ordinary cross. At
24 its center, in its heart, is the American
25 Legion symbol. It's gigantic. And at the base

1 in four capital -- huge capital letters are
2 words: Valor, Endurance, Courage, Devotion.

3 Third, not a single word of religious
4 content appears anywhere; rather, the base has
5 a nine-foot plaque listing the 49 names with an
6 inscription to them.

7 And, fourth, the monument is situated
8 in Veterans Memorial Park alongside other war
9 memorials.

10 JUSTICE SOTOMAYOR: Do you know how
11 many other parks are like this one? I've
12 looked at pictures, and this is an unusual park
13 because there's major highways dividing it up.
14 It's almost as if the city artificially
15 designed an area that's huge to encompass other
16 plaques and declared it a park, but you can't
17 really tell that this cross is with anything
18 else. There's three or four -- six-lane
19 highway on one side. There's another highway
20 on the other. I'm told you can't even get off
21 the highways to walk to this cross. So --

22 MR. KATYAL: Oh, no, you actually can.
23 I've done it. There's parking and so on. So I
24 -- I disagree with that representation.

25 Veterans Memorial Park has been there

1 for a long time, the record shows at least
2 since 1983. So this isn't like McCreary, in
3 which there's some pretextual stuff added
4 later --

5 JUSTICE SOTOMAYOR: All right.

6 MR. KATYAL: -- Justice Sotomayor.

7 JUSTICE SOTOMAYOR: And you said
8 "dismember or destroy." You can move it.

9 MR. KATYAL: You could --

10 JUSTICE SOTOMAYOR: You could transfer
11 the land to private entities, correct?

12 MR. KATYAL: Well, you could -- those
13 -- those would be hypothetically possible, but
14 the record shows that both --

15 JUSTICE SOTOMAYOR: So is destruction
16 and -- and anything else.

17 MR. KATYAL: Well -- well, Justice
18 Sotomayor, the record -- this is at Court of
19 Appeals Joint -- Joint Appendix 623 and 1585 --
20 say if you move it, because of the cracks in
21 this cross, it very well may be destroyed. And
22 as far --

23 JUSTICE SOTOMAYOR: Then give it back
24 to the Legion.

25 MR. KATYAL: And give it back to the

1 Legion, as our -- as our petition reply brief
2 at page 12 points out, they have an e-mail in
3 this case saying they know that Maryland can't
4 do that because of the traffic concerns. They
5 can't give it to a private entity. The
6 Maryland brief before this Court also makes the
7 same claim.

8 JUSTICE SOTOMAYOR: They could -- they
9 could speak to that. But putting that aside,
10 are you relying on the fact that -- at all,
11 that -- at least one brief claims that all 49
12 soldiers named on this plaque or for whom this
13 plaque were, were Christian?

14 MR. KATYAL: Not at all, Your Honor.
15 We think this memorial, from start to finish,
16 has been about honoring those 49, plus all
17 World War I veterans.

18 JUSTICE SOTOMAYOR: Is it -- are you
19 just grandfathering this, or are you claiming
20 that today, let's say, for the Vietnam War,
21 that any government, local or state, could
22 build a cross 40 feet high, not put any emblem
23 on or some sectarian emblem, and say we are
24 dedicating this to all the soldiers who have
25 died in the Vietnam War?

1 MR. KATYAL: So we're not at all
2 saying that, grandfathering or anything like
3 that. This case, because of its 93-year
4 tradition, is an easy one and for reasons
5 Justice Breyer said in Van Orden --

6 JUSTICE SOTOMAYOR: No, no, but answer
7 my question. What is the tradition? Is the
8 tradition that, in World War II, a cross was
9 used, or is the tradition that the government
10 can put up sectarian symbols like crosses or a
11 picture of Jesus Christ in honor of anyone
12 because that's within the nation's tradition?

13 MR. KATYAL: So, Justice Sotomayor,
14 I'll make two different arguments. One is with
15 respect to this cross, which has stood for 93
16 years, 86 of them without challenge, and for
17 reasons Justice Breyer's opinion in Van Orden
18 said -- and the Buono plurality -- that would
19 make this cross constitutional.

20 Now your question is, well, what about
21 this tradition of crosses in general? And it's
22 true we have a second argument about Town of
23 Greece, which says that, if there is a long
24 tradition of the type of displays, that would
25 make it constitutional.

1 Notably, however, it doesn't make your
2 hypothetical constitutional. Your
3 hypothetical's actually a real case. Lake
4 County, the Seventh Circuit case in 1993, is a
5 huge cross with Jesus Christ nailed in the
6 center of it, in a public park. It's been
7 there since 1955. And it was protested right
8 then. And the Seventh Circuit said that is
9 unconstitutional. And we agree.

10 JUSTICE KAGAN: What would happen if
11 all the facts that you gave were the same,
12 except for the 93 years? In other words, a
13 community decides, for whatever reason, we
14 don't have a World War I memorial; we want to
15 put up exactly this to memorialize the -- the
16 -- the war dead from -- from World War I, but
17 now.

18 MR. KATYAL: Right. So, if it's a war
19 memorial, we do think that it would be
20 constitutional. We think that there might be
21 some skepticism. You'd just want to make sure
22 that it wasn't a pretext and it didn't look
23 like that cross as I was describing about Lake
24 County. But, if it was a cross like this one,
25 same facts, Justice Kagan, we do think that

1 would be constitutional.

2 JUSTICE KAGAN: And -- and does that
3 answer apply not just to memorials for World
4 War I soldiers but to memorials for soldiers
5 from any armed conflict?

6 MR. KATYAL: Well, I think that -- I
7 think that it probably would, that there's a
8 tradition of using these crosses with respect
9 to any conflict, but it would have to look like
10 this one.

11 JUSTICE GINSBURG: Mr. Katyal, what
12 about, not a World -- World War or any war
13 memorial, but a memorial to a tragic event,
14 let's say, a mass shooting at a school?

15 Could the local community then decide
16 it wants to put up a cross in front of that
17 school to honor the children and the teachers
18 who died in the mass shooting?

19 MR. KATYAL: Well, I think the test,
20 Justice Ginsburg, would be whether there is a
21 independent secular purpose. So take a real
22 case, like the one that came out of the World
23 Trade Centers, the Second Circuit case from
24 2014, where two steel beams were discovered in
25 the rubble, and they were put up in the shape

1 -- they were put up in the shape of a cross.

2 Now, if that were in a public park, I
3 think that that would be permissible because it
4 has independent historic value and independent
5 secular value, showing values of resilience and
6 courage.

7 JUSTICE GINSBURG: My -- my example
8 was nothing that was found in the rubble. It's
9 just the local community decides it wants to
10 honor the dead in this terrible tragedy.

11 MR. KATYAL: Right. The test would be
12 whether or not there's an independent secular
13 purpose. I don't think you could probably
14 harken back to the same tradition that you
15 could with respect to, for example, these World
16 War I crosses, Fields of Flanders --

17 JUSTICE GINSBURG: The purpose -- the
18 purpose is to honor those who died in the
19 tragedy.

20 MR. KATYAL: Yes.

21 JUSTICE GINSBURG: So -- so, no, could
22 you --

23 MR. KATYAL: I don't think purpose is
24 what this Court's decisions turn on. Van
25 Orden, the Buono plurality say that it's --

1 CHIEF JUSTICE ROBERTS: Well, I'm
2 sorry, but I --

3 MR. KATYAL: -- objective meaning.

4 CHIEF JUSTICE ROBERTS: -- I thought
5 you just said that the test is whether there's
6 a secular purpose.

7 MR. KATYAL: I meant objective
8 meaning, I'm sorry, Mr. Chief Justice. The
9 test is, as -- as your opinion that you joined
10 in *Buono* said, what is the objective meaning of
11 this display? Now sometimes purpose is
12 relevant to that, and the Court has looked to
13 it, but the test is always that.

14 JUSTICE SOTOMAYOR: Well, but that --

15 JUSTICE GINSBURG: So it would be okay
16 then -- it would be okay to put up in front of
17 the public school --

18 MR. KATYAL: Well, I think we'd need
19 to know more about the facts of that particular
20 hypothetical.

21 JUSTICE KAGAN: Well, here are some
22 facts, Mr. Katyal, from that hypothetical. And
23 you can understand how something like this can
24 come about, that people want to memorialize the
25 dead, and in one religious tradition, and a

1 dominant one in many, many communities of this
2 country, the preeminent symbol to memorialize
3 the dead is the Latin cross. And -- and so
4 they gravitate toward that symbol as a way to
5 memorialize the dead.

6 But, at the same time, for members of
7 other faiths, that symbol is not a way to
8 memorialize the dead and does not have that
9 meaning.

10 So I think that the question that
11 Justice Ginsburg is asking, you know, for many
12 people, this is a very natural way to do
13 exactly what they want to do. For others, not.

14 MR. KATYAL: And, Justice Kagan, if it
15 does have the same hallmarks as this type of
16 cross, we think that that would be permissible,
17 that is -- and I think that's a natural
18 consequence of what this Court's already said
19 in *Buono* in the plurality and the *Van Orden*
20 opinion.

21 CHIEF JUSTICE ROBERTS: I thought -- I
22 read your brief to put a lot of weight on the
23 fact that the cross here has more than a
24 sectarian meaning, because, as your history
25 sets forth, the cross was a symbol throughout

1 the battlefields in World War I.

2 Now I'm wondering why that doesn't
3 limit your argument in -- so that, in such a
4 case, as Justice Kagan hypothesized, you would
5 not accept that?

6 MR. KATYAL: Mr. Chief Justice, we
7 certainly agree that all of that tradition, the
8 Fields of Flanders and stuff, make this a very
9 easy case. And we don't think you need to go
10 further than that.

11 JUSTICE GINSBURG: In the Field of
12 Flanders, are all of the graves marked by
13 crosses? Are there not graves marked by Stars
14 of David?

15 MR. KATYAL: There certainly are some.
16 But I think the dominant image of the time,
17 everything from that poem to art, to the war
18 bond advertisements that the United States
19 Government put, to the 1924 congressional
20 resolution, all did use this cross.

21 And that's why we agree, Justice
22 Ginsburg --

23 JUSTICE GINSBURG: But I visited some
24 of those battlefields, and there are Stars of
25 Davids marking the graves of Jewish --

1 MR. KATYAL: Quite --

2 JUSTICE GINSBURG: -- soldiers.

3 MR. KATYAL: -- quite true. We're not
4 disagreeing with that. We're just saying that
5 here -- and this is what the Buono plurality
6 recognized, and Justice Alito's separate
7 opinion -- that there is a secular meaning with
8 respect to these crosses.

9 JUSTICE KAVANAUGH: What do you say to
10 the Jewish war veterans brief that say and for
11 those Jewish soldiers, the government's
12 decision to honor only the salvation that
13 Christians believe is hurtful, wrong, and not
14 in keeping with the promise of the
15 Constitution? What do you say to them?

