

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMANDA KONDRAT'YEV, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from a Final Judgment of the
United States District Court for the Northern District of Florida
No. 3:16-cv-00195-RV-CJK, Hon. Roger Vinson

**BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE;
AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION
OF FLORIDA; ANTI-DEFAMATION LEAGUE; BAPTIST JOINT COMMITTEE
FOR RELIGIOUS LIBERTY; CENTER FOR INQUIRY; CENTRAL CONFERENCE
OF AMERICAN RABBIS; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION
OF AMERICA, INC.; JEWISH SOCIAL POLICY ACTION NETWORK; MUSLIM
ADVOCATES; NATIONAL COUNCIL OF JEWISH WOMEN, INC.; SIKH
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Amici are nonprofit entities. They have no parent corporations, and no publicly held corporation owns any portion of any of them or has an interest in the outcome of the case or appeal.

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interests of the <i>Amici Curiae</i>	1
Issue Presented	1
Introduction and Summary of Argument.....	2
Argument.....	3
A. The Judgment Is Correct As A Matter Of Law.	3
B. The Controlling Jurisprudence Is Consistent With The History, Purpose, And Original Understanding Of The Establishment Clause.	5
1. Our Nation is built on the understanding that governmental involvement with religion is a grave threat to religious freedom.	6
2. The Religion Clauses were designed to prevent even seemingly benign governmental involvement with religion.	10
C. Removal Of The City’s Latin Cross Advances Religious Freedom.	17
1. Symbols have concrete, real-world effects.	18
2. The Latin cross is an unmistakable and powerful religious symbol.	21
3. Removing the City’s Latin cross respects all Pensacola residents.	25
Conclusion	29
Appendix of <i>Amici Curiae</i>	1a

TABLE OF AUTHORITIES

	Page(s)
Cases	
* <i>ACLU of Ga. v. Rabun Cty. Chamber of Commerce</i> , 698 F.2d 1098 (11th Cir. 1983)	4
<i>ACLU of Ill. v. City of St. Charles</i> , 794 F.2d 265 (7th Cir. 1986)	5
* <i>Am. Atheists, Inc. v. Davenport</i> , 637 F.3d 1095 (10th Cir. 2010)	4, 5, 24, 25, 26
<i>Am. Humanist Ass’n v. Md.–Nat’l Capital Park & Planning Comm’n</i> , 874 F.3d 195 (4th Cir. 2017)	4, 24, 25, 27, 28
<i>Ariz. Christian Sch. Tuition Org. v. Winn</i> , 563 U.S. 125 (2011)	13
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940)	17
<i>Capital Square Review & Advisory Bd. v. Pinette</i> , 515 U.S. 753 (1995)	4
<i>Colo. Christian Univ. v. Weaver</i> , 534 F.3d 1245 (10th Cir. 2008)	28
<i>County of Allegheny v. ACLU Greater Pittsburgh Chapter</i> , 492 U.S. 573 (1989)	28
<i>Davis v. Beason</i> , 133 U.S. 333 (1890)	13
<i>Edwards v. Aguillard</i> , 482 U.S. 578 (1987)	3
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962)	14, 15, 29
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	4

TABLE OF AUTHORITIES—Continued

* <i>Everson v. Bd. of Educ.</i> , 330 U.S. 1 (1947)	passim
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968)	13
<i>Glassroth v. Moore</i> , 335 F.3d 1282 (11th Cir. 2003)	3
<i>Gonzales v. North Township</i> , 4 F.3d 1412 (7th Cir. 1993)	5
<i>Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC</i> , 565 U.S. 171 (2012)	13
<i>Illinois ex rel. McCollum v. Bd. of Educ.</i> , 333 U.S. 203 (1948)	14, 15
<i>Larson v. Valente</i> , 456 U.S. 228 (1982)	28
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984)	25, 26
* <i>McCreary County v. ACLU of Ky.</i> , 545 U.S. 844 (2005)	4, 15, 17, 26, 27
<i>Regan v. Time, Inc.</i> , 468 U.S. 641 (1984)	18
<i>Reynolds v. United States</i> , 98 U.S. 145 (1878)	13
<i>Salazar v. Buono</i> , 559 U.S. 700 (2010)	23
* <i>Santa Fe Indep. Sch. Dist. v. Doe</i> , 530 U.S. 290 (2000)	4, 25, 26
<i>Sch. Dist. v. Schempp</i> , 374 U.S. 203 (1963)	16
<i>Separation of Church & State Comm. v. City of Eugene</i> , 93 F.3d 617 (9th Cir. 1996)	5, 27

TABLE OF AUTHORITIES—Continued

<i>Texas v. Johnson</i> , 491 U.S. 397 (1989)	18, 19
<i>Trunk v. City of San Diego</i> , 629 F.3d 1099 (9th Cir. 2011)	4, 26, 27
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985)	4, 16, 17
<i>Walz v. Tax Comm’n of N.Y.</i> , 397 U.S. 664 (1970)	13
<i>Watson v. Jones</i> , 80 U.S. (13 Wall.) 679 (1871)	13
<i>Weinbaum v. City of Las Cruces</i> , 541 F.3d 1017 (10th Cir. 2008)	24
<i>W. Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943)	16, 18, 29

Constitution

* U.S. Const. amend. I	<i>passim</i>
------------------------------	---------------

Miscellaneous

AKHIL REED AMAR, <i>THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION</i> (2000)	10
Association of Religion Data Archives, <i>County Membership Report: Escambia County, Florida</i> (2010), http://bit.ly/2iYsxp1	26
GEORGE WILLARD BENSON, <i>THE CROSS: ITS HISTORY AND SYMBOLISM</i> (1934)	23
Vincent Blasi, <i>Essay, School Vouchers and Religious Liberty: Seven Questions from Madison’s Memorial and Remonstrance</i> , 87 CORNELL L. REV. 783 (2002)	11, 12
COMPLETE WRITINGS OF ROGER WILLIAMS (Samuel L. Caldwell ed., 1963)	7, 8

