

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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19 Washington, D.C.

20 Wednesday, February 27, 2019

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22 The above-entitled matter came on for

23 oral argument before the Supreme Court of the

24 United States at 10:21 a.m.

25

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9 in support of the Petitioners.

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11 on behalf of the Respondents.

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

2 (10:21 a.m.)

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

10 Mr. Katyal.

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

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

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

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

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

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

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

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

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

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

25 Veterans Memorial Park has been there

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

5 JUSTICE SOTOMAYOR: All right.

6 MR. KATYAL: -- Justice Sotomayor.

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

9 MR. KATYAL: You could --

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

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

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

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

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

25 MR. KATYAL: And give it back to the

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

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

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

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

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

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

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

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

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

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

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

1 would be constitutional.

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

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

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

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

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

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

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

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

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

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

21 MR. KATYAL: Yes.

22 JUSTICE GINSBURG: So -- yeah, so, no,
23 could you --

24 MR. KATYAL: I don't think purpose is
25 what this Court's decisions turn on. Van

1 Orden, the Buono plurality say that it's --

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

4 MR. KATYAL: -- objective meaning.

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

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

15 JUSTICE SOTOMAYOR: Well, would that
16 be --

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

20 MR. KATYAL: Well, I think we'd need
21 to know more about the facts of that particular
22 hypothetical, but --

23 JUSTICE KAGAN: Well, here are some
24 facts, Mr. Katyal, from that hypothetical. And
25 you can understand how something like this can

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

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

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

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

23 CHIEF JUSTICE ROBERTS: I thought -- I
24 read your brief to put a lot of weight on the
25 fact that the cross here has more than a

1 sectarian meaning, because, as your history
2 sets forth, the cross was a symbol throughout
3 the battlefields in World War I.

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

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

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

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

23 And that's why we agree, Justice
24 Ginsburg --

25 JUSTICE GINSBURG: And I visited some

1 of those battlefields, and there are Stars of
2 Davids marking the graves of Jewish --

3 MR. KATYAL: Quite --

4 JUSTICE GINSBURG: -- soldiers.

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

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

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

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

25 Second, there's a -- there's a

1 contrary tradition that the Retired Flag
2 Officers brief at page 9 says that some Jewish
3 vets were actually put and buried under the
4 cross and wanted to be.

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

9 JUSTICE SOTOMAYOR: If -- if the Chief
10 would per --

11 MR. KATYAL: Rather, the test is
12 objective meaning.

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

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

1 If that were the rule, you'd be
2 tearing down crosses at Arlington Cemetery and
3 nationwide. The U.S. brief at page 29 says
4 that.

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

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Carvin.

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

13 MR. CARVIN: Mr. Chief Justice, and
14 may it please the Court:

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

22 We think this is the simplest route.
23 You would simply extend Town of Greece rule for
24 religious speech to symbolic speech and it
25 would provide, in a situation where the chances

1 for coercion and proselytization are much less
2 than in the communal prayer --

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

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

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

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

22 I would also point out that this
23 standard is completely the correct one under
24 the text and history of the Establishment
25 Clause because, when they were discussing all

1 the hallmarks of establishment, what they were
2 talking about was tangible interference.

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

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

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

16 JUSTICE GORSUCH: What's the
17 difference between that and an endorsement?

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

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

22 MR. CARVIN: Right.

23 JUSTICE GORSUCH: And nobody knows how
24 to apply it.

25 MR. CARVIN: Right.

1 JUSTICE GORSUCH: The circuit courts
2 are confused, you tell us.

3 MR. CARVIN: It's not that --

4 JUSTICE GORSUCH: And then you replace
5 it with coercion but now maybe proselytizing in
6 the reply brief.

7 MR. CARVIN: Right.

8 JUSTICE GORSUCH: I'm -- I -- I don't
9 see the daylight between proselytizing and
10 endorsement. Can you help me out?

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

18 JUSTICE KAGAN: Well, suppose a city
19 --

20 MR. CARVIN: -- all sectarian symbols
21 are unconstitutional.

22 JUSTICE KAGAN: -- suppose a city
23 erected a cross not for purposes of
24 memorializing the war dead or -- but just to
25 emphasize the values of Christianity. Would --

1 would that be proselytizing, or would that not
2 be proselytizing?