16 MR. KATYAL: I -- I'd say three
17 things, Justice Kavanaugh, and then if I could
18 reserve the balance of my time.

19 The first is that, factually, one of
20 the main proponents for fundraisers of this
21 particular cross was J. Moses Eldovich, who
22 himself was a Jewish veteran.

23 Second, there's a -- there's a
24 contrary tradition that the Retired Flag
25 Officers brief at page 9 says that some Jewish

1 vets were actually put and buried under the
2 cross and wanted to be.

3 And, third, I don't think this Court
4 has ever adopted the view that, if some people
5 disagree with something, that that itself
6 creates an Establishment Clause violation.

7 JUSTICE SOTOMAYOR: If -- if the Chief
8 would per --

9 MR. KATYAL: Rather, the test is
10 objective meaning.

11 JUSTICE SOTOMAYOR: If the Chief would
12 permit me. There is a brief here that says
13 that, to deeply religious Christians,
14 secularizing the cross is blasphemy. Christ
15 died on the cross. He was resurrected from his
16 grave. So those people don't view secularizing
17 the cross as something -- it's not just Jewish
18 people or Hindu people who might be offended.
19 It could be Christians as well.

20 MR. KATYAL: Justice Sotomayor, my
21 answer would be the same as the third part to
22 Justice Kavanaugh. I don't think we let those
23 objectors dictate that.

24 If that were the rule, you'd be
25 tearing down crosses at Arlington Cemetery and

1 nationwide. The U.S. brief at page 29 says
2 that.

3 And I think that would actually inject
4 this Court and create more of an Establishment
5 Clause problem and sew religious divisions.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Carvin.

9 ORAL ARGUMENT OF MICHAEL A. CARVIN ON
10 BEHALF OF PETITIONERS IN CASE NO. 17-1717

11 MR. CARVIN: Mr. Chief Justice, and
12 may it please the Court:

13 While the Peace Cross should be upheld
14 under any sensible Establishment Clause
15 analysis, we submit the Court should analyze it
16 under the Town of Greece coercion test, which
17 prohibits tangible interference with religious
18 liberty, as well as proselytizing, for a number
19 of reasons.

20 We think this is the simplest route.
21 You would simply extend Town of Greece rule for
22 religious speech to symbolic speech and it
23 would provide, in a situation where the chances
24 for coercion and proselytization are much less
25 than in the communal prayer --

1 JUSTICE GINSBURG: Mr. Carvin, could
2 you explain -- you have this coercion theory
3 that you think you're urging us to adopt.

4 But, if that's what the Establishment
5 Clause prohibits, only coercion, how does this
6 offer -- how does this office differ from the
7 Free Exercise Clause? That is, can you suggest
8 a practice that would be unconstitutionally
9 coercive under the Establishment Clause and yet
10 be inoffensive under the free exercise clause?

11 MR. CARVIN: Yes, Your Honor, forcing
12 us to pay threepence to a minister. That would
13 violate my negative liberty not to support a
14 church I don't want to, but it wouldn't violate
15 any religious tenets or my ability to pursue
16 the religion I do want to.

17 So it creates a negative liberty not
18 to support coercively religions which you do
19 not support.

20 I would also point out that this
21 standard is completely the correct one under
22 the text and history of the Establishment
23 Clause because, when they were discussing all
24 the hallmarks of establishment, what they were
25 talking about was tangible interference.

1 It also extends to proselytizing under
2 this Court's decisions in both Town of Greece
3 and the Allegheny County dissent, which is what
4 we're asking the Court to adopt.

5 JUSTICE KAGAN: What -- what counts as
6 proselytizing? I think I understand what
7 coercion means better than what proselytizing
8 means.

9 MR. CARVIN: Well, I think it's
10 actually very straightforward. The definition
11 is preaching conversion. The lower courts have
12 said this is aggressively advocating conversion
13 from one sect to another.

14 JUSTICE GORSUCH: What's the
15 difference between that and an endorsement?

16 MR. CARVIN: Well, there's --

17 JUSTICE GORSUCH: You tell us we
18 should abandon Lemon's endorsement test because
19 it's become a dog's breakfast.

20 MR. CARVIN: Right.

21 JUSTICE GORSUCH: Nobody knows how to
22 apply it.

23 MR. CARVIN: Right.

24 JUSTICE GORSUCH: The circuit courts
25 are confused, you tell us. And then you

1 replace it with coercion but now maybe
2 proselytizing in the reply brief.

3 MR. CARVIN: Right.

4 JUSTICE GORSUCH: I'm -- I -- I don't
5 see the daylight between proselytizing and
6 endorsement. Can you help me out?

7 MR. CARVIN: We think there's a
8 fundamental difference, Justice Gorsuch. Under
9 our test, all symbolic, including sectarian,
10 symbols would be presumptively valid except in
11 the rare circumstances where they've been
12 misused to proselytize, whereas, under the
13 endorsement test, all --

14 JUSTICE KAGAN: Well, suppose a city
15 --

16 MR. CARVIN: -- all sectarian symbols
17 are unconstitutional.

18 JUSTICE KAGAN: -- suppose a city
19 erected a cross not for purposes of
20 memorializing the war dead or -- but just to
21 emphasize the values of Christianity. Would --
22 would that be proselytizing, or would that not
23 be proselytizing?

24 MR. CARVIN: I think, again, that
25 stays very close to the hypothetical that

1 Justice Kennedy put in the Allegheny County
2 dissent where you've got a permanent Latin
3 cross on top of City Hall.

4 JUSTICE KAGAN: Right. This one is
5 not on top of City Hall.

6 MR. CARVIN: Yes.

7 JUSTICE KAGAN: This one is, you know,
8 in a park.

9 MR. CARVIN: Oh. Well, then I think
10 it's very much like Penn Ed. If they've got
11 other symbols there and they -- and they allow
12 --

13 JUSTICE KAGAN: It's just a cross.
14 This is -- they want to emphasize the values of
15 Christianity, so they put up a cross.

16 MR. CARVIN: I think it would be a
17 very rare case, or unless you were sort of
18 conditioning access to government services,
19 like the one on City Hall would certainly
20 suggest, that that would either constitute de
21 facto establishment or de facto coercion.

22 And I don't think the other side can
23 provide a real-world hypothetical involving a
24 cross that could be misused for proselytizing
25 purposes, which is why I think the endorsement

1 standard is --

2 JUSTICE KAGAN: Well, I guess what --
3 what -- what I was trying to suggest was that
4 this was something that indicated that the city
5 was aligning itself with one particular
6 religion. We're putting up a cross. We're not
7 putting up any other religious symbols because
8 we believe in the values that the cross
9 indicates.

10 MR. CARVIN: Again --

11 JUSTICE KAGAN: But it's -- it's not
12 on top of City Hall. It's on a street. It's
13 in a park.

14 MR. CARVIN: Well --

15 JUSTICE KAGAN: Maybe there are two
16 crosses. Maybe there could be 10 crosses, you
17 know, in different parts of the city.

18 MR. CARVIN: Well --

19 JUSTICE KAGAN: But that's why the --
20 the -- the city is doing it, and, of course,
21 everybody recognizes what a cross is.

22 MR. CARVIN: Right. It's a relatively
23 straightforward inquiry, Justice Kagan. Is the
24 religion of it a non-proselytizing purpose that
25 -- that could be concerned.

1 JUSTICE KAGAN: Well, is there?

2 MR. CARVIN: Again, in these
3 circumstances, I need to know was this, for
4 example, suggested by people who were honoring
5 the victims of a school shooting. Was it
6 simply -- what was the genesis? You need to
7 look at --

8 JUSTICE KAGAN: It's just a -- it's
9 just a cross. It really is. So it's -- it's
10 -- it's -- you know, these values are important
11 to this community, the values of Christianity,
12 so we would like to put up some crosses around
13 town.

14 MR. CARVIN: Oh, again, if that's the
15 -- if that's the announced purpose and effect,
16 of aligning ourselves with Christianity, then I
17 would think it would sound much like
18 proselytizing.

19 JUSTICE KAVANAUGH: Well, suppose that
20 -- suppose after this case Hyattsville puts up
21 a cross and College Park puts up a cross and
22 the surrounding communities put up crosses, and
23 they -- there's mixed purposes. Some people do
24 it because they want to support it because they
25 want to celebrate Christianity. Some people do

1 it because they say we want to celebrate war
2 dead. There's mixed purposes. Proselytizing
3 or not proselytizing?

4 MR. CARVIN: Again, I think sectarian
5 symbols are presumptively valid, Justice
6 Kavanaugh, because --

7 JUSTICE KAVANAUGH: Presumptively
8 valid and can -- that presumption can be
9 overcome when?

10 MR. CARVIN: Again, if you show that
11 there isn't a legitimate non-proselytizing
12 purpose --

13 CHIEF JUSTICE ROBERTS: Counsel --

14 JUSTICE GORSUCH: Well, I guess then
15 that's where I --

16 CHIEF JUSTICE ROBERTS: I was just
17 going to say you start out with what you -- you
18 advertise is a pretty concise test, but it
19 degenerates pretty quickly into, well, I need
20 to know about this, I need to know about that,
21 and becomes kind of a fact-specific test rather
22 than the -- the -- the crisper one that you
23 propose in your brief.

24 MR. CARVIN: Your Honor, we could have
25 a bright line test that only formal coercion is

1 prohibited, but I don't think that would
2 satisfy this Court because the dangers of the
3 Establishment Clause posed by coercion, which
4 is tangible threat to liberty, may -- could be
5 reached indirectly through the sorts of things
6 I'm talking about.

7 And it is true, of course, that every
8 test that this Court adopts needs to focus on
9 context, purpose, and effect. But the key
10 point is you're asking a different question
11 than you are under the endorsement test.

12 JUSTICE GORSUCH: Well, I don't --

13 MR. CARVIN: We're not asking --

14 JUSTICE GORSUCH: That's where --
15 that's where I -- I'm just stuck.

16 MR. CARVIN: Okay.

17 JUSTICE GORSUCH: And -- and to say I
18 endorse something --

19 MR. CARVIN: Right. Well --

20 JUSTICE GORSUCH: -- is -- what's the
21 difference between saying I endorse something
22 and I proselytize or promote, perhaps, is
23 another synonym something?

24 It seems to me that you are taking us
25 right back to the dog's breakfast you've warned

1 us against. And I do understand the coercion
2 test, but I -- I -- I don't understand your
3 abandonment of it.

4 MR. CARVIN: Fair enough. In God we
5 Trust certainly promotes religion, endorses
6 religion, no question about it. But it's not a
7 -- it's not an effort to proselytize.

8 JUSTICE KAGAN: Justice Scalia once --

9 MR. CARVIN: The free exercise --

10 JUSTICE KAGAN: -- Justice Scalia once
11 asked a question when somebody gave that
12 example. He said what -- what would happen if
13 a coin had said "In Jesus Christ we trust"?