TABLE OF AUTHORITIES—Continued

ALEXIS DE TOCQUEVILLE, <i>DEMOCRACY IN AMERICA</i> (Harvey C. Mansfield & Delba Withrop eds. & trans. 2000) (1835)	14
EUSEBIUS, <i>LIFE OF CONSTANTINE</i> (Averil Cameron & Stuart G. Hall trans. 1999).....	22
THE FEDERALIST NOS. 10, 51 (James Madison).....	10
Noah Feldman, <i>The Intellectual Origins of the Establishment Clause</i> , 77 N.Y.U. L. REV. 346 (2002)	7, 9
FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY (John J. Patrick ed., 1995)	12, 13
Letter from Benjamin Franklin to Richard Price (October 9, 1780), http://bit.ly/2jMsrVO	9
EDWIN S. GAUSTAD, ROGER WILLIAMS (2005)	8
WINTHROP S. HUDSON, <i>RELIGION IN AMERICA</i> (3d ed. 1981).....	10
Thomas Jefferson, <i>Autobiography, 6 Jan.–29 July 1821</i> , FOUNDERS ONLINE, NATIONAL ARCHIVES, http://bit.ly/1TJvbc5	15, 16
Letter from Thomas Jefferson to Charles Clay (January 29, 1815), http://bit.ly/2yq06H4	13
Letter from Thomas Jefferson to Jeremiah Moore (August 14, 1800), http://bit.ly/2y9nvNn	13, 14
Thomas Jefferson, <i>The Virginia Statute for Religious Freedom</i> (Jan. 16, 1786)	12, 13
Kyle D. Johnson et al., <i>Pilot Study of the Effect of Religious Symbols on Brain Function: Association with Measures of Religiosity</i> , 1 SPIRITUALITY IN CLINICAL PRACTICE (2014), http://bit.ly/2ifUo4M	21
DOUGLAS KEISTER, <i>STORIES IN STONE: A FIELD GUIDE TO CEMETERY SYMBOLISM AND ICONOGRAPHY</i> (2004)	22, 23
JOHN LOCKE, <i>A LETTER CONCERNING TOLERATION</i> (James H. Tully ed., Hackett Publ'g Co. 1983) (1689)	9

TABLE OF AUTHORITIES—Continued

BRUCE W. LONGENECKER, <i>THE CROSS BEFORE CONSTANTINE: THE EARLY LIFE OF A CHRISTIAN SYMBOL</i> (2015)	22
James Madison, <i>Amendments to the Constitution</i> , [8 June] 1789, FOUNDERS ONLINE, NATIONAL ARCHIVES, http://bit.ly/2zy69uO	16
Letter from James Madison to Edward Livingston (July 10, 1822), http://bit.ly/2zUXhBT	6
Letter from James Madison to William Bradford (April 1, 1774), http://bit.ly/2h57Xm5	9
James Madison, <i>Memorial and Remonstrance Against Religious Assessments</i>	11, 12, 14
RICHARD P. MCBRIEN, <i>CAESAR’S COIN: RELIGION AND POLITICS IN AMERICA</i> (1987)	8
ALISTER E. MCGRATH, <i>CHRISTIANITY: AN INTRODUCTION</i> (2d ed. 2006)	21, 22, 23
JON MEACHAM, <i>AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION</i> (2006)	10
Andy G. Olree, “ <i>Pride Ignorance and Knavery</i> ”: <i>James Madison’s Formative Experiences with Religious Establishments</i> , 36 HARV. J.L. & PUB. POL’Y 211 (2013)	11
JOHN O’SHAUGHNESSY & NICHOLAS JACKSON O’SHAUGHNESSY, <i>PERSUASION IN ADVERTISING</i> (2004).....	19
NICHOLAS JACKSON O’SHAUGHNESSY, <i>POLITICS AND PROPAGANDA</i> (2004)	18, 19
Merrill D. Peterson, <i>Jefferson and Religious Freedom</i> , ATLANTIC MONTHLY (Dec. 1994), http://theatlntc/2idj7Xo	12
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TABLE OF AUTHORITIES—Continued

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JONATHAN RILEY-SMITH, THE CRUSADES: A HISTORY (2d ed. 2005)	22, 23
Philip A. Saigh, <i>The Effect of Perceived Examiner Religion on the Digit Span Performance of Lebanese Elementary Schoolchildren</i> , 109 J. SOC. PSYCHOL. 167 (1979).....	20, 21
Philip A. Saigh, <i>Religious Symbols and the WISC-R Performance of Roman Catholic Junior High School Students</i> , 147 J. GENETIC PSYCHOL. 417 (1986).....	20, 21
Philip A. Saigh et al., <i>Religious Symbols and the WISC-R Performance of Roman Catholic Parochial School Students</i> , 145 J. GENETIC PSYCHOL. 159 (1984)	20, 21
RICHARD TAYLOR, HOW TO READ A CHURCH: A GUIDE TO SYMBOLS AND IMAGES IN CHURCHES AND CATHEDRALS (2003)	23
U.S. CONFERENCE OF CATHOLIC BISHOPS, BUILT OF LIVING STONES: ART, ARCHITECTURE, AND WORSHIP (Nov. 16, 2000), http://bit.ly/2x51bWL	24
Roger Williams, <i>The Bloudy Tennant, Of Persecution for Cause of Conscience</i> (1644)	7, 8
JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2d ed. 2005)	10

INTERESTS OF THE *AMICI CURIAE*¹

Amici are religious and civil-liberties organizations that represent diverse faiths and beliefs but are united in respecting the important but distinct roles of religion and government in the life of the Nation. From the time of the founding, the Establishment Clause and the religious and philosophical ideals that motivated it have protected religious freedom for all Americans by ensuring that government does not interfere with private conscience in matters of faith and belief. Although the court below decided this case correctly, it cast doubt on these essential constitutional safeguards. *Amici* write to dispel any resulting confusion so that the protections are not undermined.

