Nos. 17-1717 and 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 OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Rutherford Institute (the "Institute") is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated, and in educating the public about constitutional and human rights issues. Religious freedom is an area in which the Institute has been particularly active in terms of legal representation and public education alike.[1]

In this case, the Institute seeks reversal because the Fourth Circuit has misinterpreted the Establishment Clause in a way that threatens citizens' First Amendment rights to freely exercise their religion. Religious freedom was the main aspiration that sent America's founders searching for independence from England. That is why the Framers included the guarantee of freedom of

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[1] Recent cases before the Court in which the Institute has submitted an amicus brief include *Adorers of the Blood of Christ v. Federal Energy Regulatory Commission*, No. 18-548; *Hoever v. Belleis*, No. 17-1035; and *Holt v. Hobbs*, No. 13-6827. Other First Amendment cases decided by the Court in which the Institute has been involved include *Good News Club v. Milford Central Sch. Dist.*, 533 U.S. 98 (2001) and *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989).

The Institute has been similarly active at the state level. For example, the Institute challenged an Oklahoma requirement for submitting to a biometric photograph as a condition of obtaining a driver's license. It has also urged the California legislature to accommodate religious objections to a mandatory vaccine law.

religion in the First Amendment. If allowed to stand, the Fourth Circuit's decision will interfere with religious freedom in a way that would have been unfathomable even by the standards of eighteenth century England—much less those of the twenty-first century United States of America. It will also create a precedent that would, for the very first time, transmogrify the First Amendment so that its protections of freedom ***of*** religion would be nullified by a mandate that public property be free ***from*** any display of religious symbols.

SUMMARY OF ARGUMENT

The Court's precedents are clear that the Establishment Clause does not require eradication of all religious symbols in the public realm. The Fourth Circuit's mandate that the Bladensburg Peace Cross cannot remain in the Veterans Memorial Park where it has stood for the past 93 years is contrary to these precedents. If not reversed, the Fourth Circuit's decision also threatens to create the "religiously based divisiveness" that the Establishment Clause seeks to avoid. The neutrality toward religion that the Establishment Clause requires does not permit the government to favor the "nonreligion" espoused by the American Humanist Association over religion in general or any individual religion in particular. The First Amendment does not require—and in fact prohibits—the dismemberment or destruction of the Bladensburg Peace Cross that the Fourth Circuit has mandated.

ARGUMENT

A. The Establishment Clause Does Not Require Eradication of the Passive Display of All Religious Symbols from Public Property

The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof… ." As envisioned by the Framers, the First Amendment was intended to guarantee freedom ***of*** religion. As reinterpreted by the Fourth Circuit, however, the First Amendment instead guarantees freedom ***from*** religion.

The Fourth Circuit's decision is contrary to the precedents of the Court interpreting the Establishment Clause. The Establishment Clause "does not require eradication of all religious symbols in the public realm." *Salazar v. Buono,* 559 U.S. 700, 718 (2010) (plurality opinion) (citing *Lee v. Weisman*, 505 U.S. 577, 598 (1992)). *See also Lynch v. Donnelly,* 465 U.S. 668, 678-79 (1984). Yet that is exactly what the Fourth Circuit has decreed must happen to the Bladensburg Peace Cross.

The Bladensburg Peace Cross is a memorial to World War I veterans of Prince George's County, Maryland. It has stood for the past 93 years in what is now a public park—known as Veterans Memorial Park—surrounded by other war memorials. Like many other monuments across the country (including war memorials in nearby Arlington National Cemetery), the Bladensburg Peace Cross is in the shape of the Latin cross. This is unacceptable, according to the Fourth Circuit panel that issued the decision, because the Latin cross is "the preeminent symbol of Christianity." App. 20a. On that basis, the panel majority concluded, the Establishment Clause requires that the Peace Cross must be "raz[ed]," have its arms "remov[ed]," or be subject to "alternative arrangements that would not offend the Constitution." App. 31a-32a n.19.

With all due respect to the Fourth Circuit, it is the panel majority's interpretation of the Establishment Clause—not the Bladensburg Peace Cross—that "offend[s] the Constitution." If the Fourth Circuit's decision is allowed to stand, the Bladensburg Peace Cross will suffer the same fate as the ancient statues of Buddha in Afghanistan that

the Taliban destroyed in 2001. In this country, however, the First Amendment prevents rather than requires such an outcome. The Fourth Circuit erred in holding otherwise.

The Briefs of Petitioners—The Maryland-National Capital Park and Planning Commission (the "M-NCPPC") and The American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131 (collectively, the "American Legion Petitioners")—address in detail the various tests that the Court has applied to determine whether the use of religious symbols in passive displays violates the Establishment Clause. These tests include the one articulated by the Court in *Van Orden v. Perry*, 545 U.S. 677 (2005) and followed in, among other cases, *Buono*.

