

Nos. 17-1717, 18-18

In the Supreme Court of the United States

AMERICAN

MARYLAND- NATIONAL CAPITAL
PARK AND PLANNING COMMISSION,

v.

AMERICAN HUMANIST ASSOCIATION,

ELLIOT M. MINCBERG
DIANE LAVIOLETTE

DEBORAH A. JEON

JEFFREY I. PASEK

TABLE OF CONTENTS—continued

	Page
1. A narrow focus on legal coercion would allow official favoritism to degrade religious freedom and render the Establishment Clause superfluous.	23
2. A test limited to considering practices at the time of ratification would be empty.....	27
3. The absence of past challenges to an act of religious favoritism does not alone show lack of cognizable harm.	31
Conclusion	35
Appendix.....	1a

TABLE OF AUTHORITIES

Page(s)

CASES

374 U.S. 203 (1963) ^{v.}	26, 29, 30, 32
616 F.3d 1145 (10th Cir. 2010) ^{v.}	

TABLE OF AUTHORITIES—continued

	Page(s)
335 F.3d 1282 (11th Cir. 2003).....	33
565 U.S. 171 (2012).....	12, 30
333 U.S. 203 (1948).....	12, 31
400 F. Supp. 2d 707 (M.D. Pa. 2005).....	34
456 U.S. 228 (1982).....	2, 4, 24
505 U.S. 577 (1992).....	
465 U.S. 668 (1984).....	3, 32
5 U.S. (1 Cranch) 137 (1803).....	26
463 U.S. 783 (1983).....	27, 30
545 U.S. 844 (2005).....	
319 U.S. 105 (1943).....	28
98 U.S. 145 (1878).....	12
515 U.S. 819 (1995).....	24
559 U.S. 700 (2010).....	3, 16, 20

TABLE OF AUTHORITIES—continued

	Page(s)
530 U.S. 290 (2000) v. ,	3, 32
93 F.3d 617 (9th Cir. 1996) v.	18
491 U.S. 397 (1989) v.	14
572 U.S. 565 (2014) v.	27, 30
629 F.3d 1099 (9th Cir. 2011) v.	18, 28
545 U.S. 677 (2005) v.	13, 31
472 U.S. 38 (1985) v.	4, 29
397 U.S. 664 (1970) v.	12, 27, 30
80 U.S. (13 Wall.) 679 (1871) v.	12
319 U.S. 624 (1943) v. ,	14, 34
474 U.S. 481 (1986) v.	30
376 F.3d 292 (4th Cir. 2004) v.	33
343 U.S. 306, 313 (1952) v.	24

TABLE OF AUTHORITIES—continued

	Page(s)
The Federalist No. 10 (James Madison).....	10
The Federalist No. 51 (James Madison).....	10
Noah Feldman, 77 N.Y.U. L. Rev. 346 (2002).....	6, 7, 10
Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), http://bit.ly/2jMsrVO	8
Edwin S. Gaustad, (2005).....	7
Winthrop S. Hudson, (3d ed. 1981)	9
Thomas Jefferson, (Jan. 16, 1786), (John J. Patrick ed., 1995)	11, 12
Kyle D. Johnson et al., 1 Spirituality in Clinical Practice 82 (2014), http://bit.ly/2ifUo4M	19
Douglas Keister, (2004).....	16
Ron Knox, , Lawrence Journal-World (Sept. 27, 2006), http://tinyurl.com/r6yol	34

TABLE OF AUTHORITIES—continued

	Page(s)
Douglas Laycock,	
61 Case W. Res. L. Rev. 1211 (2011)	17
Douglas Laycock,	
2014 U. Ill. L. Rev. 839 (2014)	28
Sara Amy Leach,	
41:4 AGS Q.: Bull. Ass'n for Gravestone Studies 36 (2017), https://bit.ly/2CdBu7w	20
Lauri Lebo, (2008)	34
John Locke, (James H. Tully ed., Hackett Publ'g Co. —	ú
	ú