Detailed descriptions of the *amici* appear in the Appendix.

ISSUE PRESENTED

The Establishment Clause forbids government to act with a religious purpose or effect or to communicate endorsement of religion or any particular faith. The City of Pensacola displays in a city park a 34-foot Latin cross as the focal point for an amphitheater designed for hosting worship services on Easter.

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to this filing.

The question presented is whether the City’s display violates the Establishment Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

Religious symbols are powerful. Contemplating a symbol of one’s own faith can be a profound experience. Being confronted with a government-sponsored symbol of a faith to which one does not subscribe can likewise be a profound experience—in a quite different way. When government displays a towering symbol of one religion on public land, it communicates an impermissible message of favoritism and exclusion that stigmatizes nonadherents while also demeaning the faith of many adherents.

The dictates of the Establishment Clause are therefore clear, as the court below recognized: Pensacola’s display cannot withstand constitutional scrutiny. But despite reaching the correct legal result, the court below devoted a substantial portion of its opinion to expressing disregard for settled Supreme Court and Circuit precedent, based on inaccurate descriptions of the history, purpose, and fundamental objectives of the Establishment Clause. The court characterized Establishment Clause jurisprudence as “historically unmoored” and asserted that this case really ought to come out the other way because, in the court’s view, “the Founding Fathers did not intend for the

Establishment Clause to ban crosses and religious symbols from public property.” Op. 3, 6.

In actuality, the architects of the First Amendment effected a separation of government and religion as the means to ensure enduring religious freedom. As our Nation has become increasingly religiously diverse, that aim is more critical than ever. The official display of the Latin cross—the preeminent symbol of Christianity—sends divisive and harmful messages that are directly contrary to this fundamental objective: It tells members of other religions, or of no religion, that they are excluded, second-class citizens. It co-opts the Latin cross’s spiritual content for governmental purposes, offending many Christians. And it divides communities along religious lines. The judgment here is thus not only doctrinally compelled but also historically justified and critically important to prevent religiously based civil strife that would intrude on our fundamental commitment to religious freedom for all.

ARGUMENT

A. The Judgment Is Correct As A Matter Of Law.

To satisfy the Establishment Clause, state action must have a primary purpose and principal effect that are secular. *See Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003). The City of Pensacola is thus required to maintain

strict “governmental neutrality . . . between religion and nonreligion” (*McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))) and is forbidden to take action that “an objective observer . . . would perceive . . . as a state endorsement” of religion (*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring in the judgment))).

“The Latin Cross . . . is the principal symbol of Christianity around the world, and display of the cross alone could not reasonably be taken to have any secular point.” *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring in part and concurring in the judgment). As a result, this Court and the other Circuits have repeatedly held that cross displays on public land violate the Establishment Clause. *See ACLU of Ga. v. Rabun Cty. Chamber of Commerce*, 698 F.2d 1098, 1111 (11th Cir. 1983) (cross display in public park); *see also, e.g., Am. Humanist Ass’n v. Md.–Nat’l Capital Park & Planning Comm’n*, 874 F.3d 195, 200 (4th Cir. 2017) (large cross in intersection); *Trunk v. City of San Diego*, 629 F.3d 1099, 1125 (9th Cir. 2011) (display of cross as part of veterans’ memorial “primarily conveys a message of government endorsement of religion that violates the Establishment Clause”); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095,

1121 (10th Cir. 2010) (crosses along public highway to honor fallen state troopers impermissibly “convey[ed] to a reasonable observer that the state . . . is endorsing Christianity”); *Gonzales v. North Township*, 4 F.3d 1412, 1423 (7th Cir. 1993) (cross display in public park); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 272 (7th Cir. 1986) (cross atop municipal fire department “unmistakably signifies Christianity”).

Pensacola’s Latin cross was erected with an unambiguously religious purpose; its display has an overwhelmingly religious effect; and it communicates to all observers that the City favors Christianity. If that were not enough, Pensacola’s mayor has expressly stated that he seeks to preserve the cross because he “hope[s] there is always a place for religion in the public square.” Op. 10. Thus, this case is an easy one: The City’s display straightforwardly violates the Establishment Clause. *See, e.g., Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 619 (9th Cir. 1996) (solitary cross in public park “clearly represents governmental endorsement of Christianity”).

B. The Controlling Jurisprudence Is Consistent With The History, Purpose, And Original Understanding Of The Establishment Clause.

While acknowledging that long-standing, unequivocal, binding precedent compels the conclusion that the City’s Latin cross violates the Establishment Clause, the court below criticized that precedent, arguing

that beginning with *Everson v. Board of Education*, 330 U.S. 1 (1947), the Supreme Court departed from “the well-established original understanding of the Establishment Clause” (Op. 6), setting the courts on a path that cannot be reconciled with the Clause’s basic purpose (*see id.* at 10, 22 (musing that “the cross is certainly constitutional” in the Framers’ view, and expressing “hope” that “the Supreme Court will one day revisit and reconsider its Establishment Clause jurisprudence”)). We respectfully submit that the district court’s view of history is incorrect; and the implications of that misunderstanding threaten to corrode the First Amendment’s essential protections for religious freedom.

1. Our Nation is built on the understanding that governmental involvement with religion is a grave threat to religious freedom.

The architects of the First Amendment recognized that “religion & Govt. will both exist in greater purity, the less they are mixed together.” Letter from James Madison to Edward Livingston (July 10, 1822), <http://bit.ly/2zUXhBT>. This principle, that religion flourishes best when government is least involved, has deep roots in theology and political philosophy going back well before the founding of the Republic. Grounded in the understanding that freedom of conscience is an essential component of faith, as well as the experience of a long, sad history of religiously based strife and oppression, the principle of separation recognizes that

governmental support for religion corrodes true belief, makes religious denominations and houses of worship beholden to the state, and places subtle—or not so subtle—coercive pressure on individuals and groups to conform.