14 MR. CARVIN: And, again, that's
15 actually a very nice illustration of the
16 distinction. On day one, we've got "In God we
17 trust," which is promoting, endorsing religion.
18 It is no good under the Lemon test. On day
19 two, we've got "In Jesus we trust."

20 What message is the government
21 sending? You can't trust this Jewish God.
22 You've got to -- you've got to take sides in a
23 sectarian dispute where Jesus is the one we're
24 doing. And if they are taking sides in a
25 sectarian dispute, as Justice Scalia pointed

1 out, that's precisely the definition of what
2 constitutes an establishment. To -- to --

3 JUSTICE GORSUCH: Why am I not
4 proselytizing religion when I say "In God we
5 trust" but I am when I say "In Jesus Christ we
6 trust"? I'm just proselytizing religion in a
7 more generic sense.

8 MR. CARVIN: That -- that's fair
9 enough, and I think Justice Scalia would
10 respond in this --

11 JUSTICE GORSUCH: Well, there we are.

12 MR. CARVIN: No -- no, but what's --
13 the difference between promoting religion
14 versus irreligion and promoting one sect over
15 another --

16 JUSTICE KAVANAUGH: What -- what --

17 MR. CARVIN: -- which I think the
18 sectarian point would obviously lend itself to
19 proselytizing. In this context, I do want to
20 emphasize that all symbols are sectarian.
21 There's no such thing as a
22 non-denominational --

23 JUSTICE KAVANAUGH: What --

24 MR. CARVIN: -- religious symbol.

25 JUSTICE KAVANAUGH: -- what's your

1 answer -- what's your answer to the cross on
2 City Hall? I didn't get whether your answer is
3 that's unconstitutional or constitutional.

4 MR. CARVIN: Again, we're seeking to
5 have this Court adopt Justice Kennedy's dissent
6 in Allegheny County. He --

7 JUSTICE KAVANAUGH: And in that
8 dissent, he said that a cross on City Hall
9 would be unconstitutional.

10 MR. CARVIN: Because it's --

11 JUSTICE KAVANAUGH: Do you --

12 MR. CARVIN: Because it --

13 JUSTICE KAVANAUGH: Do you agree?

14 MR. CARVIN: Because it constitutes
15 proselytizing, and we certainly do agree. I --
16 I think in all contexts you need to be careful.
17 If it was Las Cruces, New Mexico, and again
18 there was a legitimate non-proselytizing reason
19 for the permanent cross, then -- but, as a
20 general matter, sure, if they're putting up
21 crosses at every courtroom, every DMV window,
22 and all the parade of hypotheticals we've
23 gotten on the other side, I can certainly
24 understand why somebody would believe that
25 they're trying to convert you to Christianity.

1 After all, the hallmark of the
2 establishment in Professor McConnell's article,
3 which we're largely relying on, is seeking to
4 inculcate a certain religious belief, a certain
5 sectarian belief. Now --

6 CHIEF JUSTICE ROBERTS: Well, but if
7 you look at his -- of course, you have. His
8 brief highlights six things --

9 MR. CARVIN: Right.

10 CHIEF JUSTICE ROBERTS: -- that he'd
11 say would be -- and it starts out with the
12 government establishing a church.

13 MR. CARVIN: Right.

14 CHIEF JUSTICE ROBERTS: All right.
15 We'll give you that.

16 MR. CARVIN: Right.

17 CHIEF JUSTICE ROBERTS: You know, the
18 -- the requiring people to pay for the church,
19 prohibiting -- imposing burdens on people who
20 don't believe. I mean, all pretty stark items
21 that -- that certainly under -- underlay the
22 Establishment Clause when it was adopted.

23 MR. CARVIN: Yes.

24 CHIEF JUSTICE ROBERTS: But you're
25 certainly -- I don't understand your position

1 to be limited in that way.

2 MR. CARVIN: Again, we could certainly
3 say that kind of direct formal coercion is the
4 only thing reached by the Establishment Clause.
5 Both of the opinions we rely on, Town of Greece
6 and Allegheny County, go a bit further, and
7 they say in the real world, we want to make
8 sure we're not creating the same dangers when
9 the government is trying to create indirectly
10 what it couldn't do directly.

11 Again, this will be a rare exception,
12 and they can't provide a real-world
13 hypothetical.

14 JUSTICE SOTOMAYOR: So we go back to
15 Justice --

16 JUSTICE KAGAN: But do I --

17 MR. CARVIN: If the Court doesn't want
18 to go that far --

19 JUSTICE SOTOMAYOR: So we go back to
20 Justice Gorsuch --

21 MR. CARVIN: Yes.

22 JUSTICE SOTOMAYOR: I hear you using
23 the word "de facto" -- "extreme
24 proselytization," "de facto coercion."

25 MR. CARVIN: Right.

1 JUSTICE SOTOMAYOR: "Excessive
2 promotion or proselytization." It is the
3 endorsement test.

4 MR. CARVIN: Again --

5 JUSTICE SOTOMAYOR: Now you may make
6 an argument like your colleague that this has
7 to do more with tradition than it does with
8 coercion, but it is endorsement.

9 MR. CARVIN: To make it as simple as I
10 can: Under the endorsement test, a sectarian
11 symbol of a creche is no good. Under our test,
12 it's perfectly fine because it's -- it's
13 achieving a --

14 JUSTICE SOTOMAYOR: So you would
15 overturn Allegheny under that theory?

16 MR. CARVIN: I would endorse the Town
17 of Greece test, which says sectarian prayer,
18 purely sectarian prayer, is okay. Sectarian
19 speech in the symbolic --

20 JUSTICE GORSUCH: But would you
21 proselytize that test?

22 MR. CARVIN: Excuse me?

23 JUSTICE GORSUCH: You endorse the
24 test. Do you proselytize for it?

25 (Laughter.)

1 MR. CARVIN: We -- we -- we -- we are
2 actually adopting the word "proselytize" from
3 the Town of Greece test. And, again, my final
4 point on all of this is, in the symbolic
5 context, this distinction is not of real-world
6 consequence because all symbols are sectarian,
7 and if you ban sectarian symbols, then you are
8 necessarily banning all religious symbols,
9 which evinces hostility and is in stark tension
10 with the Free Exercise and Free Speech Clause.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 General Wall.

14 ORAL ARGUMENT OF JEFFREY B. WALL
15 FOR THE UNITED STATES, AS AMICUS CURIAE,
16 IN SUPPORT OF THE PETITIONERS

17 GENERAL WALL: Mr. Chief Justice, and
18 may it please the Court:

19 Three points: First, under Town of
20 Greece, the memorial cross is permissible
21 because it falls within our nation's long
22 tradition of accommodating religious speech or
23 symbols in civic life.

24 Second, adhering to Town of Greece
25 would easily resolve --

1 JUSTICE SOTOMAYOR: In all places?
2 Meaning I don't know of a founding father, town
3 or state, that put up a 40-foot cross on
4 government property. So we don't have a long
5 tradition of that. It's sectarian. We have a
6 lot of founding fathers, including George
7 Washington, who was exceedingly careful to
8 ensure that references to God were as neutral
9 as possible to as many religions as possible.

10 So it can't be that all sectarian
11 symbols, whether it's a cross or Jesus Christ
12 or some other symbol, is within our tradition
13 merely because we say "In God we trust."

14 GENERAL WALL: Well, two different --
15 two things, Justice Sotomayor.

16 First, obviously, this symbol has a
17 unique history, as the Buono plurality
18 detailed. The VFW brief, I think, does a nice
19 job of this, that, to the World War I
20 generation, though it's now distant in time,
21 that was a secular or civic meaning --

22 JUSTICE SOTOMAYOR: But you're --

23 GENERAL WALL: -- that it took on to
24 that generation.

25 JUSTICE SOTOMAYOR: But you limited

1 your point to one generalized point, which
2 means we could put it up today to memorialize
3 all Vietnam vets, despite the fact that all
4 Vietnam vets were not Christian --

5 GENERAL WALL: Oh --

6 JUSTICE SOTOMAYOR: -- and that many
7 of them would feel --

8 GENERAL WALL: Yes, just as Mr. Katyal
9 said, when they found the cross at Ground Zero
10 in the rubble and that became a makeshift
11 shrine in the weeks after 9/11, I don't think
12 that that violated the Establishment Clause,
13 just as it doesn't now when it sits in the 9/11
14 museum owned by the Port Authority.

15 But the second point I'd make is I
16 understand Town of Greece and the Allegheny
17 County dissent to say you either trace a
18 practice back to the founding or you look to
19 see whether it's akin to the kind of
20 acknowledgments that the founders and the early
21 generation thought were permissible, and you
22 ask whether it presents any greater dangers
23 than that.

24 Here, crosses have been memorials
25 since before the founding. They have been war

1 memorials since the post-Civil War
2 generation --

3 JUSTICE GINSBURG: Does it make any
4 difference --

5 GENERAL WALL: -- the one that
6 incorporated --

7 JUSTICE GINSBURG: -- the change from
8 the founding, this was an almost overwhelmingly
9 Christian country, but now we're told that
10 30 percent of the U.S. population does not
11 adhere to a Christian faith, does -- does that
12 change make any difference?

13 GENERAL WALL: I don't think it
14 affects whether the cross took on in the wake
15 of the Great War a secular meaning and whether
16 that's the meaning for which the mothers
17 erected it and the commission now maintains it.

18 So, when Canada gave us the Canadian
19 Cross of Sacrifice to honor Americans who went
20 north and joined the Canadian forces to fight
21 in the war before America entered, I have no
22 reason to believe that all of those Americans
23 were Christian or that Canada thought they
24 were, but it thought that a cross with a sword
25 running down it in Arlington would commemorate

1 all of them. And I think that's the meaning
2 that the Buono plurality correctly said in that
3 context that symbol carries.

4 JUSTICE SOTOMAYOR: Isn't a cemetery
5 substantially different than the middle of a
6 town where something is 40 foot high?

7 GENERAL WALL: Well --

8 JUSTICE SOTOMAYOR: I mean, I have
9 pictures of this cross. It's the only thing
10 that's that high. It dwarfs buildings. It
11 dwarfs people. You can barely see them in the
12 pictures.

13 GENERAL WALL: I mean, with all -- all
14 respect, Justice Sotomayor, and, obviously,
15 this is more under the reasonable observer test
16 and we've asked the Court to apply Town of
17 Greece, but having been out to the site, it is
18 certainly a -- a tall cross, but it has words
19 on it that are visible from hundreds of feet
20 away that are secular words. It's in the midst
21 of a number of other memorials that you can
22 see. It's been part of a memorial park for
23 decades before litigation was ever brought.

24 I -- I understand the concern if you
25 just look at the size, but that ignores the

1 fact that there's "U.S." on both sides of the
2 cross, the words, the plaque --

3 JUSTICE KAGAN: So, Mr. Wall, just
4 to --

5 GENERAL WALL: -- and all of the
6 surrounding context.

7 JUSTICE KAGAN: -- figure out where
8 you want to draw the line, just take a lot --
9 I'm going to give you an example of a bunch of
10 different crosses.