3 MR. CARVIN: I think, again, that
4 stays very close to the hypothetical that
5 Justice Kennedy put in the Allegheny County
6 dissent where you've got a permanent Latin
7 cross on top of City Hall.

8 JUSTICE KAGAN: Right. This one is
9 not --

10 MR. CARVIN: I think --

11 JUSTICE KAGAN: -- on top of City
12 Hall.

13 MR. CARVIN: Yes.

14 JUSTICE KAGAN: This one is, you know,
15 in a park.

16 MR. CARVIN: Oh. Well, then I think
17 it's very much like Penn Ed. If they've got
18 other symbols there and they -- and they allow
19 --

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

23 MR. CARVIN: I think it would be a
24 very rare case, or unless you were sort of
25 conditioning access to government services,

1 like the one on City Hall would certainly
2 suggest, that that would either constitute de
3 facto establishment or de facto coercion.

4 And I don't think the other side can
5 provide a real-world hypothetical involving a
6 cross that could be misused for proselytizing
7 purposes, which is why I think the endorsement
8 standard is --

9 JUSTICE KAGAN: Well, I guess what --
10 what -- what I was trying to suggest was that
11 this was something that indicated that the city
12 was aligning itself with one particular
13 religion. We're putting up a cross. We're not
14 putting up any other religious symbols because
15 we believe in the values that the cross
16 indicates.

17 MR. CARVIN: Again --

18 JUSTICE KAGAN: But it's -- it's not
19 on top of City Hall. It's on a street. It's
20 in a park.

21 MR. CARVIN: Well --

22 JUSTICE KAGAN: Maybe there are two
23 crosses. Maybe there could be 10 crosses, you
24 know, in different parts of the city.

25 MR. CARVIN: Well --

1 JUSTICE KAGAN: But that's why the --
2 the -- the city is doing it. And, of course,
3 everybody recognizes what a cross is.

4 MR. CARVIN: Right. It's a relatively
5 straightforward inquiry, Justice Kagan. Is the
6 religion of it a non-proselytizing purpose that
7 -- that could be concerned.

8 JUSTICE KAGAN: Well, is there?

9 MR. CARVIN: Again, in these
10 circumstances, I need to know was this, for
11 example, suggested by people who were honoring
12 the victims of a school shooting. Was it
13 simply -- what was the genesis? You need to
14 look at --

15 JUSTICE KAGAN: It's just a -- it's
16 just a cross. It really is. So it's -- it's
17 -- it's -- you know, these values are important
18 to this community, the values of Christianity,
19 so we would like to put up some crosses around
20 town.

21 MR. CARVIN: Oh, again, if that's the
22 -- if that's the announced purpose and effect,
23 of aligning ourselves with Christianity, then I
24 would think it would sound --

25 JUSTICE KAVANAUGH: Well, suppose --

1 MR. CARVIN: -- much like
2 proselytizing.

3 JUSTICE KAVANAUGH: -- suppose after
4 this case Hyattsville puts up a cross and
5 College Park puts up a cross and the
6 surrounding communities put up crosses, and
7 they -- there's mixed purposes. Some people do
8 it because they want to support it because they
9 want to celebrate Christianity. Some people do
10 it because they say we want to celebrate war
11 dead. There's mixed purposes. Proselytizing
12 or not proselytizing?

13 MR. CARVIN: Again, I think sectarian
14 symbols are presumptively valid, Justice
15 Kavanaugh, because --

16 JUSTICE KAVANAUGH: Presumptively
17 valid and can -- that presumption can be
18 overcome when?

19 MR. CARVIN: Again, if you show that
20 there isn't a legitimate non-proselytizing
21 purpose --

22 CHIEF JUSTICE ROBERTS: Counsel --

23 JUSTICE GORSUCH: Well, I guess then
24 that's where I --

25 CHIEF JUSTICE ROBERTS: I was just

1 going to say you start out with what you -- you
2 advertise is a pretty concise test, but it
3 degenerates pretty quickly into, well, I need
4 to know about this, I need to know about that,
5 and becomes kind of a fact-specific test rather
6 than the -- the -- the crisper one that you
7 propose in your brief.