The notion of freedom of conscience as a moral virtue traces back 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, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 356–57 (2002). Martin Luther built on this idea, teaching that the Church lacks authority to bind believers' consciences on spiritual questions: “the individual himself c[an] determine the content of his conscience based on scripture and reason.” *Id.* at 358–59. John Calvin went further, preaching that individual conscience absolutely deprives civil government of authority to dictate in matters of faith. See *id.* at 359–61.

These tenets found expression in the New World in the teachings of Roger Williams, the Baptist theologian and founder of Rhode Island. Williams preached that, for religious belief to be genuine, people must come to it of their own free will. Coerced belief and punishment of dissent are anathema to true faith; religious practices are sinful unless performed “with[] faith and true persuasion that they are the true institutions of

God.” Roger Williams, *The Bloudy Tennant, Of Persecution for Cause of Conscience* (1644), reprinted in 3 COMPLETE WRITINGS OF ROGER WILLIAMS 12 (Samuel L. Caldwell ed., 1963). When government involves itself in matters of religion, even if merely to express support for a particular faith or set of beliefs, Williams warned, the coercive authority of the state impedes the exercise of free will, while also causing bloody civil strife. Thus, Williams taught, keeping church and state separate is crucial both to protect individual religious dissenters against persecution and to safeguard religion against impurity and dilution. See Williams, *The Bloudy Tennant, supra*; EDWIN S. GAUSTAD, ROGER WILLIAMS 13, 59, 70 (2005); RICHARD P. MCBRIEN, CAESAR’S COIN: RELIGION AND POLITICS IN AMERICA 248 n.37 (1987) (“[T]he Jews of the Old Testament and the Christians of the New Testament ‘opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world.’ . . . [I]f He will ever please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world.” (quoting Williams)).

Not only did this theology shape the development of religion in this country, but it also became the foundation for the political thought on which our Nation was built. Notably, for example, John Locke incorporated it into his argument for religious toleration:

Whatsoever may be doubtful in Religion, yet this at least is certain, that no Religion, which I believe not to be true, can be either true, or profitable unto me. In vain therefore do Princes compel their Subjects to come into their Church-communion, under pretence of saving their Souls. . . . [W]hen all is done, they must be left to their own Consciences.

JOHN LOCKE, A LETTER CONCERNING TOLERATION 38 (James H. Tully ed., Hackett Publ'g Co. 1983) (1689). Based on this understanding, and the related concern that bloodshed follows when government intrudes into matters of faith, Locke reasoned that “civil government” should not “interfere with matters of religion except to the extent necessary to preserve civil interests.” Feldman, *supra*, at 368.

Many of this Nation’s founders took to heart Williams’s and Locke’s teachings on the proper relationship between religion and government. Benjamin Franklin, for example, stated:

When a Religion is good, I conceive it will support itself; and when it does not support itself, and God does not care to support [it], so that its Professors are oblig’d to call for the help of the Civil Power, ’tis a Sign, I apprehend, of its being a bad one.

Letter from Benjamin Franklin to Richard Price (October 9, 1780), <http://bit.ly/2jMsrVO>. And James Madison viewed governmental support for religion as “[r]eligious bondage [that] shackles and debilitates the mind and unfits it for every noble enterprize” (Letter from James Madison to William Bradford (April 1, 1774), <http://bit.ly/2h57Xm5>)).

2. The Religion Clauses were designed to prevent even seemingly benign governmental involvement with religion.

a. Though the United States was more homogeneous in 1789 than today, our Nation was, from the beginning, 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: CREATION AND RECONSTRUCTION* 45 (2000); WINTHROP S. HUDSON, *RELIGION IN AMERICA* 46 (3d ed. 1981). And the founding generation well knew that “[t]he centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.” *Everson*, 330 U.S. at 8–9.

The founders thus understood that they were creating a government for a diverse group of people and faiths (*see* JON MEACHAM, *AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION* 101 (2006)), and that religious liberty for all would necessarily require acceptance of religious pluralism (*see* JOHN WITTE JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 48 (2d ed. 2005) (citing *THE FEDERALIST* NOS. 10, 51 (James Madison))).

b. Experience with persecution of Baptists by Virginia's established Anglican Church further shaped the notion of freedom of conscience as a critical foundation for the new political order. See Andy G. Olree, "Pride Ignorance and Knavery": James Madison's Formative Experiences with Religious Establishments, 36 HARV. J.L. & PUB. POL'Y 211, 214–15, 226–27, 266–67 (2013). Thus, in the Virginia legislature's debate in 1784 over Patrick Henry's "Bill Establishing a Provision for Teachers of the Christian Religion," these ideas motivated the opposition to Henry's proposal to fund religious education with a property-tax levy. See Vincent Blasi, Essay, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 783–84 & n.3 (2002). Madison strenuously objected to Henry's bill as an offense against individual conscience, a threat to the health of civil government, and a gross intrusion into church governance and the free development of church doctrine. See, e.g., James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶¶ 12–13, 15, reprinted in *Everson*, 330 U.S. at 63–72 (appendix to dissent of Rutledge, J.) (arguing that Henry's bill would be "adverse to the diffusion of the light of Christianity," would "tend to enervate the laws in general, . . . slacken[ing] the bands of Society," and would infringe "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience").

Drawing on Locke (*see* Blasi, *supra*, at 789–90 & n.28), Madison argued that religion “must be left to the conviction and conscience of every man” (Madison, *Memorial and Remonstrance* ¶ 1). Governmental support for religion would only “weaken in those who profess [the benefitted] [r]eligion a pious confidence in its innate excellence,” while “foster[ing] in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.” *Id.* ¶ 6.