11 So one is World War I cross erected
12 many, many years ago. Another is World War I
13 cross erected now. A third is another war
14 memorial cross. A fourth is a memorial cross
15 that has nothing to do with any war. A
16 fifth -- are we up to five? A fifth is not a
17 memorial cross at all, just a cross, it's a
18 cross, because a community wants to put up a
19 cross.

20 Are they all okay? Are some not okay?

21 GENERAL WALL: I think the first three
22 are clearly permissible. Assuming the fourth
23 acknowledges the non-war purpose to which the
24 cross is put, so the cross that commemorates
25 the school shooting or the Star of David that

1 commemorates the Holocaust, that seems to us
2 perfectly permissible, no more coercive or
3 proselytizing than things that the founders
4 thought were perfectly permissible.

5 JUSTICE KAGAN: And the fifth?

6 GENERAL WALL: The last strikes me as
7 -- as potentially quite problematic. When --
8 when the Court -- when Justice Kennedy says in
9 Allegheny County, and the Court picks up on it
10 in Town of Greece, that you can't proselytize,
11 it understands that, Justice Gorsuch, there's a
12 much higher standard than --

13 JUSTICE KAVANAUGH: Even though all
14 five --

15 GENERAL WALL: -- are you offended or
16 excluded. It -- it understands that as are you
17 threatening damnation, the Court says, are you
18 trying to force people into the pews, are you
19 denigrating another faith? If a town just
20 starts putting up naked, unadorned crosses --

21 JUSTICE KAVANAUGH: But -- but all
22 five crosses --

23 GENERAL WALL: -- without any clear
24 secular reason --

25 JUSTICE KAVANAUGH: Excuse me. All

1 five crosses in Justice Kagan's hypothetical, I
2 believe, are the same.

3 GENERAL WALL: Well, no. Sorry, I
4 took --

5 JUSTICE KAVANAUGH: Of course, the
6 purpose articulated, unstated or stated, but
7 not visible, might be different. But the
8 crosses are all the same. And you're saying it
9 depends on the implicit purpose or reason it
10 was put up?

11 GENERAL WALL: Maybe I misunderstood
12 the hypotheticals. When she -- when -- when
13 Justice Kagan was positing war memorials or a
14 cross dedicated for some other secular or civic
15 reason, all of the examples in the real world
16 I'm aware of make that clear in some way.

17 The Argonne Cross, as to those who
18 perished in France, I -- I took the fifth one
19 to be the -- the naked unadorned cross, and
20 that seems to me to get much closer --

21 JUSTICE KAVANAUGH: So, if that's put
22 up as a war memorial but it doesn't have words
23 around it, that has to come down?

24 GENERAL WALL: Justice Kavanaugh, I'll
25 grant you that that's the -- the hardest case

1 and where the town just says we're putting it
2 up as a war memorial. It -- it may be
3 permissible, as long as the other side will
4 grant that all of the hard cases on this test
5 are imaginary. You can't find a single one
6 that looks like that.

7 JUSTICE KAGAN: Could --

8 GENERAL WALL: The problem with the
9 current law is that all of the current cases
10 are hard. This case, which should have been
11 easy, has a four-volume JA. We had expert
12 witnesses and -- and mounds of discovery.

13 JUSTICE KAGAN: Could you take the --
14 the examples I gave that are neither the first
15 nor the fifth, in other words, just the
16 memorial crosses but not any particular
17 relationship to World War I, and -- and erected
18 now. On -- on what theory are -- are -- are --
19 are those permissible?

20 In other words, when -- when -- is the
21 theory that this is a universal symbol? Is the
22 theory that this is a secular symbol? Is the
23 theory that this is a religious symbol, but
24 that's perfectly fine, to adopt one religious
25 symbol rather than another? What's the theory?

1 GENERAL WALL: I think the theory is
2 and the real-world example I'd give is the
3 cross at Ground Zero. I'd point the Court to
4 the Second Circuit case.

5 JUSTICE KAGAN: I think that that's an
6 odd kind of case, so I -- I think let's --
7 let's not talk about that one. Let's just talk
8 about your ordinary decision to erect -- to,
9 you know, not anything that's found in a -- you
10 know, let's just talk about --

11 GENERAL WALL: Well, my point is just
12 that's a --

13 JUSTICE KAGAN: -- an ordinary
14 municipal decision to erect a cross as a way to
15 memorialize some group of citizens.

16 GENERAL WALL: And my -- my only point
17 was there aren't a lot of these war memorials
18 going up. That's a new cross that I think was
19 perfectly permissible because it presents no
20 greater dangers than the kinds of
21 acknowledgment of religion that have existed
22 since the founding.

23 But, if you took a new war memorial,
24 if Bladensburg tomorrow wanted to erect a
25 memorial like this one, we think that would be

1 perfectly permissible and, indeed, an honorable
2 thing for a locality to do.

3 JUSTICE KAGAN: And -- and I guess I
4 ask, why is that? Is it because the cross has
5 become a symbol that's universal? Is that what
6 your -- your claim is?

7 GENERAL WALL: I think because, as the
8 Buono plurality said, it has taken on a secular
9 meaning associated with sacrifice or -- or
10 death or commemoration. And a locality, a
11 state can decide to use it for that meaning.

12 JUSTICE KAGAN: I mean, it is the
13 foremost symbol of Christianity, isn't it? It
14 invokes the central theological claim of
15 Christianity, that Jesus Christ, the Son of
16 God, died on the cross for humanity's sins and
17 that he rose from the dead. This is why
18 Christians use crosses as a way to memorialize
19 the dead.

20 Is it because it connects to that
21 central theological belief, isn't that correct?

22 GENERAL WALL: So I'm not going to
23 dispute that, obviously, it's the preeminent
24 symbol of Christianity. I believe all of the
25 members of the plurality in Buono believe that

1 too.

2 The question is whether it's also
3 taken on a secular meaning, because to say the
4 cross has only that religious meaning I think
5 would condemn every cross in the public sphere,
6 including the ones that sit in Arlington, which
7 even Respondents say we don't have to take
8 down.

9 JUSTICE ALITO: And does it -- does it
10 matter --

11 GENERAL WALL: So we know that context
12 has to matter.

13 JUSTICE ALITO: -- does it matter in
14 this particular case that this cross was put up
15 to commemorate the deaths of 49 real people and
16 that this was done in the wake of World War I?

17 GENERAL WALL: I think, Justice Alito,
18 it makes it an easier case. But what I would
19 say is we have four basic buckets of litigation
20 over displays in the state and federal courts.
21 You've got war memorials, Ten Commandments,
22 holiday displays, and other forms of symbolic
23 expression, like mottos or seals.

24 I -- I -- I don't think the reasoning
25 here is specific just to the cross bucket,

1 though I do think it would take care of the
2 vast bulk of -- of war memorials that are being
3 litigated.

4 I think the -- the logic of Town of
5 Greece that we're urging the Court just to
6 apply in this related context is, do any of
7 those present greater dangers than the
8 acknowledgments of religion in the public
9 sphere that have existed since the founding?

10 We would say that because they do not,
11 we would ask the Court to allow the cross to
12 remain and to allow those it honors to rest in
13 peace.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 General.

16 Ms. Miller.

17 ORAL ARGUMENT OF MONICA L. MILLER

18 ON BEHALF OF THE RESPONDENTS

19 MS. MILLER: Mr. Chief Justice, and
20 may it please the Court:

21 I think we can all agree that the
22 Establishment Clause at the very least
23 prohibits the government from preferring one
24 religion over another religion.

25 And the Commission is arguing

1 essentially that its cross does not violate the
2 central command of the Establishment Clause
3 because it's essentially a non-religious,
4 non-Christian symbol that honors everyone,
5 irrespective of their religion.

6 Yet, I don't think anyone here would
7 deny that it would be unconstitutional and
8 inappropriate to go into Arlington and place a
9 Latin cross over the grave of every person
10 there, every fallen soldier, irrespective of
11 their religion.

12 In fact, in 1924, everyone in the
13 congressional debate about the overseas markers
14 was in agreement that it would be completely
15 inappropriate and even sacrilegious to put a
16 cross over the burial of a Jewish fallen
17 soldier.

18 But the Commission is here arguing
19 today, as well as the other Petitioners, that
20 it is, you know, telling Jews, telling Muslims,
21 telling humanists that the cross honors them,
22 when they emphatically say it does not.

23 And it's telling Christians that their
24 most preeminent and -- and sacred symbol of
25 Jesus Christ actually, in fact, also symbolizes

1 atheism.

2 JUSTICE ALITO: Could I -- could I ask
3 a question that picks up on a question that
4 Justice Ginsburg asked earlier?

5 MS. MILLER: Yes.

6 JUSTICE ALITO: So let's say there is
7 a shooting at a church, and Christians are
8 targeted and killed. There is a shooting at a
9 synagogue and Jews are targeted and killed.
10 There is a shooting at a mosque and Muslims are
11 targeted and killed.

12 In each case, the town says we are
13 outraged by this, we want to put up a monument
14 to express our sympathy and solidarity with the
15 families and with the communities that they
16 represent.

17 They ask those people what kind of
18 monument would you like, and they all say it's
19 very important for us to put up something of
20 religious significance.

21 And that -- the town does that. Those
22 towns do that.

23 Would that be a violation of the
24 Establishment Clause?

25 MS. MILLER: Your Honor, I think it

1 depends, of course, on the context. But I
2 think, for instance, if we're talking about a
3 45-foot cross in the middle -- or, sorry, a
4 45-foot Star of David in the middle of a
5 roadway, I think that that would be a problem.

6 If, say, like an obelisk with maybe a
7 Star of David, that's not as loud, you know,
8 not -- we're actually trying to, you know -- I
9 think the commemorative purpose would need to
10 predominate over the sectarian.

11 JUSTICE GORSUCH: Well, that -- that
12 raises for me -- that -- that answer raises for
13 me a question about standing.

14 Is it too loud? Is the Star of David
15 too loud? Is it too offensive? There aren't
16 many places in the law where we allow someone
17 to make a federal case out of their
18 offensiveness about a symbol being too loud for
19 them. We accept that people have to sometimes
20 live in a world in which other people's speech
21 offend them. We have to tolerate one another.

22 This is the only area I can think of
23 like that where we allow people to sue over an
24 offense because, for them, it is too loud. And
25 we get into, as a result, having to dictate

1 taste with respect to displays.

2 We have a Ten Commandments display
3 just above you, which may be too loud for many.

4 Why shouldn't we apply our normal
5 standing rules and require more than mere
6 offense to make a federal case out of these?

7 MS. MILLER: Yes, Your Honor. Well, I
8 don't think that it's mere offense. It's --
9 it's about being a citizen in your own
10 community. And it's not private speech we're
11 talking about. We're talking about the
12 government being the speaker and essentially
13 giving you the message as the non-Christian in
14 your community that you are a lesser citizen.