8 MR. CARVIN: Your Honor, we could have
9 a bright line test that only formal coercion is
10 prohibited, but I don't think that would
11 satisfy this Court because the dangers of the
12 Establishment Clause posed by coercion, which
13 is tangible threat to liberty, may -- could be
14 reached indirectly through the sorts of things
15 I'm talking about.

16 And it is true, of course, that every
17 test that this Court adopts needs to focus on
18 context, purpose, and effect. But the key
19 point is you're asking a different question
20 than you are under the endorsement test.

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

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

23 JUSTICE GORSUCH: That's where --
24 that's where I -- I'm just stuck.

25 MR. CARVIN: Okay.

1 JUSTICE GORSUCH: And -- and to say I
2 endorse something --

3 MR. CARVIN: Right. Well --

4 JUSTICE GORSUCH: -- is -- what's the
5 difference between saying I endorse something
6 and I proselytize or promote, perhaps, is
7 another synonym, something?

8 It seems to me that you are taking us
9 right back to the dog's breakfast you've warned
10 us against. And I do understand the coercion
11 test, but I -- I -- I don't understand your
12 abandonment of it.

13 MR. CARVIN: Fair enough. "In God we
14 trust" certainly promotes religion, endorses
15 religion, no question about it. But it's not a
16 -- it's not an effort to proselytize.

17 JUSTICE KAGAN: Justice Scalia once --

18 MR. CARVIN: The free exercise --

19 JUSTICE KAGAN: -- Justice Scalia once
20 asked a question when somebody gave that
21 example. He said, what -- what would happen if
22 a coin had said "In Jesus Christ we trust"?

23 MR. CARVIN: And, again, that's
24 actually a very nice illustration of the
25 distinction. On day one, we've got "In God we

1 trust," which is promoting, endorsing religion.
2 It is no good under the Lemon test. On day
3 two, we've got "In Jesus we trust."

4 What message is the government
5 sending? You can't trust this Jewish God.
6 You've got to -- you've got to take sides in a
7 sectarian dispute where Jesus is the one we're
8 doing. And if they are taking sides in a
9 sectarian dispute, as Justice Scalia pointed
10 out, that's precisely the definition of what
11 constitutes an establishment. To -- to --

12 JUSTICE GORSUCH: Why am I not
13 proselytizing religion when I say "In God we
14 trust" but I am when I say "In Jesus Christ we
15 trust"? I'm just proselytizing religion in a
16 more generic sense.

17 MR. CARVIN: That -- that's fair
18 enough, and I think Justice Scalia would
19 respond in this --

20 JUSTICE GORSUCH: Well, there we are.

21 MR. CARVIN: No -- no, but the
22 difference between promoting religion versus
23 irreligion and promoting one sect over
24 another --

25 JUSTICE KAVANAUGH: What -- what --

1 MR. CARVIN: -- which I think the
2 sectarian point would obviously lend itself to
3 proselytizing. In this context, I do want to
4 emphasize that all symbols are sectarian.
5 There's no such thing as a
6 non-denominational --

7 JUSTICE KAVANAUGH: What --

8 MR. CARVIN: -- religious symbol.

9 JUSTICE KAVANAUGH: -- what's your
10 answer -- what's your answer to the cross on
11 City Hall? I didn't get whether your answer is
12 that's unconstitutional or constitutional.

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

16 JUSTICE KAVANAUGH: And in that
17 dissent, he said that a cross on City Hall
18 would be unconstitutional.

19 MR. CARVIN: Because it's --

20 JUSTICE KAVANAUGH: Do you --

21 MR. CARVIN: Because it --

22 JUSTICE KAVANAUGH: Do you agree?

23 MR. CARVIN: Because it constitutes
24 proselytizing, and we certainly do agree. I --
25 I think in all contexts you need to be careful.