TABLE OF AUTHORITIES—continued

Page(s)

Richard P. McBrien,

TABLE OF AUTHORITIES—continued

	Page(s)
Philip A. Saigh,	
109 J. Soc. Psychol. 167 (1979).....	19
Philip A. Saigh,	
147 J. Genetic Psychol. 417 (1986).....	19
Church & State 20 (Nov. 2004), http://tinyurl.com/zka3n6r	33
Wayne R. Swanson,	
(1990).....	32
Richard Taylor,	
(2003).....	15
1 Alexis de Tocqueville, (Bradley ed. 1945)	29
Transcript of Oral Argument, v.	

The are:

Americans United for Separation of Church and State.

American Civil Liberties Union.

American Civil Liberties Union of Maryland.

Anti-Defamation League.

Hadassah, the Women's Zionist Organization of America, Inc.

Hindu American Foundation.

Interfaith Alliance Foundation.

Jewish Social Policy Action Network.

Men of Reform Judaism.

National Council of Jewish Women.

People for the American Way Foundation.

Reconstructing Judaism.

Reconstructionist Rabbinical Association.

Union for Reform Judaism

religion, and between religion and nonreligion" (quoting *Lemon v. Kurtzman*, 393 U.S. 97, 104 (1968)).

By ordaining that governmental and religious authorities operate in separate spheres, the Framers sought to safeguard religion from governmental influence and interference, so that all may worship and pray, or not, according to the dictates of individual conscience. And they undertook to quell the "hatred, disrespect, and even contempt" that historically has resulted "whenever government ha[s] allied itself with one particular form of religion." *Lemon v. Kurtzman*, 393 U.S. 421, 431 (1962). The First Amendment thus disallows official religious favoritism, no matter how modest or how benign in intent.

"The cross is of course the preeminent symbol of Christianity." *Allegheny County v. American Family Association*, 559 U.S. 700, 725 (2010) (Alito, J., concurring in part and concurring in the judgment). For some Christians, contemplating a government-sponsored symbol of their faith may be a profoundly affirming experience. But for those who do not subscribe to Christian beliefs, being confronted with an official display of a Latin cross may be a pro-

the cross to be a memorial to all veterans, without regard to the countless non-Christians who fought and died for our country.

When government chooses, as it should, to honor those who have made the ultimate sacrifice for our Nation, it should recognize the equal citizenship and equal sacrifice of all. It should not favor only those who hold a preferred faith or set of beliefs.

This Court's long-standing jurisprudence, which forbids such religious favoritism, appropriately safeguards religious freedom for all. As the United States becomes increasingly religiously diverse, that constitutional protection is more crucial than ever. The Court should therefore reject any invitation to forsake our "profound commitment to religious liberty" (, 545 U.S. at 884) and should instead reaffirm the fundamental principles and essential protections for religious freedom that have served this country and all its people so well for so long.

ARGUMENT

"[T]he Framers of the First Amendment forbade" any "official denominational preference," mandating instead the strict "principle of denominational neutrality." , 456 U.S. at 246, 255.² Petitioners ask

² Accord, , v. , 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) ("[O]ur constitutional tradition, from the Declara-

this Court to approve a towering Latin cross as an official monument to all veterans and fallen soldiers, without regard for the diverse faiths and beliefs

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not so subtle—coercive pressure on individuals and faith groups to conform.

a. The notion of freedom of conscience as a moral virtue traces to the thirteenth-century teachings of Thomas Aquinas, who wrote that conscience must be a moral guide and that acting against one's conscience constitutes sin. See Noah Feldman,

, 77 N.Y.U. L. Rev. 346, 356-357 (2002). Martin e ui3(l)5((.)-1712n)-1700hir

Many of our Nation's founders took these teachings to heart. Benjamin Franklin, for example, stated:

These principles led to the defeat of Henry's proposal and spurred adoption instead of Thomas Jefferson's Bill for Establishing Religious Freedom (see Merrill D. Peterson, *Atlantic Monthly* (Dec. 1994), <http://theatl.in.tc/2idj7Xo>), the forebear of the First Amendment's Religion Clauses (see *Everson v. Board of Education*, 330 U.S. at 13).

a. Though the United States was more homogeneous in 1789 than it is today, this country has, from the beginning, been home to unprecedented religious diversity. Congregationalists maintained a stronghold in New England; Anglicans dominated religious life in the South; and Quakers influenced society significantly in Pennsylvania. See Akhil Reed Amar, *The Bill of Rights* 45 (1998); Winthrop S. Hudson, *The Bill of Rights* 46 (3d ed. 1981).

The Framers knew



favoritism inevitably leads to “persecution for cause of conscience” that breaches the “express command of God that peace be kept.” Williams, *Williams*, at 59, 61. And Locke, “[w]riting in the aftermath of religious turmoil in England and throughout Europe,” had recognized “the tendency of both religious and governmental leaders to overstep their bounds and intermeddle in the others’ province,” producing civil strife. Michael W. McConnell,

McConnell, 103 Harv. L. Rev. 1409, 1431-1432 (1990). Locke had argued, therefore, that separation was a prerequisite to lasting peace. *Locke*; see also Feldman, *Feldman*, at 368.

The Framers thus well understood that they were creating a government for a diverse group of people and faiths (see Jon Meacham, *Meacham*, 101 (2006)) and that religious liberty for all would necessarily require accommodation of religious pluralism (see John Witte Jr., *Witte*,

Witte, 45 (2d ed. 2005) (citing *The Federalist* Nos. 10, 51 (James Madison))). Cf. McConnell, *McConnell*, at 1513, 1516 (arguing that Free Exercise Clause was product of, and protection for, religious pluralism).

b. It was against this philosophical and political backdrop—including the lived experience of persecution of Baptists and other religious dissenters at the hands of the established Anglican church (see Andy G. Olree,

Olree, 36 Harv. J.L. & Pub. Pol’y 211, 215, 226-227, 266-267 (2013))—that Virginia enacted Jefferson’s

person played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." _____, 330 U.S. at 13 (citing _____ v. _____, 98 U.S. 145, 164 (1878); _____ v. _____, 80 U.S. (13 Wall.) 679 (1871); _____ v. _____, 133 U.S. 333, 342 (1890))

our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate" (

B. The Counties' Cross Display Intrudes On Religious Freedom.

a. Symbols have power. They communicate complex ideas, often more effectively and more forcefully than mere words. "The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind."

v. , 319 U.S. 624, 632 (1943). Symbols "attract public notice, they are remembered for decades or even centuries afterwards," and they "speak[] directly to the heart" as well as the head. Nicholas Jackson O'Shaughnessy, 102 (2004). That is why "[c]auses and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." , 319 U.S. at 632; cf. *v.* , 491 U.S. 397, 405 (1989) ("Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America.'").

What is true for symbols generally is especially so for religious ones, which may convey at a glance millennia of collective experience, hope, and triumph to those who hold them dear

, Catholic News (Mar. 12, 2017), <http://bit.ly/2CLyEqE>; cf. U.S. Conference of Catholic Bishops, § 91 (2000) (“[T]he image of Christ crucified * * *

Douglas Laycock,

, 61 Case W. Res. L. Rev. 1211, 1239 (2011).

b. It is therefore entirely understandable that private citizens in Prince George's County and then the American Legion, also a private group, chose to erect a Latin cross. For them, the cross, with its deep layers of spiritual meaning, served two distinct but mutually reinforcing ends: It allowed them to commemorate the life, death, honor, and sacrifice of soldiers presumed to be Christian. And it simultaneously provided a vehicle to honor the group members' own faith and to pledge themselves collectively to a spiritual path that they regarded as righteous.