15 And I think if you look at our record
16 and -- and the letters that were sent to the
17 Commission by self-proclaimed Christians that
18 were outraged by the notion that their cross
19 must have to be, you know, removed, you see
20 that monuments like this sort of contribute to
21 the idea that non-Christians are inferior. You
22 know, we are Christians. We can put a cross
23 wherever we want to.

24 CHIEF JUSTICE ROBERTS: Well, just to
25 follow up on Justice Gorsuch's question, what

1 if you had one letter from one person who
2 purported to be offended by it? Would that be
3 enough to support your argument?

4 MS. MILLER: Well -- well, no, Your
5 Honor. I think -- I think it would have to be
6 that you are a member of the community, that
7 you've witnessed the -- you've had the
8 encounter -- I mean, there's no -- you know,
9 Valley Forge says that you can't be someone in
10 another state that read about it in a
11 newspaper. You have to be personally affected
12 by the message.

13 And if you are a citizen in a
14 community, you are usually, you know, within
15 the zone of interest of someone that would take
16 offense or feel marginalized by the display.

17 And, here, all of the -- all of the
18 plaintiffs are individuals who are
19 non-Christian, who say that when they encounter
20 the government's symbol saying, you know, that
21 Christians have valor, Christians have courage,
22 Christians have devotion, Christians have
23 endurance, those words on the base, that says
24 something to them.

25 And I think, you know, when you look

1 back at the record in the 1920s, you know, Jews
2 were fighting immense discrimination. A lot of
3 them joined the war, you know, to combat the
4 stigma that they were considered cowards. And
5 I think one of the amicus briefs even had a
6 letter from a Jewish soldier who had to put on
7 his own Rosh Hashanah because they wouldn't
8 accommodate the Jewish soldiers with their
9 own --

10 JUSTICE ALITO: I mean, this would be
11 a different case if some of those 49 soldiers
12 whose names are associated with this monument
13 were Jewish or -- or Muslim or a member of some
14 other non-Christian faith and the town insisted
15 on putting their names on a monument in the
16 form of a cross. But there's no evidence that
17 that's what happened here.

18 MS. MILLER: Well --

19 JUSTICE ALITO: Is that right?

20 MS. MILLER: -- two things, Your
21 Honor: One, we don't know the names -- we
22 don't know the -- the religious beliefs of
23 those on the cross. What we know is that
24 there's about 14 of them, seven of whom are
25 buried in Arlington, that do not have a cross

1 on their headstone, even though Arlington had
2 the cross as an available emblem.

3 JUSTICE ALITO: All right. Well, it's
4 speculation, but we don't know that there was
5 anybody who objected, that there was any family
6 who objected to having this form of a
7 memorial --

8 MS. MILLER: There --

9 JUSTICE ALITO: -- for their fallen
10 family member, do we?

11 MS. MILLER: I think there's an
12 inference that can be made from the fact that
13 the government's records refer to 52 to 54
14 Prince Georgians who died in World War I and
15 they only have 49 names on the cross.

16 But I would also submit that the
17 government has basically forfeited that
18 argument by having this elaborate and public
19 rededication ceremony to rededicate the cross
20 as a memorial for all veterans of all wars.
21 That's how the town's treated it.

22 The Commission's here today saying
23 that this is an everyone memorial for --

24 JUSTICE ALITO: I mean, there are
25 cross monuments all over the country, many of

1 them quite old. Do you want them all taken
2 down?

3 MS. MILLER: No, Your Honor. And I
4 actually would submit that there's a lot of
5 exaggeration and distortion going on. I think
6 those people --

7 JUSTICE ALITO: So which ones do you
8 think can stand?

9 MS. MILLER: Well, certainly, the two
10 in Arlington. And there -- there's several
11 reasons. One is that much like -- you know,
12 much like the practice that was in Town of
13 Greece where the town created a, you know,
14 forum for private citizens to deliver prayers
15 of their own idiom, there is a statute that
16 governs monuments in Arlington that says that
17 -- it basically creates a non-discriminatory
18 religiously neutral opportunity for people to
19 place their own monuments in Arlington subject
20 to a lot of rules, but two of which are that
21 you have to --

22 JUSTICE ALITO: Yeah, that's the way
23 this sort of thing is being handled today in a
24 pluralistic society in which ordinary people
25 get along pretty well and -- and are not at

1 each other's throats about religious divisions.

2 But let me ask you about some others
3 that are not in Arlington. How about the Irish
4 Brigade monument at Gettysburg put up in 1888?

5 MS. MILLER: Yes, Your Honor. Well,
6 it's one of, I think, something like 3,000
7 monuments within Gettysburg Park. It -- it
8 presents itself as -- as almost an object in a
9 museum. And it's not to say that museum
10 contexts can always negate the government's
11 imprimatur, but it seems in that context the
12 government is more like a curator of a museum
13 than it is putting it up.

14 I mean, remember, this was put up by
15 the Town of Bladensburg. They accepted --

16 CHIEF JUSTICE ROBERTS: What about --

17 JUSTICE KAGAN: May -- may I ask about
18 this cross -- I'm sorry.

19 CHIEF JUSTICE ROBERTS: I was just
20 going to ask, I understand Native American
21 totems have spiritual and religious
22 significance. If one of those is on a federal
23 -- on federal property, does it have to be torn
24 down?

25 MS. MILLER: I would say no, Your

1 Honor, but I -- I would -- I would think that
2 we'd need some sort of expert testimony to sort
3 of talk about what that means. I think in
4 common --

5 CHIEF JUSTICE ROBERTS: Well, it has
6 spiritual and religious significance for Native
7 Americans, similar to, let's say, religious
8 symbols, a Star of David, a cross.

9 MS. MILLER: It -- it's difficult. I
10 know that the Ninth Circuit had a case that
11 dealt with an Aztec -- an ancient Aztec symbol,
12 and they concluded that it didn't violate the
13 Establishment Clause, in part because no one
14 would reasonably think that the government that
15 was predominantly, I think, Christian in that
16 community was erecting -- it was for -- it was
17 to commemorate Mexican culture -- you know,
18 would actually be trying to endorse the Aztec
19 religion. So I think context would matter.

20 I think that --

21 CHIEF JUSTICE ROBERTS: So, if the --
22 if the local government in the community were
23 Native American, whether it's on the
24 reservation or a -- a native village in Alaska,
25 that would make a difference?

1 MS. MILLER: You know, I think we
2 would have to understand more about the
3 symbolism and what it means if there is some
4 sort of dual secular meaning, such as with the
5 Ten Commandments, how it's basically shorthand
6 for law itself, so if in context it's intended
7 for the secular aspect to predominate, perhaps,
8 but I -- it's hard to say with --

9 JUSTICE KAGAN: So this cross,
10 Ms. Miller --

11 JUSTICE GORSUCH: So are you
12 suggesting all Ten Commandment -- I'm sorry.

13 JUSTICE KAGAN: This cross, Ms.
14 Miller --

15 MS. MILLER: Yes.

16 JUSTICE KAGAN: -- it's very old, was
17 erected almost 100 years ago, right after World
18 War I. It does have -- it's two fallen
19 soldiers from World War I, and World War I does
20 have this history that this is how soldiers
21 were memorialized in World War I.

22 And it's true not all soldiers. When
23 you go into a World War I battlefield, there
24 are Stars of David there, but because those
25 battlefields were just rows and rows and rows

1 of crosses, the cross became, in people's
2 minds, the preeminent symbol of how to
3 memorialize World War I dead.

4 And then you have these other facts
5 that Mr. Katyal started us off with. There are
6 other war memorials around the park. There's
7 no -- there are no religious words on the
8 memorial, quite the opposite. All the words on
9 the memorial are words about military valor and
10 so forth.

11 So why in a case like that can we not
12 say essentially the religious content has been
13 stripped of this monument?

14 MS. MILLER: Well, Your Honor, I don't
15 think you can say --

16 JUSTICE KAGAN: Or the particular
17 religious content?

18 MS. MILLER: I don't think -- I'm not
19 aware of any case or reason to say that a large
20 Latin cross can be stripped of its religious
21 meaning. I don't think it needs special words
22 to -- to announce that this is a -- a religious
23 symbol. I think that the --

24 JUSTICE GORSUCH: Well, hold on. Just
25 a moment ago, you told us the Ten Commandments

1 can be stripped of their religious significance
2 and that an Indian totem pole may be stripped
3 of its religious significance. Why -- why not
4 so too here?

5 MS. MILLER: Well, as far as I'm
6 concerned, I'm not aware of any secondary
7 meaning that's derived from the Latin cross.
8 Its meaning as a war memorial is distinctly for
9 Christians. There is no evidence that any --

10 JUSTICE KAGAN: Well, I guess what I'm
11 -- what I'm suggesting --

12 MS. MILLER: Yes.

13 JUSTICE KAGAN: And I really did mean
14 to confine it to this World War I context,
15 because I think there's something quite
16 different about this historic moment in time
17 when -- so if you look -- you know, if you look
18 at all the crosses that are war memorials,
19 they're basically all World War I memorials,
20 that this was sort of the -- because of the
21 battlefields and the way the crosses were
22 erected there, this became the preeminent
23 symbol for how to memorialize the war dead at
24 that time.

25 Why isn't that important?

1 MS. MILLER: Well, Your Honor, I --
2 it's -- factually speaking, the doughboy statue
3 was by far the most common. In fact, on this
4 record, I'm only aware of six other crosses,
5 inclusive of Arlington, that are war memorial
6 -- World War I memorials on government land.
7 The few others that their -- that they cite are
8 actually on private land. The ones in
9 Baltimore, for instance, one has Jesus Christ
10 written on it, so that says to us at the same
11 time Bladensburg cross was being put up, other
12 World War I memorials were being put up in
13 direct recognition of Jesus Christ. That was
14 the understanding at the time. These are
15 Christian symbols.

16 Again, their -- the government's
17 argument in this case is not that this is a
18 Christian symbol anymore but that it, in fact,
19 represents Jews and atheists and Muslims. And
20 I think that there's no history whatsoever of
21 anyone using Latin crosses to honor Jews,
22 Muslims, and atheists.

23 And as the brief of the Joint --
24 Baptist Community and -- and all the other, you
25 know, representative groups that represent

1 millions of Christians in this country, find
2 that argument deeply offensive and -- and could
3 potentially degrade their religion --

4 JUSTICE KAVANAUGH: I -- I take your
5 point that it's a religious symbol. I'm not
6 going to dispute that at all. But our cases
7 have upheld religious displays and religious
8 words in cases like Marsh, the chaplain in
9 Congress, and the prayer cases like Van Orden,
10 the Ten Commandments, cases like Town of
11 Greece, legislative prayer before a meeting.

12 How do you square your position in
13 this case with those cases, which have upheld
14 religious symbols, displays, or words in
15 government property or government events?