1 If it was Las Cruces, New Mexico, and again
2 there was a legitimate non-proselytizing reason
3 for the permanent cross, then -- but, as a
4 general matter, sure, if they're putting up
5 crosses at every courtroom, every DMV window,
6 and all the parade of hypotheticals we've
7 gotten on the other side, I can certainly
8 understand why somebody would believe that
9 they're trying to convert you to Christianity.

10 After all, the hallmark of the
11 establishment in Professor McConnell's article,
12 which we're largely relying on, is seeking to
13 inculcate a certain religious belief, a certain
14 sectarian belief. Now --

15 CHIEF JUSTICE ROBERTS: Well, but if
16 you look at his -- of course, you have. His
17 brief highlights six things --

18 MR. CARVIN: Right.

19 CHIEF JUSTICE ROBERTS: -- that he'd
20 say would be -- and it starts out with the
21 government establishing a church.

22 MR. CARVIN: Right.

23 CHIEF JUSTICE ROBERTS: All right.
24 We'll give you that.

25 MR. CARVIN: Right.

1 CHIEF JUSTICE ROBERTS: You know, the
2 -- the requiring people to pay for the church,
3 prohibiting -- imposing burdens on people who
4 don't believe. I mean, all pretty stark items
5 that -- that certainly under -- underlay the
6 Establishment Clause when it was adopted.

7 MR. CARVIN: Yes.

8 CHIEF JUSTICE ROBERTS: But you're
9 certainly -- I don't understand your position
10 to be limited in that way.

11 MR. CARVIN: Again, we could certainly
12 say that kind of direct formal coercion is the
13 only thing reached by the Establishment Clause.
14 Both of the opinions we rely on, Town of Greece
15 and Allegheny County, go a bit further, and
16 they say in the real world, we want to make
17 sure we're not creating the same dangers when
18 the government is trying to create indirectly
19 what it couldn't do directly.

20 Again, this will be a rare exception,
21 and they can't provide a real-world
22 hypothetical.

23 JUSTICE SOTOMAYOR: So we go back to
24 Justice --

25 JUSTICE KAGAN: But do I --

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

3 JUSTICE SOTOMAYOR: So we go back to
4 Justice Gorsuch.

5 MR. CARVIN: Yes.

6 JUSTICE SOTOMAYOR: I hear you using
7 the word "de facto" -- "extreme
8 proselytization," "de facto coercion."

9 MR. CARVIN: Right.

10 JUSTICE SOTOMAYOR: "Excessive
11 promotion or proselytization." It is the
12 endorsement test.

13 MR. CARVIN: Again --

14 JUSTICE SOTOMAYOR: Now you may make
15 an argument like your colleague that this has
16 to do more with tradition than it does with
17 coercion, but it is endorsement.

18 MR. CARVIN: To make it as simple as I
19 can: Under the endorsement test, a sectarian
20 symbol of a creche is no good. Under our test,
21 it's perfectly fine because it's -- it's
22 achieving a --

23 JUSTICE SOTOMAYOR: So you would
24 overturn Allegheny under that theory?

25 MR. CARVIN: I would endorse the Town

1 of Greece test, which says sectarian prayer,
2 purely sectarian prayer, is okay. Sectarian
3 speech in the symbolic --

4 JUSTICE GORSUCH: But would you
5 proselytize that test?

6 MR. CARVIN: Excuse me?

7 JUSTICE GORSUCH: You endorse the
8 test. Do you proselytize for it?

9 (Laughter.)

10 MR. CARVIN: We -- we -- we -- we are
11 actually adopting the word "proselytize" from
12 the Town of Greece test. And, again, my final
13 point on all of this is, in the symbolic
14 context, this distinction is not of real-world
15 consequence because all symbols are sectarian,
16 and if you ban sectarian symbols, then you are
17 necessarily banning all religious symbols,
18 which evinces hostility and is in stark tension
19 with the Free Exercise and Free Speech Clause.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 General Wall.

23

24

25

1 ORAL ARGUMENT OF JEFFREY B. WALL
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 IN SUPPORT OF THE PETITIONERS

4 GENERAL WALL: Mr. Chief Justice, and
5 may it please the Court:

6 Three points: First, under Town of
7 Greece, the memorial cross is permissible
8 because it falls within our nation's long
9 tradition of accommodating religious speech or
10 symbols in civic life.