These arguments not only led to the defeat of Henry’s proposal but also spurred the passage of Jefferson’s Bill for Establishing Religious Freedom. *See* Merrill D. Peterson, *Jefferson and Religious Freedom*, ATLANTIC MONTHLY (Dec. 1994), <http://theatlntc/2idj7Xo>. The Bill forthrightly declared it an “impious presumption of legislators and rulers, civil as well as ecclesiastical . . . [to] assume[] dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others.” Thomas Jefferson, *The Virginia Statute for Religious Freedom* (Jan. 16, 1786), *reprinted in* FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY 94, 95 (John J. Patrick ed., 1995). The Bill recognized that governmental favoritism “tends only to corrupt the principles of that very Religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it.” *Id.* at

94–95. In short, religion neither requires nor benefits from the support of the state: “truth is great and will prevail if left to herself.” *Id.* at 95.

c. As the Supreme Court has explained: “the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson 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.” *Everson*, 330 U.S. at 13 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Davis v. Beason*, 133 U.S. 333, 342 (1890)). Jefferson and Madison’s vision thus defined the original understanding of the Establishment Clause,² which was that religious liberty would be frustrated by what Thomas Jefferson termed the “loathsome combination of church and state” (Letter from Thomas Jefferson to Charles Clay (January 29, 1815), <http://bit.ly/2yq06H4>).

As Jefferson explained, historically “the clergy, by getting themselves established by law, & ingrafted into the machine of government, have been a very formidable engine against the civil &

² See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 183 (2012) (identifying Madison as “the leading architect of the religion clauses of the First Amendment”); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 166 (2011) (same); *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 705–06 (1970) (same); *Flast v. Cohen*, 392 U.S. 83, 103 (1968) (same).

religious rights of man.” Letter from Thomas Jefferson to Jeremiah Moore (August 14, 1800), <http://bit.ly/2y9nvNn>. Or as Madison put it: “[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. . . . What have been [their] fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution.” Madison, *Memorial and Remonstrance* ¶ 7.

“[T]he Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison’s life, thought and sponsorship.” *Everson*, 330 U.S. at 39 (Rutledge, J., dissenting). See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284 (Harvey C. Mansfield & Delba Withrop eds. & trans. 2000) (1835) (observing American understanding that “[r]eligion . . . cannot share the material force of those who govern without being burdened with a part of the hatreds to which they give rise”).

Hence, in recognition “that a union of government and religion tends to destroy government and to degrade religion” (*Engel v. Vitale*, 370 U.S. 421, 431 (1962)), “the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each

is left free from the other within its respective sphere” (*Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948)). The Establishment Clause “stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.” *Engel*, 370 U.S. at 432. And it reflects Madison and Jefferson’s “plan of preserving religious liberty to the fullest extent possible in a pluralistic society,” allowing religion to flourish while quelling the civil strife that pluralism can so easily engender. *See McCreary*, 545 U.S. at 882 (O’Connor, J., concurring). As this Nation becomes ever more religiously diverse (*see* Public Religion Research Institute, *America’s Changing Religious Identity* (Sept. 6, 2017), <http://bit.ly/2wboSZW>), these fundamental safeguards for the freedom of all to believe, or not, and to worship, or not, according to the dictates of their conscience are more important today than ever before.

d. The court below considered none of that, preferring Justice Story’s speculation that the majority of Americans at the founding would have disfavored religious neutrality and chosen instead to afford Christianity a privileged position. *See* Op. 5. But the enactment of the Virginia Bill and its role in shaping the First Amendment were, in Jefferson’s words, “proof that [the people] meant to comprehend, within the mantle of [the law’s] protection, the Jew and the Gentile, the Christian and Mahometan, the

Hindoo and infidel of every denomination.” See Thomas Jefferson, *Autobiography*, 6 Jan.–29 July 1821, FOUNDERS ONLINE, NATIONAL ARCHIVES, <http://bit.ly/1TJvbc5>; cf. James Madison, *Amendments to the Constitution*, [8 June] 1789, FOUNDERS ONLINE, NATIONAL ARCHIVES, <http://bit.ly/2zy69uO> (Bill of Rights was intended to apply “in some cases, against the community itself; or, in other words, against the majority in favor of the minority”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”). That view, which won in the ratification debates, is also the one recognized by the Supreme Court. See, e.g., *Everson*, 330 U.S. at 15.

The court below also pointed to state-established churches in the founding era as evidence for how the Establishment Clause ought to be understood. Op. 3–4. But the last state establishment was abolished in 1833. See *Sch. Dist. v. Schempp*, 374 U.S. 203, 255 n.20 (1963) (Brennan, J., concurring). And the Establishment Clause did not apply to the states until the Fourteenth Amendment was ratified (in 1868) and the First Amendment was incorporated against the states through it (in 1940). See *Wallace*, 472 U.S. at 49 (“Until the Fourteenth Amendment was added to

the Constitution, the First Amendment’s restraints on the exercise of federal power simply did not apply to the States.”); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (recognizing incorporation of Religion Clauses). The view that the existence of *state* establishments at the time of ratification should displace the contemporaneous explanations of the First Amendment’s *federal* limitations on *federal* power cannot be squared with history.

As for the district court’s desire to upend settled constitutional jurisprudence, *amici* can think of no better rejoinder than the following from Justice O’Connor:

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?

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

C. Removal Of The City’s Latin Cross Advances Religious Freedom.

In keeping with these guiding principles, settled law forbids the City of Pensacola to maintain a 34-foot Latin cross on public land—for good reason: Official religious displays send impermissible and damaging

messages both to those for whom the symbols are sacred and to those for whom they are not.

1. Symbols have concrete, real-world effects.

Symbols have power. They encapsulate many layers of meaning and often communicate complex ideas 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.” *Barnette*, 319 U.S. at 632; *see also Regan v. Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part) (“one picture is worth a thousand words”). Symbols not only communicate ideas but also persuade and motivate action. “[T]hey attract public notice, they are remembered for decades or even centuries afterwards. A symbol speaks directly to the heart” NICHOLAS JACKSON O’SHAUGHNESSY, *POLITICS AND PROPAGANDA* 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.” *Barnette*, 319 U.S. at 632.

For many Americans, images of the Stars and Stripes rising from atop Mount Suribachi on Iwo Jima in 1945, and from the rubble of the World Trade Center in 2001, capture American resilience more eloquently than words ever could. “Pregnant with expressive content, the flag as

readily signifies this Nation as does the combination of letters found in ‘America.’” *Texas v. Johnson*, 491 U.S. 397, 405 (1989).