16 MS. MILLER: Yes, Your Honor. I would
17 start with Town of Greece because I think Town
18 of Greece is about as akin to, say, Arlington
19 Cemetery as any case can be.

20 There, the Court was saying that when
21 the government takes essentially a hands-off
22 position with respect to the sectarian content
23 of the prayers, you really -- it's not to say
24 that it's private speech, but the government
25 isn't being the mouthpiece for the sectarian

1 message.

2 When the government is this -- the
3 mouthpiece, when it is 100 percent the
4 government's speech --

5 JUSTICE KAVANAUGH: What about the Ten
6 -- the -- I'm sorry to interrupt --

7 MS. MILLER: Okay.

8 JUSTICE KAVANAUGH: -- but the Ten
9 Commandments then?

10 MS. MILLER: With respect to the Ten
11 Commandments, I realize that that is something
12 that this Court has routinely recognized as a
13 dual meaning symbol. Although, yes, there are
14 commandments that are certainly religious, the
15 Court has seen it as something that is more
16 ecumenical, embraced -- you know, as Justice --

17 JUSTICE SOTOMAYOR: Were those statues
18 built by private people and placed in the
19 parks? If I'm remembering --

20 MS. MILLER: The -- the Ten
21 Commandments?

22 JUSTICE SOTOMAYOR: Yes.

23 MS. MILLER: I believe the Eagles was
24 the primary donator of -- of most of the Ten
25 Commandments displays at issue, and my

1 understanding, especially in reading Justice
2 Breyer's concurrence, was that the fact that
3 the -- the Ten Commandments didn't predominate
4 in the setting, you know, they weren't the
5 largest, they were in line with all these other
6 displays, that the secular aspect of the Ten
7 Commandments, the one that says, you know, this
8 is how law was founded, this is symbolic of
9 law, predominated.

10 But there's nothing in either the
11 plurality or Justice Breyer's opinion that I
12 read to say that -- that -- that context can
13 somehow strip a Latin cross of its sectarian
14 meaning.

15 JUSTICE BREYER: They have 54 in the
16 briefs, 54 examples of things that people might
17 bring cases and, if you win, tear them down.
18 Well, there may be more. There may be fewer.

19 What do you think of saying, yes, look
20 at the historical context here? History
21 counts. And so, yes, okay, but no more.
22 That's what Justice Ginsburg, I think, was
23 bringing up. But no more. We're a different
24 country. We are a different country now, and
25 there are 50 more different religions, and,

1 therefore, no more.

2 We're not going to have people trying
3 to tear down historical monuments even here,
4 okay? Now, what do you think of that? I'm not
5 suggesting I'm for it. I want to know what you
6 think of it.

7 MS. MILLER: Sure, Your Honor. I
8 mean, I -- I think two things. One is, again,
9 the exaggeration that's going on on the record
10 that there is somehow 50 or hundreds -- we've
11 gotten all sorts of numbers -- of crosses that
12 are on public land.

13 They -- they cite, for instance, 50
14 examples of something that is not a cross.
15 What -- it's a boot with a rifle and a helmet.
16 And it's cited in the Respondent's -- or the
17 Petitioner's reply brief, the -- the
18 Commission's reply brief, I think at page 17,
19 they refer to a cross in Lewisville, North
20 Carolina. It's not a cross. They cite about
21 50 examples of that.

22 They cite crosses in -- on private
23 land. I counted about 15 amongst the amicus
24 briefs on private land. So I'd say there is
25 something closer to about ten, maybe 20, not as

1 inclusive of -- of crosses that are quite
2 small.

3 With respect to history, there are a
4 lot of reasons why religious minorities in --
5 in Christian-dominated societies would not feel
6 safe challenging an actively used war memorial
7 that is the town's most prominent symbol.

8 You know, my clients have been
9 threatened. I've received death threats. And
10 I bet you it was not safer 90 years ago than it
11 was -- it is today.

12 Also, I don't think that you can say
13 that this is just some sort of passive display
14 that people don't take note of. Like I said,
15 if you look in the record, look at the letters
16 that people -- how people are processing a
17 monument like this, sort of like a billboard.

18 It kind of engrains in your mind that
19 there is this association between having --
20 being Christian and having valor, having
21 courage, and what message that sends to the
22 religious minorities, and Christian, you know,
23 members of the society that are the majority.

24 CHIEF JUSTICE ROBERTS: Well, but
25 that's one of the main criticisms of the -- of

1 the Lemon test that different people are going
2 to process that in different ways.

3 I mean, you heard from one of your
4 friends on the other side that one of the major
5 fund-raisers of this was a Jewish individual.
6 So he was obviously observing it or
7 anticipating it in a different way.

8 MS. MILLER: Well, Your Honor, I think
9 that we cannot take one person's example,
10 again, someone who is probably one of maybe the
11 only Jewish people in that county at a time
12 when there was an active clan burning crosses,
13 burning Jewish buildings or Jewish, you know,
14 businesses at a time when atheists couldn't run
15 for office, Jews had to swear that they
16 believed in an after-life in order to qualify,
17 I mean --

18 JUSTICE KAGAN: Ms. Miller --

19 JUSTICE ALITO: There were 12--

20 MS. MILLER: -- I can't --

21 JUSTICE KAGAN: -- why does it even
22 matter --

23 JUSTICE ALITO: -- there were 12 --
24 there were 12 African-American soldiers among
25 the 49.

1 MS. MILLER: I believe there are. And
2 I believe that the --

3 JUSTICE ALITO: And do you think that
4 the -- that the situation of -- of African
5 Americans in Prince George's County at that
6 time was worse -- was better than the situation
7 for Jews?

8 MS. MILLER: Here's what I'll say to
9 the plaque. They -- the names that are on the
10 plaque are the same names that are put up on
11 the one in Upper Marlboro. I don't believe
12 there is any evidence that the Town of
13 Bladensburg knew who was on the cross.

14 About a third of the men actually have
15 no apparent connection to Prince George's
16 County. They named some guy in, like,
17 Philadelphia who had no connection here. So I
18 don't think how they got the names there.

19 JUSTICE KAGAN: Ms. -- Ms. Miller, I
20 -- I have been struck, some of these questions
21 about how people process these symbols and what
22 messages they convey, that you've sort of
23 accepted this idea that that's what we should
24 be thinking about.

25 But why isn't it enough to just say:

1 Does erecting a symbol like this align the
2 government with a particular religion and not
3 align it with every other religion?

4 MS. MILLER: That's right, Your Honor.
5 That is actually more the test that we put
6 forth in our brief. We noticedly -- notably
7 don't use the reasonable observer test.

8 I think the reasonable observer test
9 in some situations might be helpful, especially
10 when you need to put yourself in someone else's
11 shoes, but it's really just a proxy for facts.

12 We're saying look at the facts. There
13 is a 40-foot cross. It's in the middle of the
14 highway. It dominates all of the other newer
15 displays that the city has put up or the town
16 has put up recently.

17 You know, there is bushes obscuring
18 the plaque. There are no walkways, by the way,
19 to the cross. You have to risk life and limb
20 to get over the -- the lanes of traffic.

21 JUSTICE GORSUCH: You do --

22 MS. MILLER: There's --

23 JUSTICE GORSUCH: You do suggest we --
24 at various points we should consider how people
25 process things and whether they are offended

1 and elsewhere you don't.

2 And I guess I am curious in response
3 to Justice Kagan, you say we shouldn't apply
4 Lemon in this case. It's been a long time
5 since this Court has applied Lemon; but yet the
6 courts of appeals continue to cite it and use
7 it. And there reasonable observers process
8 things in all sorts of different ways.

9 And it has resulted in a welter of
10 confusion, I think, by anyone's admission,
11 including your own.

12 Is it time for this Court to thank
13 Lemon for its services and send it on its way?

14 (Laughter.)

15 MS. MILLER: No, Your Honor, I do not
16 think so. I think there is a difference
17 between Lemon and the reasonable observer. The
18 reasonable observer is an overlay that comes
19 from Justice O'Connor, who is trying to
20 acknowledge and reconcile the complexity of the
21 cases.

22 And I think the reasonable observer is
23 one that --

24 JUSTICE GORSUCH: But if you don't
25 find it useful in this case, and you don't want

1 the Court to apply it in this case, what about
2 all those poor court of appeals judges who are
3 left still with confusion?

4 We haven't overruled it, but we never
5 use it any more, except for when we might have
6 25 years ago. And I -- I -- I think a majority
7 of this Court, though never at the same time,
8 has advocated for Lemon's dismissal.

9 So what -- I mean, is it really fair
10 on the lower court judges struggling to apply
11 this Court's dictates if we don't provide an
12 answer on Lemon?

13 MS. MILLER: On the contrary, Your
14 Honor, I think that Lemon is very useful. I
15 think when you -- when you heard the arguments
16 earlier today they talked about context, they
17 talked about purpose, they talked about effect.
18 Those -- that's the crux of Lemon.

19 I don't think that --

20 JUSTICE KAVANAUGH: But how can it --

21 MS. MILLER: -- Lemon --

22 JUSTICE KAVANAUGH: -- be useful when
23 we haven't used it in the most important cases
24 that are on point here, cases like Town of
25 Greece, it's not used. Van Orden, Marsh v.

1 Chambers, those are the cases that are on
2 point. Those go back 40 years, and we haven't
3 used the test.

4 And to Justice Gorsuch's point, the
5 lower courts need some clarity about that. If
6 the test isn't being used, that would suggest
7 that the test doesn't work for this context.

8 MS. MILLER: Your Honor, I would
9 submit that the Court really hasn't had the
10 proper opportunity to apply Lemon since Van
11 Orden, although remember that Van Orden was
12 decided by --

13 JUSTICE KAVANAUGH: Well, Town of
14 Greece was certainly a case. And that's about
15 prayer before a legislative meeting.

16 MS. MILLER: Well, Town of Greece was
17 -- was extending Marsh, which had jettisoned
18 Lemon, but there's -- but the Court comes back
19 to saying in, for instance, Trump versus Hawaii
20 that reiterating the large -- the Larson test,
21 which is that, you know, the clearest command
22 of the Establishment Clause is one denomination
23 can't be preferred to another, that case relies
24 on Lemon.

25 But, more importantly, I think that,

1 like I said, I think everyone agrees that
2 purpose and effect are critical inquiries under
3 the Establishment Clause. They long predated
4 Lemon.

5 I think there was something like 14
6 cases pre-Lemon that were purpose and effect
7 cases. Lemon just enshrined those out of the
8 Third from Walz --

9 JUSTICE KAVANAUGH: I think --

10 MS. MILLER: -- about entanglement.

11 JUSTICE KAVANAUGH: I think you
12 alluded to this earlier, but I wanted to ask
13 it, so I'm clear. The distinction between the
14 Ten Commandments and the cross?

15 MS. MILLER: Is -- is twofold. One is
16 it that it has this dual meaning as, you know,
17 a symbol of law. And so when it's conveyed,
18 say, for instance, alongside, you know, Moses
19 with 18 other lawmakers, the clear effect is or
20 impression is this is a law symbol.