Under this test, a public display does not violate the Establishment Clause if the government's purpose in maintaining the display and the objective meaning of the display are both predominantly secular. Applying this test, the Court held in *Van Orden* that the Establishment Clause did not require removal of a display of the Ten Commandments on the grounds of the Texas State Capitol. *See* 545 U.S. at 703-04. In *Buono,* the Court similarly held that the Establishment Clause did not require removal from a national park of a 76-year-old World War I memorial that—like the Bladensburg Peace Cross—was in the shape of a cross:

> [A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and

> respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

559 U.S. at 721.

The Court's Establishment Clause precedents are also clear that the existence of a longstanding history or tradition of similar practices suggests the absence of any conflict with the Establishment Clause. As the Court held in *Town of Greece v. Galloway*, 572 U.S. 565 (2014), the Establishment Clause "must be interpreted by reference to historical practices and understandings," and "[a]ny test the Court adopts must acknowledge … practice[s] that w[ere] accepted by the Framers and ha[ve] withstood the critical scrutiny of time and political change." *Id.* at 576-77 (quotation marks omitted). The Briefs of both the M-NCPPC and the American Legion Petitioners provide the historical context—with respect to both the Bladensburg Peace Cross and similar displays at Arlington National Cemetery and elsewhere—establishing why this particular monument passes muster under the standard articulated in *Town of Greece*.

B. Requiring Desecration of the Bladensburg Peace Cross Would Create the "Religiously Based Divisiveness" That the Establishment Clause Seeks to Avoid

Regardless of the test applied, requiring the destruction or dismemberment of the Peace Cross will engender the very sort of "religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring). Petitioners' Briefs recount in detail the various secular activities surrounding the Bladensburg Peace Cross that have taken place without incident for the past 93 years. The fact that the memorial has not caused such divisiveness is among the reasons that it is not prohibited by the Establishment Clause under *Town of Greece*, among other precedents. In contrast, such divisiveness is the likely if not intended effect of requiring the Bladensburg Peace Cross to be dismembered—as evidenced by, *inter alia*, the volume of *amicus briefs* being submitted in this case.

C. The Establishment Clause Prohibits the Government from Favoring Nonreligion and Requires the Government to Accommodate Religious Expression

The Court has consistently held that "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). *See also Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985) (the Court has "consistently recognized" a

requirement that "the government . . . maintain a course of neutrality among religions, and between religion and nonreligion"); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("Th[e] [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."). In these and other cases, the Court has consistently warned against the "risk of fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 845-46 (1995).

It is as much a violation of the Establishment Clause for the government to favor nonreligion—including the "humanism" espoused by Respondent—over religion as it is for the government to favor one particular religion over another. The website of Respondent in this case, the American Humanist Association, has the tagline "Good Without a God" under its name and logo. *See* www.americanhumanist.org. It also describes Respondent's mission as "advocating progressive values and equality for humanists, atheists, and freethinkers." *See id.* These are perfectly legitimate goals that the First Amendment protects and permits.

What the First Amendment does not permit, however, is for the government to favor Respondent's nonreligion over religion. Favoritism of nonreligion violates the Establishment Clause every bit as much

as it would for the government to favor the Episcopal Church over the Presbyterian Church, Protestantism over Catholicism, Christianity over Judaism, or Islam over Hinduism. Contrary to the position of Respondent in this case, "'[t]he Constitution [does not] require complete separation of church and state." *Lynch v. Donnelly*, 465 U.S. at 673. Rather, the First Amendment "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Id.*, citing *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

The Court has long recognized the role that religion has played in our nation's history. *See, e.g.*, *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 212 (1963) ("[R]eligion has been closely identified with our history and government . . . ."); *Engel v. Vitale*, 370 U.S. 421, 434 (1962) ("The history of man is inseparable from the history of religion."). The Court has also stated that "[a] secular state . . . is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed." *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989).

The wiping out of all public references to religion is entirely inconsistent with the Establishment Clause's mandate that government exhibit "neutrality between . . . religion and nonreligion." *Epperson*, 393 U.S. at 103-04. And such whitewashing of our country's religious history will take us dangerously close to an effective

endorsement of atheism as our nation's official creed. Like the public display of the crèche at issue in *Lynch v. Donnelly*, the menorah at issue in *Allegheny*, and the Ten Commandments at issue in *Van Orden*, the presence of the Bladensburg Peace Cross in Veterans Memorial Park is protected—not prohibited—by the Establishment Clause.

CONCLUSION

The Framers never envisioned that the Establishment Clause would require the obliteration of all religious symbols from every public place, especially not in the secular context in which the Bladensburg Peace Cross is displayed in Veterans Memorial Park. The Fourth Circuit decision is not faithful to the text of the First Amendment. Nor is it faithful to the Court's subsequent interpretation of the Establishment Clause. The Institute therefore respectfully requests that the decision of the Fourth Circuit be reversed.

Respectfully submitted,

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