Symbols play equally influential roles in more mundane aspects of life. In commerce, for example, corporate branding is a commonplace because frequent viewing conditions consumers to respond favorably to a company’s products. See JOHN O’SHAUGHNESSY & NICHOLAS JACKSON O’SHAUGHNESSY, PERSUASION IN ADVERTISING 63, 67 (2004); O’SHAUGHNESSY, POLITICS AND PROPAGANDA, *supra*, at 102. Social scientists have found that the more often one views a symbol, the stronger its effect: “Making a brand familiar by repeated exposure through advertising encourages its adoption.” O’SHAUGHNESSY & O’SHAUGHNESSY, PERSUASION IN ADVERTISING, *supra*, at 63. Repeated exposure “induces more familiarity and, as a consequence, greater liking” for the product, “independent of any conscious cognitive appraisal” of its quality or value. *Id.* at 63, 67. In other words, simple, evocative symbols foster special affinity for what is being symbolized, in ways that empirical evidence and rational argument often cannot.

What is true for symbols generally is doubly so for religious ones, many of which are known the world over, conveying at a glance millennia of shared history and collective aspirations and triumphs to those who hold them dear—and at times the opposite messages to those who do not.

Empirical research confirms that religious symbols can affect behavior, for good or for ill, even when they are displayed with no intent to proselytize, persuade, or oppress. Studies demonstrate, for example, that viewing religious symbols has statistically significant effects on students' academic performance. Researchers found in a controlled experiment 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, *Religious Symbols and the WISC-R Performance of Roman Catholic Junior High School Students*, 147 J. GENETIC PSYCHOL. 417, 417–18 (1986); Philip A. Saigh et al., *Religious Symbols and the WISC-R Performance of Roman Catholic Parochial School Students*, 145 J. GENETIC PSYCHOL. 159, 159–62 (1984). And in religiously diverse Lebanon, both Christian and Muslim students scored better than expected when the examiner wore the symbol of the students' faith and worse than expected when the examiner wore the symbol of the other faith. Philip A. Saigh, *The Effect of Perceived Examiner Religion on the Digit Span Performance of Lebanese Elementary Schoolchildren*, 109 J. SOC. PSYCHOL. 167, 168–170 (1979). The researchers attributed these effects to students' anxiety over "confessional conflict" with an authority figure, on the one hand, and comfort in the presence of a coreligionist, on the other. See Saigh, *Junior High*, *supra*, at

418; Saigh, *Parochial School Students*, *supra*, at 163; Saigh, *Lebanese Elementary Schoolchildren*, *supra*, at 170–71. But regardless of the specific psychological mechanism at work, the studies revealed that even slight exposure to religious symbols displayed by authority figures affected students' performance.

These effects are not limited to children. A study measuring the effects of symbols on adult brain function found that exposure to religious symbols that test subjects viewed as negative (such as an inverted pentagram) suppressed brain activity; exposure to religious symbols that test subjects regarded as positive (such as a dove) had no deleterious effects. See Kyle D. Johnson et al., *Pilot Study of the Effect of Religious Symbols on Brain Function: Association with Measures of Religiosity*, 1 SPIRITUALITY IN CLINICAL PRACTICE 82, 82, 84 (2014), <http://bit.ly/2ifUo4M>. Religious symbols, in short, have real, measurable effects both on adherents and on nonadherents.

2. The Latin cross is an unmistakable and powerful religious symbol.

Few things are more universally culturally familiar—to Christians and non-Christians alike—than the Latin cross. See, e.g., ALISTER E. MCGRATH, *CHRISTIANITY: AN INTRODUCTION* 320 (2d ed. 2006). For nearly the whole of the Common Era, the cross has been inextricably and

inexorably linked with Christianity and Christian religious practice. *See id.* (“The cross has been the universally acknowledged symbol of the Christian faith from a very early period . . .”).

It achieved prominence about three hundred years after Jesus’ death, when the Roman Emperor Constantine adopted Christianity for the Empire. Constantine’s embrace of Christianity related concretely to the symbolic power of the cross. *See* BRUCE W. LONGENECKER, *THE CROSS BEFORE CONSTANTINE: THE EARLY LIFE OF A CHRISTIAN SYMBOL* 3 (2015). According to the early Church historian Eusebius, Constantine, while praying, “saw with his own eyes the trophy of a cross of light in the heavens, above the sun, and bearing the inscription, ‘Conquer by this.’” EUSEBIUS, *LIFE OF CONSTANTINE* 1:28 (Averil Cameron & Stuart G. Hall trans. 1999). That night, Eusebius reported, Jesus appeared to Constantine in a dream “with the same sign which he had seen in the heavens, and commanded him to make a likeness of that sign . . . and to use it as a safeguard in all engagements with his enemies.” *Id.* at 1:29.

Since that time, the cross has been consistently identified with Christianity. *See* DOUGLAS KEISTER, *STORIES IN STONE: A FIELD GUIDE TO CEMETERY SYMBOLISM AND ICONOGRAPHY* 173–74 (2004). It was the primary symbol used during the Crusades to distinguish the crusaders from opposing forces. *See* JONATHAN RILEY-SMITH, *THE CRUSADES: A*

HISTORY 15–16 (2d ed. 2005). And it was vitally important to Medieval and Renaissance art, when “the painted picture was invaluable as an interpreter and exponent of religious truths,” because the cross communicated the Church’s message of redemption. GEORGE WILLARD BENSON, *THE CROSS: ITS HISTORY AND SYMBOLISM* 121, 126 (1934). Thus, the countless portrayals of Jesus’ death always included the cross, not just as representational art, but to disseminate Church doctrine. See MCGRATH, *supra*, at 321. For similar reasons, crosses have historically adorned and been design elements for churches, inside and out. See RICHARD TAYLOR, *HOW TO READ A CHURCH: A GUIDE TO SYMBOLS AND IMAGES IN CHURCHES AND CATHEDRALS* 46–47 (2003).