21 When it's displayed in isolation or is
22 for one denomination, I think Justice Scalia
23 had a lot of good points about this in his
24 McCreary dissent about how he perceived the Ten
25 Commandments as being for -- embraced by

1 Judaism, Islam, and Christianity, but, for
2 instance, if it was just the Christian version,
3 which I am not sure what that looks like, but
4 assuming such could be the case, that might be
5 a problem.

6 The reason why we say the Court
7 doesn't need to reach Lemon in this case is
8 because there's a -- there's an easier route.
9 And that is the notion of one religion over
10 another can't be preferred.

11 JUSTICE ALITO: Well, along those
12 lines, would it be a violation of the
13 Establishment Clause for the state to promote
14 secularism or humanism as opposed to religion?

15 MS. MILLER: Human -- humanism, yes.
16 If the government decided to put up a giant
17 happy humanist symbol, that's our -- it's like
18 this man with little hands. If they decided to
19 replace the cross with the happy humanist, 40
20 feet tall, and they said this is the humanist
21 monument, I think that would be a problem.

22 JUSTICE ALITO: Well, let me take you
23 back to Justice Breyer's question, which is an
24 interesting question to me, and your response
25 was he's wrong on the numbers, but I don't

1 know. I've got pictures of lots of crosses
2 that are on public land.

3 So, you know, assuming for the sake of
4 argument that there are 50 or there are --
5 there are a lot of them, and we say you got to
6 take down all of the crosses, what message does
7 that send when people see that on -- on TV,
8 they see crosses all over the country being
9 knocked down?

10 MS. MILLER: Well, I don't think, Your
11 Honor, that they need to be knocked down at
12 all. In fact, our preferred remedy, I think,
13 is the least divisive in -- you know, outcome
14 of this case, which is to -- to move it to
15 private land.

16 Now I know that --

17 JUSTICE ALITO: All right, take --
18 move -- moved, taken down, but they are -- they
19 are taken down one way or the other. What --
20 what message is that?

21 MS. MILLER: Well, you're also --

22 JUSTICE ALITO: That may promote a
23 particular world view, but is that -- is that
24 consistent with the Establishment Clause?

25 MS. MILLER: I -- Your Honor, with

1 respect, I think you're forgetting the third
2 option, which is transferring the underlying
3 property, which this Court sanctioned in Buono,
4 as well as the Ninth Circuit sanctioning in --

5 JUSTICE GORSUCH: Well --

6 MS. MILLER: -- the Trunk case.

7 JUSTICE GORSUCH: Well, let's just
8 take that.

9 MS. MILLER: Okay.

10 JUSTICE GORSUCH: I mean, we're
11 fighting the hypothetical, counsel.

12 MS. MILLER: Okay.

13 JUSTICE GORSUCH: Now, I love doing
14 that too.

15 MS. MILLER: Yeah.

16 JUSTICE GORSUCH: But let's just stick
17 with the hypothetical.

18 MS. MILLER: Sure.

19 JUSTICE GORSUCH: You can't transfer
20 it. You can't move it. You have to tear it
21 down. Road-side crosses along public highways,
22 for example, those are many. And in some
23 places they've been ruled to be
24 unconstitutional, including in my old court.

25 MS. MILLER: That's right.

1 JUSTICE GORSUCH: Because they endorse
2 religion, proselytize. So back to --

3 MS. MILLER: Yes.

4 JUSTICE GORSUCH: -- Justice Alito's
5 question.

6 MS. MILLER: Sure.

7 JUSTICE GORSUCH: If you could answer
8 it, I -- I'd be grateful.

9 MS. MILLER: Yes.

10 JUSTICE GORSUCH: That would help me.

11 MS. MILLER: Yes. I mean, I think
12 that the message -- again, I just want to say
13 one fourth option, which is creating an open
14 forum, something like Town of Greece.

15 But, with respect to bulldozing, you
16 say, 50 crosses, I mean, certainly, people will
17 get the message that you can't prefer
18 Christianity. But this Court has always
19 rejected the idea that restoring the government
20 to a place of neutrality is hostile to
21 religion.

22 In fact, I think that argument cuts
23 directly against their argument that says this
24 isn't a religious symbol.

25 To say that it would be so hostile to

1 religion, to move it to private land, to
2 transfer the land underneath it, I think,
3 really damages their argument in a way that,
4 you know, it -- it --

5 JUSTICE BREYER: It's not just an
6 argument. It's -- it's partly guidance. I
7 don't know if we can. This is a tough area.

8 Okay. So I'm interested in your
9 reaction, which now that Justice Alito mentions
10 it, I did, and I didn't hear an answer.

11 MS. MILLER: With respect to -- well,
12 I think the hypothetical is so difficult
13 because I don't believe --

14 JUSTICE BREYER: It's not a
15 hypothetical.

16 MS. MILLER: Okay.

17 JUSTICE BREYER: I'm saying, a very
18 good book, the Law & Its Compass, Lord
19 Radcliffe, all our liberties come from freedom
20 of religion. You have your religion. I have
21 mine. And we're not going to kill each other.
22 Okay? So we say history counts.

23 Now what he raised is a problem. So
24 what about saying past is past, if you go back
25 93 years, but no more. We're now 54 religions.

1 We're now everything under the sun. And people
2 will take offense.

3 Now how do I do that? Is that
4 sensible? Is it ridiculous? What do you
5 think?

6 MS. MILLER: Well, I think that there
7 are ways to display a historical cross in a way
8 that isn't the government currently being the
9 mouthpiece for that sectarian speech.

10 The 9/11 cross that Petitioners speak
11 of is a perfect example. It sits in an exhibit
12 panel along with other pieces of rubble and an
13 explanatory plaque about how it came to be.

14 I think that if this were not being
15 actively used by the town as an annual war
16 memorial that every year after year the town is
17 saying this is how we honor our veterans, this
18 giant cross, that's a constant message. It's
19 not a historical artifact.

20 JUSTICE GORSUCH: What if -- what if
21 -- what if -- what if other cities replicated
22 the 9/11 cross? It's a different world. It's
23 a different time. History's changed. But
24 here's an example of a cross that has very
25 contemporary meaning and to a lot of people.

1 Would -- would you prohibit cities and
2 states from duplicating that cross on -- on
3 their -- on their public memorials to 9/11?

4 MS. MILLER: So just so I understand,
5 you're saying they commission a cross that
6 looks like the rubble -- a piece of rubble, and
7 then -- you know, I think it depends on how
8 they're displaying it. If it's --

9 JUSTICE GINSBURG: Didn't you answer
10 that it doesn't exist in splendid isolation?

11 MS. MILLER: Exactly. It does not
12 exist in isolation, yes, it's -- it's in a
13 museum.

14 JUSTICE GORSUCH: No, no, it's -- it's
15 -- my question is, it's a 9/11 memorial.

16 MS. MILLER: Yes.

17 JUSTICE GORSUCH: And that's the
18 predominant thing, and there might be some
19 names on it, just like our Bladensburg cross.

20 MS. MILLER: Yes, Your Honor. Well,
21 then that would certainly be a problem. That
22 would be a cross that's being displayed as the
23 government's war memorial, not as a piece of
24 artifact that is in an exhibit, as a museum, in
25 a museum context.

1 JUSTICE SOTOMAYOR: Can we go back
2 outside of hypotheticals to this case?

3 MS. MILLER: Yes, Your Honor.

4 JUSTICE SOTOMAYOR: Mr. Katyal said
5 that the only way to have a remedy here is to
6 destroy -- change the cross or destroy it. He
7 says you can't move it because it'll fall apart
8 and you can't give it to the Legion because of
9 safety concerns.

10 Do you agree with his position on
11 this?

12 MS. MILLER: I don't agree. For one,
13 with respect to moving it, we don't have any
14 statements that say -- we -- there's one
15 statement in the deposition that says it might
16 be hard to move.

17 But we also have deposition testimony
18 saying that the state has moved large historic
19 houses, so we have a hard time imagining that a
20 house is more difficult to move. There's two
21 World War I memorials that were in the center
22 of medians.

23 The -- the reality is that --

24 JUSTICE SOTOMAYOR: I do understand
25 also that the cross is falling apart and has to

1 be fixed anyway.

2 MS. MILLER: Well, that's --

3 JUSTICE SOTOMAYOR: So whether it's
4 fixed in a move or fixed in place in situ is
5 irrelevant. It still has to be fixed.

6 MS. MILLER: That's -- that's right.
7 Exactly. And I think that they're ignoring the
8 key problem that their own experts have -- have
9 warned them about, which is that the current
10 location is causing its demise. And that's why
11 I say that I think our preferred remedy, which
12 is moving it somewhere else, is the best
13 situation for the cross.

14 It can be placed in a place where
15 people don't have to risk their lives to cross
16 the street. They can actually come pay their
17 respects. They can do so maybe a little bit
18 more privately.

19 JUSTICE SOTOMAYOR: May -- may I go
20 back to the question that's been underlying
21 some of my colleagues' points and points you've
22 been trying to make.

23 It is contextual, the endorsement test
24 is always contextual, and, according to you,
25 contextually, the 50 crosses that Justice Alito

1 and Breyer are worried about, you don't think
2 it's 50?

3 MS. MILLER: I --

4 JUSTICE SOTOMAYOR: You still think it
5 may be only 10 or 20. So I accept that.

6 Can we, given the nature of the right
7 at issue, given that the other side concedes
8 that there's extreme proselytization, that
9 there is -- and there has to be, because the
10 First Amendment, there has to be de facto
11 coercion to make any sense of the Establishment
12 Clause. And defining that is always going to
13 involve context.

14 You were giving up the reasonable
15 observer test. You were talking about an
16 objective factors test. Could you go into that
17 a little bit more?

18 MS. MILLER: Yes, Your Honor. I think
19 Part 1 of our brief details those factors, and
20 I think all the factors relate to the
21 government's imprimatur.

22 So we -- once you've accepted that we
23 have a symbol that only honors one religion --
24 because I see it as sort of two prongs.

25 You're testing how -- you know, is

1 this a sectarian symbol? Does it, you know,
2 prefer one religion to another? And then, if
3 so, is it the government putting its hands on
4 it?

5 I'd say the Arlington crosses, it's
6 not, because one's donated by Canada. It's
7 pursuant to this, like I said, statute that
8 allows anyone to put them up. So the factors
9 relate to how much government support is there.

10 When you see it in the -- you know,
11 the size of it can matter, insofar as it says
12 how enthusiastic the city is about it.

13 If you had a 90-foot cross and a
14 two-foot Star of David, it says we really like
15 Christians, we're okay with -- with Jews, you
16 know, and so I think the size, the placement of
17 it, obviously, in the most prominent parcel of
18 land, the more prominent it is, the more it
19 begs the question why is it there? Why did the
20 government allow this?