11 Second, adhering to Town of Greece
12 would easily resolve --

13 JUSTICE SOTOMAYOR: In all places?
14 Meaning I don't know of a founding father, town
15 or state, that put up a 40-foot cross on
16 government property. So we don't have a long
17 tradition of that. It's sectarian. We have a
18 lot of founding fathers, including George
19 Washington, who was exceedingly careful to
20 ensure that references to God were as neutral
21 as possible to as many religions as possible.

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

1 GENERAL WALL: Well, two different --
2 two things, Justice Sotomayor.

3 First, obviously, this symbol has a
4 unique history, as the Buono plurality
5 detailed. The VFW brief, I think, does a nice
6 job of this, that, to the World War I
7 generation, though it's now distant in time,
8 that was a secular or civic meaning --

9 JUSTICE SOTOMAYOR: But you're --

10 GENERAL WALL: -- that it took on to
11 that generation.

12 JUSTICE SOTOMAYOR: But you limited
13 your point to one generalized point, which
14 means we could put it up today to memorialize
15 all Vietnam vets, despite the fact that all
16 Vietnam vets were not Christian --

17 GENERAL WALL: Oh --

18 JUSTICE SOTOMAYOR: -- and that many
19 of them would feel --

20 GENERAL WALL: Yes, just as Mr. Katyal
21 said, when they found the cross at Ground Zero
22 in the rubble and that became a makeshift
23 shrine in the weeks after 9/11, I don't think
24 that that violated the Establishment Clause,
25 just as it doesn't now when it sits in the 9/11

1 museum owned by the Port Authority.

2 But the second point I'd make is I
3 understand Town of Greece and the Allegheny
4 County dissent to say you either trace a
5 practice back to the founding or you look to
6 see whether it's akin to the kind of
7 acknowledgments that the founders and the early
8 generation thought were permissible, and you
9 ask whether it presents any greater dangers
10 than that.

11 Here, crosses have been memorials
12 since before the founding. They have been war
13 memorials since the post-Civil War
14 generation --

15 JUSTICE GINSBURG: Does it make any
16 difference --

17 GENERAL WALL: -- the one that
18 incorporated --

19 JUSTICE GINSBURG: -- the change from
20 the founding, this was an almost overwhelmingly
21 Christian country, but now we're told that
22 30 percent of the U.S. population does not
23 adhere to a Christian faith, does -- does that
24 change make any difference?

25 GENERAL WALL: I don't think it

1 affects whether the cross took on in the wake
2 of the Great War a secular meaning and whether
3 that's the meaning for which the mothers
4 erected it and the commission now maintains it.

5 So, when Canada gave us the Canadian
6 Cross of Sacrifice to honor Americans who went
7 north and joined the Canadian forces to fight
8 in the war before America entered, I have no
9 reason to believe that all of those Americans
10 were Christian or that Canada thought they
11 were, but it thought that a cross with a sword
12 running down it in Arlington would commemorate
13 all of them. And I think that's the meaning
14 that the Buono plurality correctly said in that
15 context that symbol carries.

16 JUSTICE SOTOMAYOR: Isn't a cemetery
17 substantially different than the middle of a
18 town where something is 40 foot high?

19 GENERAL WALL: Well --

20 JUSTICE SOTOMAYOR: I mean, I have
21 pictures of this cross. It's the only thing
22 that's that high. It dwarfs buildings. It
23 dwarfs people. You can barely see them in the
24 pictures.

25 GENERAL WALL: I mean, with all -- all

1 respect, Justice Sotomayor, and, obviously,
2 this is more under the reasonable observer test
3 and we've asked the Court to apply Town of
4 Greece, but having been out to the site, it is
5 certainly a -- a tall cross, but it has words
6 on it that are visible from hundreds of feet
7 away that are secular words. It's in the midst
8 of a number of other memorials that you can
9 see. It's been part of a memorial park for
10 decades before litigation was ever brought.