What has been true since the time of Constantine remains true today: The cross is not merely *a* symbol of Christianity; it is *the* symbol. See MCGRATH, *supra*, at 320; *Salazar v. Buono*, 559 U.S. 700, 725 (2010) (Alito, J., concurring in part and concurring in the judgment) (“The cross is of course the preeminent symbol of Christianity”). It is “hard to think of a symbol more closely associated with a religion than the cross is with Christianity.” KEISTER, *supra*, at 172. It is a “pure religious object” (Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1023–24 (2005)) that serves as the physical embodiment of Christian tenets of resurrection and redemption. Pope Francis, for example, has said

that “[t]he Christian Cross is not something to hang in the house ‘to tie the room together’ . . . or an ornament to wear, but a call to that love, with which Jesus sacrificed Himself to save humanity from sin and evil.” *Pope Francis: The Cross Is the Gate of Salvation*, VATICAN RADIO (Mar. 12, 2017), <http://bit.ly/2hysfbS>; cf. U.S. CONFERENCE OF CATHOLIC BISHOPS, BUILT OF LIVING STONES: ART, ARCHITECTURE, AND WORSHIP § 91 (Nov. 16, 2000), <http://bit.ly/2x51bWL> (“[T]he image of Christ crucified . . . makes tangible our belief that our suffering when united with the passion and death of Christ leads to redemption.”).

The unique potency of the cross for transmitting complex messages and encouraging religious practice is why institutions and individuals choose to display it. Thus, in *Davenport, supra*, the defendants erected crosses on public land as the official memorial to state troopers who were killed in the line of duty because they believed that “only a white cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety.” 637 F.3d at 1111 (quoting record). Accordingly, the Tenth Circuit held that because “a Latin cross . . . ‘is unequivocally a symbol of the Christian faith,’” the state’s cross displays unconstitutionally endorsed Christianity. *Id.* at 1120 (quoting *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1022 (10th Cir. 2008)); see also, e.g., *Md.–Nat’l Capital*, 874 F.3d at 207 (“[T]he Latin

cross . . . only holds value as a symbol of death and resurrection *because* of its affiliation with the crucifixion of Jesus Christ.”).

3. Removing the City’s Latin cross respects all Pensacola residents.

Pensacola’s display of the Latin cross in Bayview Park, like the cross displays in *Davenport* and the other cases cited above, employs the cross’s clear, unequivocal message to communicate governmental favoritism for Christianity. *See, e.g., Davenport*, 637 F.3d at 1122 (cross displays “have the impermissible effect of conveying to the reasonable observer that the State prefers or otherwise endorses Christianity”). Not only is that message forbidden by the Establishment Clause, but it disrespects and infringes the religious freedom of Pensacola residents, Christian and non-Christian alike.

As its history makes clear, the Latin cross communicates and reinforces the spiritual identity and sense of moral worth of believers. *See Ravitch, supra*, at 1023–24. At the same time, however, governmental “sponsorship of a religious message . . . sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the

political community.” *Santa Fe*, 530 U.S. at 309–10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

The Pensacola area is home to considerable religious diversity. See Association of Religion Data Archives, *County Membership Report: Escambia County, Florida* (2010), <http://bit.ly/2iYsxp1> (listing 59 different religious traditions represented in Escambia County). To many—including Jews, Muslims, Hindus, Sikhs, Buddhists, and atheists—the government’s prominent display of the central symbol of Christianity is a strong message of exclusion: It officially communicates that “Pensacola is a Christian community; those who don’t share our faith do not belong.” That message is not just wrong but dangerous. For “nothing does a better job of roiling society” than “when the government weighs in on one side of religious debate.” *McCreary*, 545 U.S. at 876.

Though the City suggests that “there can be a variety of secular reasons for erecting a cross,” it offers just one: memorializing the dead. Br. 64. But “a memorial cross is not a *generic* symbol of death; it is a *Christian* symbol of death that signifies or memorializes the death of a *Christian*.” *Davenport*, 637 F.3d at 1122. The notion that Pensacola’s Latin cross might honor fallen soldiers—an argument that the City has never pressed (see Op. 16 n.4)—would thus still communicate a message of exclusion, namely, that the City honors only Christian soldiers. See, e.g., *Trunk*, 629

F.3d at 1112 (“[T]he use of exclusively Christian symbolism in a memorial would . . . ‘lead observers to believe that the [government] has chosen to honor only Christian veterans.’”) (quoting *City of Eugene*, 93 F.3d at 626 (O’Scannlain, J., concurring)).

And it is not just members of minority faiths and nonbelievers who may be offended and alienated by Pensacola’s Latin cross. By appropriating the preeminent symbol of Christianity for its own use in defining Pensacola as a Christian polity, rather than allowing individuals and families to form their own faith communities, the City intrudes on and denigrates the cross’s sacred status. *See Ravitch, supra*, at 1067. And it puts a thumb on the scale in favor of a preferred set of religious beliefs, thus interfering with theological commitments to the free exercise of conscience. After all, “[v]oluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices.” *McCreary*, 545 U.S. at 883 (O’Connor, J., concurring). The First Amendment makes individuals, not government, the final arbiters in religious matters. *See id.* And as for arguments that the cross transcends denominational lines, the suggestion that “the Latin cross symbolizes anything other than Christianity may be deemed offensive to Christians”

by denying the cross’s deep spiritual meaning for them. *Md.–Nat’l Capital*, 874 F.3d at 207 n.9.

* * *

“From the beginning, this nation’s conception of religious liberty included, at a minimum, the equal treatment of all religious faiths without discrimination or preference.” *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008); see *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”). Departures from this strict neutrality principle—even in the supposedly benign sense of official support for one faith through a public display rather than express disfavor toward another—harm both the burdened and the nominally benefitted. And to downplay the spiritual significance of the Latin cross is to misunderstand its essential nature and abiding power, both for those who revere it and for those who do not. *Cf. County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 661 (1989) (recognizing coercive effect of “the permanent erection of a large Latin cross on the roof of city hall”) (Kennedy, J., concurring in part and dissenting in part).