21 JUSTICE KAVANAUGH: Can I --

22 CHIEF JUSTICE ROBERTS: Well, I was
23 just going to say, if -- if I were, I once was,
24 a lower court judge and I get that type of
25 analysis, I'm just going to throw my hands up.

1 Those are 20 different facts, how big is it,
2 where, you know, is it located. And maybe
3 that's the best we can do.

4 But do you -- do you have like
5 something more concise about the test you would
6 apply beyond looking at all the contextual
7 factors and history and all that?

8 MS. MILLER: I mean, I think it's very
9 difficult and I think that's why the Court
10 hasn't come up with that one, you know,
11 singular test, because the cases are complex.
12 That's the Establishment Clause.

13 And I think it actually helps us, you
14 know, deal with each cross. That's why it's
15 easy to say you don't have to tear down any
16 other crosses after this. Each one is
17 evaluated with its specific facts.

18 And I know that that is not the best
19 answer you want to hear. But the reality is no
20 one has come up with a better test than Lemon.

21 We don't need the reasonable observer
22 one. We can look at facts. And I think --

23 JUSTICE ALITO: You raised -- so you
24 just said no other cross has to be torn down,
25 just this one. Would you like us to write that

1 in the opinion?

2 (Laughter.)

3 MS. MILLER: I mean, with respect,
4 this Court has done that. I mean, in its
5 cases, it says, you know, we're not -- we're
6 not deciding anything more. Buono is a perfect
7 example. I don't --

8 JUSTICE ALITO: Say we're going to
9 write an opinion and we're going to say this
10 cross is particularly bad. This one has to be
11 moved, torn down, transferred, so forth. But
12 every other cross is fine.

13 MS. MILLER: I don't know why --

14 JUSTICE ALITO: Is that what you just
15 said?

16 MS. MILLER: No, Your Honor, that's
17 not what I said. What I said was --

18 JUSTICE ALITO: Okay. I
19 misunderstood.

20 MS. MILLER: -- that this Court says,
21 you know, cases are ill-suited for sweeping
22 pronouncements and categorical rules.

23 So, when the Court says that it says,
24 you know, not every cross is going to be torn
25 down, not every cross is going to be held --

1 upheld, and I think that's an appropriate way
2 to leave room for exceptions.

3 JUSTICE KAVANAUGH: Your -- your
4 argument sounds in liberty. You raise an
5 important liberty argument. In thinking about
6 a liberty claim, I think the Constitution tilts
7 toward liberty in its structure, and one of the
8 ways it does so is there are lots of avenues
9 for you to -- the Bladensburg counsel could
10 change its approach here.

11 The Maryland legislature could say no
12 more. The Maryland constitution, as Judge
13 Sutton would remind us, could, or the Maryland
14 courts could prohibit it.

15 With that in mind, the Establishment
16 Clause test referenced a historical practice
17 can be thought of as setting a floor, an
18 important one, but there are other ways the
19 Constitution tilts toward liberty and other
20 avenues.

21 How should we think about that, or
22 should we think about that at all, or is that
23 irrelevant to us?

24 MS. MILLER: I mean, liberty's
25 absolutely important. And I think that's where

1 the -- the brief of the Baptist Joint Committee
2 and all of the Christian groups, you know,
3 joined saying that a ruling upholding this
4 cross would definitely degrade and damage their
5 -- their free exercise of their religious
6 liberty beliefs.

7 With respect to a test, even in Town
8 of Greece, the Court talks about not allowing a
9 policy that excludes or discriminates against
10 non-believers.

11 And I think, in that regard, it
12 actually even goes farther in favor of
13 non-believers than Marsh, because I believe
14 some Justices interpreted Marsh to mean you can
15 disregard atheists, and in Town of Greece, the
16 Court said, no, you can't.

17 JUSTICE KAVANAUGH: I guess my
18 question was, in thinking about our role, what
19 is the role of this Court in a case like this?

20 Should it matter that we know that the
21 Bladensburg council, the state legislature of
22 Maryland, the Maryland constitution, are all
23 there, or is that irrelevant to how we think
24 about this?

25 MS. MILLER: May I?

1 CHIEF JUSTICE ROBERTS: You have a
2 couple minutes left.

3 MS. MILLER: Okay. How -- how
4 Maryland decides to -- I guess I'm just not
5 quite understanding the question. Is it how --

6 JUSTICE KAVANAUGH: The fact that
7 there are other ways in which the cross --
8 other bodies that can decide the cross is too
9 much, the Maryland -- the local council could,
10 the Maryland legislature. And I'm not saying
11 that's the right answer. I'm just saying is
12 that relevant to how we think about our role in
13 a case like this or not?

14 MS. MILLER: So if, like, the Maryland
15 legislator decides that the cross is universal?

16 JUSTICE KAVANAUGH: No, that the cross
17 should come down.

18 MS. MILLER: I see.

19 JUSTICE KAVANAUGH: In other words,
20 the Bladensburg council could transfer the
21 property --

22 MS. MILLER: Oh.

23 JUSTICE KAVANAUGH: -- to the Maryland
24 legislature. The Maryland state courts, the
25 Maryland court of appeals could decide.

1 MS. MILLER: The remedy, is that what
2 you're getting at?

3 JUSTICE KAVANAUGH: Yeah.

4 MS. MILLER: Yes. I mean I think the
5 remedy is certainly relevant to considering
6 that -- that it doesn't need to be torn down,
7 but I don't know if that plays into the
8 question of --

9 JUSTICE SOTOMAYOR: I think the
10 question --

11 MS. MILLER: -- is this
12 constitutional.

13 JUSTICE SOTOMAYOR: -- is different.
14 I think the question is do we think that --
15 since there are other avenues available, that
16 the Constitution doesn't require this floor --

17 MS. MILLER: I -- I see.

18 JUSTICE SOTOMAYOR: -- as a
19 constitutional floor for an Establishment
20 Clause violation. I think that's the question
21 that's being asked.

22 MS. MILLER: Oh, then the answer is
23 no, I don't think that that's relevant at all.
24 I mean, the Establishment Clause is -- you
25 know, trumps statutes and -- and so forth. So

1 I think that would be -- yes.

2 So we ask that this Court affirm.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Three minutes, Mr. Katyal.

6 REBUTTAL ARGUMENT OF NEAL K. KATYAL
7 ON BEHALF OF THE PETITIONER IN CASE NO. 18-18

8 MR. KATYAL: Thank you. Ours is a
9 middle path between my three excellent friends.
10 The easiest way to resolve this case in the --
11 is to say, in the wake of World War I, crosses
12 like this one have an independent secular
13 meaning.

14 As Justice Kavanaugh said before, this
15 Court's decisions recognize that symbols,
16 including religious symbols, have dual
17 meanings, and you can look to Van Orden for
18 that or you could just look up. And --

19 JUSTICE GINSBURG: But does --

20 JUSTICE SOTOMAYOR: But, Mr. Katyal,
21 how --

22 JUSTICE GINSBURG: -- the cross really
23 have a dual meaning, Mr. Katyal? It is the
24 preeminent symbol of Christianity. People wear
25 crosses as -- to show their devotion to the

1 Christian faith.

2 MR. KATYAL: We don't disagree with
3 any of that, Justice Ginsburg. Our only point
4 -- it's same one that the Buono plurality made
5 -- is that crosses, particularly World War I
6 ones, have a -- have a second meaning, and that
7 meaning is what makes it constitutional.

8 That's why we disagree with my friends
9 here, because we think that their approach
10 would -- what -- would risk the destruction of
11 this 93-year-old memorial, which, you know --
12 which -- which has that real long tradition
13 going back to the field of Flanders --

14 JUSTICE SOTOMAYOR: Mr. Katyal --

15 MR. KATYAL: -- and the like.

16 JUSTICE SOTOMAYOR: -- there's a call
17 and a discussion about undoing Lemon
18 altogether.

19 MR. KATYAL: Right.

20 JUSTICE SOTOMAYOR: Substituting
21 something like a coercion test, whatever, with
22 or without limits. What position are you
23 taking --

24 MR. KATYAL: We'd be --

25 JUSTICE SOTOMAYOR: On behalf of the

1 commission -- of --

2 MR. KATYAL: We profoundly disagree.
3 We think it's unnecessary and unwise. It's
4 unnecessary because, as their own briefs say --
5 the best evidence is the last pages of each of
6 the briefs by solicitor general and the Legion.
7 They say the existing tests make this an easy
8 case to save the cross. So it's not presented
9 here.

10 If, Justice Gorsuch, you're concerned
11 about Lemon, wait for a case in which it has
12 some bite. Here, every test, whatever test you
13 apply --

14 JUSTICE GORSUCH: Well --

15 MR. KATYAL: -- yields the same
16 result.

17 JUSTICE GORSUCH: You're -- you're --
18 you're in the same boat saying apply Lemon --
19 keep Lemon, keep it -- keep it around for a
20 rainy day, but please, please, please, do not
21 apply Lemon to this case.

22 MR. KATYAL: Well, we're happy with
23 you applying Lemon. Our brief says that that
24 would be constitutional. We just think this
25 Court in Van Orden has you didn't -- for

1 passive monuments, not necessarily --

2 JUSTICE KAVANAUGH: What if we think

3 --

4 MR. KATYAL: -- the most important

5 ones --

6 JUSTICE KAVANAUGH: What if we think

7 it's unconstitutional under Lemon? What is

8 your view then?

9 MR. KATYAL: Well, I think it would be

10 very impossible for reasons that the -- for --

11 for reasons our brief explains to find it.

12 JUSTICE KAVANAUGH: And what if --

13 what if it's unconstitutional under Lemon?

14 JUSTICE GORSUCH: Yeah. The other

15 side so argues. So I -- I'd appreciate an

16 answer to that question.

17 MR. KATYAL: Yeah, so I mean, we -- if

18 it's unconstitutional, then -- you know, then I

19 think we would say, you know, you should take a

20 look at Lemon because then it would be

21 necessarily presented.

22 (Laughter.)

23 JUSTICE KAVANAUGH: Right.

24 MR. KATYAL: Right. But we think

25 you'd have to do so much work to get there,

1 Justice Kavanaugh, that it would be a
2 distortion of Lemon. And my friends say there
3 are, you know, disagreements in the lower
4 courts. Our cert petition outlines the
5 disagreements in the lower courts. They're
6 largely on crosses.

7 Our test resolves that. It resolves
8 the objective observer disputes and resolves
9 the longevity question of which there's a
10 circuit split. But to take this case and go
11 further, particularly because, you know, as the
12 Chief Justice said, they're selling you some
13 clean test, but in the end, when -- you know,
14 when push comes to shove, they have indirect
15 coercion, proselytization, you know, and all
16 these other things. Who knows what those mean.

17 The one thing we do know it means is
18 that it's going to permit crosses like the Lake
19 County cross with Jesus nailed to the center of
20 it in public parks. And that, to me, is a
21 radical change in the law.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 The case is submitted.

25

1 (Whereupon, at 11:35 a.m., the case
2 was submitted.)
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