Thus, the original organizers required donors to declare the existence of "ONE GOD" and pledge to follow the "SPIRIT" of the fallen soldiers to "GUIDE US THROUGH LIFE IN THE WAY OF GODLINESS, JUSTICE AND LIBERTY." J.A. 36. And in the hands of the American Legion, the cross was dedicated in a ceremony replete with Christian prayers led by Christian clergy. J.A. 1130.

In short, the Bladensburg Cross has, since its inception, been a monument to the Christian faith as much as to the 49 listed individuals.

c. No one disputes that these private groups had the right to use the Latin cross as a tributeDC BT1 0 101(the)-101(L)-2(a)-7 use

since. The answer to that question is a resounding “no” under settled legal doctrine, for the reasons that the court of appeals explained. The result is also the right one given the fundamental principles on which the Framers built the First Amendment’s protections for religious freedom.

In World War I, and in all wars before and since, people of many faiths, and people of no particular faith, fought and died for our country. The Christian lives lost are deserving of respect, gratitude, and remembrance. But they are not worthy than the lives, deaths, and sacrifices of the many non-Christians who served beside them.

Yet that is precisely the message that the counties have sent, intentionally or not, by adopting, dedicating, and maintaining a towering Latin cross as their official tribute to veterans and war dead. “[A] memorial Cross is not a symbol of death; it is a symbol of death that signifies or memorializes the death of a .”

The harm of that message is more than theoretical: Empirical research confirms that religious symbols have real, measurable effects on adherents and nonadherents alike, even when the symbols are displayed with no intent to proselytize or coerce. Viewing religious symbols, for example, has statistically significant effects on students' academic performance. Researchers found in controlled experiments that Catholic-school students did systematically better on standardized tests when the examiner wore a cross and systematically worse when the examiner wore a Star of David. See Philip A. Saigh,

always been "understood * * * as a memorial to veterans and the fallen of every faith." Counties' Cert. Reply Br. 4. But employing the preeminent symbol of Christianity to represent all veterans disregards

dhist Wheel of Righteousness, several Native American religious symbols, the Wiccan pentacle, and an atomic whirl for atheists. See

, U.S. Dep't of Veterans Affairs, Nat'l Cemetery Admin., <https://bit.ly/2ydVtE3>. And the

Some contend that the Establishment Clause should bar only formal legal coercion—such as fines or imprisonment for failure to participate in official religious exercises. See, e.g., *American Legion*, Br. 24-40; *U.S. v. American Legion*, Br. 13-23; *Cato Institute v. U.S. Dept. of Justice*, Br. 8-9. Others

over another" (, 456 U.S. at 244),³ or the animating principle that favoritism corrupts religion and compromises religious freedom

"just [does not] comport[] with our tradition." Tr. of Oral Arg. at 12, v. , 505 U.S. 577 (1992) (No. 90-1014).

b. A legal-coercion-only test would also violate the canons of constitutional interpretation.

There can be no doubt that the Free Exercise Clause prevents government from compelling participation in unwanted religious exercises; that is the very heart of the free-exercise guarantee. See, , v. , 374 U.S. 203, 223 (1963) ("[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.").

While there is certainly overlap in the prohibitions and protections of the Establishment and Free Exercise Clauses (see, , , 370 U.S. at 430; v. , 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment)), reading the Establishment Clause to bar legal coercion would make it duplicative of the Free Exercise Clause (see , 505 U.S. at 621 (Souter, J., concurring) ("[A] literal application of the coercion test would render the Establishment Clause a virtual nullity"); , 492 U.S. at 628 (O'Connor, J., concurring)).