The Establishment Clause “guarantees religious liberty and equality to people of all faiths.” *Md.–Nat’l Capital*, 874 F.3d at 204. Disallowing

official religious displays implies no disrespect for religion, for it is not antireligious to say that matters of faith and belief are best left to individuals, families, and their houses of worship, free from the heavy hand of government. *See Engel*, 370 U.S. at 435. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *Barnette*, 319 U.S. at 642. Pensacola is bound to respect the rights of all its citizens to come to their beliefs freely; it may not and should not impose an orthodoxy on them.

CONCLUSION

The judgment of the court below should be affirmed; the criticism of settled precedent and the fundamental values that it embodies should not.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7)(B) and Fed. R. App. P. 29(a)(5) because it contains 6371 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2013 in Century Schoolbook, a proportionally spaced typeface, in a size measuring 14 points or larger.

/s/ Richard B. Katskee

Dated November 22, 2017

CERTIFICATE OF SERVICE

I certify that on November 22, 2017, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Richard B. Katskee

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 represents more than 125,000 members and supporters across the country. Its mission is to advance the free-exercise rights of individuals and religious communities to worship as they see fit and to preserve the separation of church and state as a vital component of democratic governance. Since its founding in 1947, Americans United has served as a party, as counsel, or as an *amicus curiae* in scores of church–state cases decided by the Supreme Court, this Court, and the federal and state courts nationwide.

American Civil Liberties Union and ACLU of Florida

The American Civil Liberties Union is a nationwide, nonprofit, non-partisan 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 Florida 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

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. 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.

Baptist Joint Committee for Religious Liberty

The Baptist Joint Committee for Religious Liberty is an education and advocacy organization that serves 15 supporting organizations, including national and state Baptist conventions and conferences, as well as congregations throughout the United States. The BJC deals exclusively with religious-liberty issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to protecting religious liberty for all Americans. Since its inception in 1936, the BJC has defended the constitutional boundaries between the

institutions of religion and government in the U.S. Congress, the courts, and at state and local levels. The BJC has filed *amicus curiae* briefs in more than one hundred cases, including most of the U.S. Supreme Court's religious-liberty cases.

Center for Inquiry

The Center for Inquiry is a nonprofit educational organization dedicated to promoting a secular society based upon reason, science, freedom of inquiry, and humanist values. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

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 330,000 Members, Associates, and supporters nationwide. While traditionally known for its role in developing and supporting health care 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 critical in preserving the religious liberty of all Americans, and especially of religious minorities.

Jewish Social Policy Action Network

The Jewish Social Policy Action Network is an organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the vulnerable in our society. For most of the last two thousand years, Jews lived in countries in which religion and state were one, and in which members of all minority faiths were constantly reminded of their outsider status by prominent governmental displays of religious symbols. In Europe, especially, Jews and minority Christian faith communities faced discrimination, persecution, expulsion, or worse. Those who emigrated to America in the nineteenth and twentieth centuries found that here one could be both a Jew and an American, a Catholic and an American, or an atheist and an American. JSPAN believes that the gift of church–state separation bestowed on us by the Founding Fathers is essential to all our fundamental freedoms and that therefore great care must be taken to prevent any erosion of the principles of separation of church and state embodied in the Establishment Clause. Critical to this effort is that

members of minority faiths not be made to feel like second-class citizens in their own country by being subjected to government-sponsored displays of Christian religious symbols. Although many Christians also find it offensive when their sacred symbol is co-opted for governmental purposes, for Jews and other minority religious groups, governmental use of such symbols sends a divisive message that their faith group does not enjoy the same privileged status.

JSPAN has filed *amicus curiae* briefs in the Supreme Court in Establishment Clause cases regularly since the organization was formed in 2003, including in *Salazar v. Buono*, 559 U.S. 700 (2010), *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), and more recently in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); and members of JSPAN's Church/State Policy Center have done so in scores of such cases for more than 50 years.

Muslim Advocates

Muslim Advocates is a national legal advocacy and educational organization that works on the front lines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a

legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life. The issues at stake in this case directly relate to Muslim Advocates' work fighting for civil-rights protections for American Muslim communities.

National Council of Jewish Women, Inc.

The National Council of Jewish Women is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by 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 and Resolutions state that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society." NCJW resolves to work for the enactment, enforcement, and preservation of laws and regulations that protect civil rights and individual liberties for all. Consistent with our Principles and Resolutions, NCJW joins this brief.

Sikh Coalition

The Sikh Coalition is a community-based civil-rights organization that defends civil liberties, including religious freedom, for all Americans. Our mission is to promote educational awareness and advocacy, and

provide legal representation in moving toward a world in which Sikhs and other religious minorities may freely practice their faith without bias or discrimination. The Sikh Coalition is the largest community-based Sikh civil-rights organization in the United States. Since its inception on September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism in order to promote cultural understanding and diversity. The Sikh Coalition has vindicated the rights of numerous Sikh Americans subjected to bias and discrimination because of their faith. Ensuring the rights of religious and other minorities is a cornerstone of the Sikh Coalition's work. The Sikh Coalition joins this *amicus* brief in the belief that the Establishment Clause is an indispensable safeguard for religious-minority communities. We believe strongly that Sikh Americans across the country have a vital interest in the separation of church and state.

Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism

The Union for Reform Judaism, whose 900 congregations across North America includes 1.5 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2000 Reform

rabbis, and the Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of our long-standing commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. The concept of separation of church and state has lifted up American Jewry, as well as other religious minorities, providing more protections, rights, and opportunities than have been known anywhere else throughout history. The prominent display of religious symbols on public land threatens the principle of separation of church and state, which is indispensable for the preservation of that spirit of religious liberty which is a unique blessing of American democracy.