The attempt to make some version of the historical approach of *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Edwards v. Aguillard*, 572 U.S. 565 (2014), the only mode of permissible analysis provides no guidance for deciding most cases that arise under the Establishment Clause.

a. In *Marsh v. Chambers*, this Court upheld legislative prayer based primarily on congressional intent reflected in the “unique,” “unambiguous” historical fact that the First Congress voted to hire legislative chaplains the same week that it approved the First Amendment. 463 U.S. at 787-788, 791-792. And in *Edwards v. Aguillard*, the Court upheld a town board’s prayer practice as consistent with the specific tradition identified in *Marsh*. 572 U.S. at 577, 584. The Court explained in *Edwards* that the Establishment Clause should be interpreted with “historical practices and understandings” in mind, not to posit that history is all that matters, but to illuminate the mandate of the Court’s preceding sentence, which directs that “*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation.” *Edwards* at 576.

Thus, the Court recognized, bedrock antiestablishment principles barring denominational preferences and religious coercion retain their legal force (see *Edwards v. Aguillard*, 572 U.S. at 586, 589), whatever historical practice might have been (see *Marsh v. Chambers* at 576). For “no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time

b. Th

to consider the many issues concerning government and religion today. To infer

, 393 U.S. 97 (holding unconstitutional state law prohibiting teaching of evolution); , 374 U.S. 203 (holding unconstitutional state law requiring public schools to begin each day with prayer and Bible verses); , 370 U.S. 421 (holding unconstitutional school district's requirement to open school day with prayers).

And the modern administrative state

Finally, some suggest that official promotion of a particular faith or of religion generally should earn constitutional license if the conduct—or, perhaps, some other example of that conduct elsewhere—was of long duration without previously sparking lawsuits or other substantial public outcry.

To be sure, avoidance of divisiveness along religious lines is a central concern of the Establishment Clause. See Section A, . But to assume that the absence of open civil strife means that there is no constitutionally cognizable interest at stake is to ignore the real, substantial threats and harms that citizens face when they stand against official religious favorit-

struction in the child's public school. See Robert S. Alley,

86-87 (1996).

In _____, children of a plaintiff were beaten and their home

graphic threats of sexual violence. See Appellant's Br. at 57, _____ v. _____, 461 F.3d 504 (5th Cir. 2006) (No. 04-20667).

CONCLUSION

Regardless of the counties' intent, the Bladensburg Cross sends the divisive and hurtful message that non-Christians are second-class citizens whose sacrifices for our Nation do not count. And the requests to scrap the Framers' plan to ensure religious freedom for all puts religious minorities, and all of us, at risk. As Justice O'Connor put it:

At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. * * * Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

, 545 U.S. at 882 (O'Connor, J., concurring).

The judgment should be affirmed.

APPENDIX

APPENDIX OF *AMICI CURIAE*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of religion and government. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an in the leading church–state cases decided by this Court and by the federal courts of appeals throughout the country. Consistent with our support for the separation of religion and government, Americans United has long fought to uphold the guarantees of the First Amendment that government must not favor, promote, or disfavor any faith or its adherents.

American Civil Liberties Union and ACLU of Maryland

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation’s civil-rights laws. The ACLU of Maryland is a state affiliate of the national ACLU. For nearly a century, the ACLU has been at the forefront of efforts to safeguard the fundamental right to religious liberty, including the core constitutional protections against governmental religious favoritism.

Anti-Defamation League

Anti-Defamation League is a leading anti-hate organization. Founded in 1913 in response to an escalating climate of anti-Semitism and bigotry, its timeless mission is to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Today, ADL continues to fight all forms of hate with the same vigor and passion. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America and to the protection of minority religions and their adherents.

Hadassah, the Women's Zionist Organization of America, Inc.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 300,000 Members, Associates and supporters nationwide. While traditionally known for its role in developing and supporting healthcare and other initiatives in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah is a strong supporter of the strict separation of church and state, as it is critical to preserving the religious liberties of all Americans and especially of religious minorities.

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Jewish Social Policy Action Network

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Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles states that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain democratic society." Consistent with our Principles and Resolutions, NCJW joins this brief.

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civi-4004800ID 16P AMCID 18>BDz805540g/P AMCID 14>1nt7 531.e4(-

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are over 100 Reconstructionist communities in the