11 I -- I understand the concern if you
12 just look at the size, but that ignores the
13 fact that there's "U.S." on both sides of the
14 cross, the words, the plaque --

15 JUSTICE KAGAN: So, Mr. Wall, just
16 to --

17 GENERAL WALL: -- and all of the
18 surrounding context.

19 JUSTICE KAGAN: -- figure out where
20 you want to draw the line, just take a lot --
21 I'm going to give you an example of a bunch of
22 different crosses.

23 So one is World War I cross erected
24 many, many years ago. Another is World War I
25 cross erected now. A third is another war

1 memorial cross. A fourth is a memorial cross
2 that has nothing to do with any war. A
3 fifth -- are we up to five? A fifth is not a
4 memorial cross at all, just a cross, it's a
5 cross, because a community wants to put up a
6 cross.

7 Are they all okay? Are some not okay?

8 GENERAL WALL: I think the first three
9 are clearly permissible. Assuming the fourth
10 acknowledges the non-war purpose to which the
11 cross is put, so the cross that commemorates
12 the school shooting or the Star of David that
13 commemorates the Holocaust, that seems to us
14 perfectly permissible, no more coercive or
15 proselytizing than things that the founders
16 thought were perfectly permissible.

17 JUSTICE KAGAN: And the fifth?

18 GENERAL WALL: The last strikes me as
19 -- as potentially quite problematic. When --
20 when the Court -- when Justice Kennedy says in
21 Allegheny County, and the Court picks up on it
22 in Town of Greece, that you can't proselytize,
23 it understands that, Justice Gorsuch, there's a
24 much higher standard than --

25 JUSTICE KAVANAUGH: Even though all

1 five --

2 GENERAL WALL: -- are you offended or
3 excluded. It -- it understands that as are you
4 threatening damnation, the Court says, are you
5 trying to force people into the pews, are you
6 denigrating another faith? If a town just
7 starts putting up naked, unadorned crosses --

8 JUSTICE KAVANAUGH: But -- but all
9 five crosses --

10 GENERAL WALL: -- without any clear
11 secular reason --

12 JUSTICE KAVANAUGH: Excuse me. All
13 five crosses in Justice Kagan's hypothetical, I
14 believe, are the same.

15 GENERAL WALL: Well, no. Sorry, I
16 took --

17 JUSTICE KAVANAUGH: Of course, the
18 purpose articulated, unstated or stated, but
19 not visible, might be different. But the
20 crosses are all the same. And you're saying it
21 depends on the implicit purpose or reason it
22 was put up?

23 GENERAL WALL: Maybe I misunderstood
24 the hypotheticals. When she -- when -- when
25 Justice Kagan was positing war memorials or a

1 cross dedicated for some other secular or civic
2 reason, all of the examples in the real world
3 I'm aware of make that clear in some way.

4 The Argonne Cross, as to those who
5 perished in France, I -- I took the fifth one
6 to be the -- the naked unadorned cross, and
7 that seems to me to get much closer --

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

11 GENERAL WALL: Justice Kavanaugh, I'll
12 grant you that that's the -- the hardest case,
13 and where the town just says we're putting it
14 up as a war memorial, it -- it may be
15 permissible, as long as the other side will
16 grant that all of the hard cases on this test
17 are imaginary. You can't find a single one
18 that looks like that.

19 JUSTICE KAGAN: Could --

20 GENERAL WALL: The problem with the
21 current law is that all of the current cases
22 are hard. This case, which should have been
23 easy, has a four-volume JA. We had expert
24 witnesses and -- and mounds of discovery.

25 JUSTICE KAGAN: Could you take the --

1 the examples I gave that are neither the first
2 nor the fifth, in other words, just the
3 memorial crosses but not any particular
4 relationship to World War I, and -- and erected
5 now. On -- on what theory are -- are -- are --
6 are those permissible?

7 In other words, when -- when -- is the
8 theory that this is a universal symbol? Is the
9 theory that this is a secular symbol? Is the
10 theory that this is a religious symbol, but
11 that's perfectly fine, to adopt one religious
12 symbol rather than another? What's the theory?

13 GENERAL WALL: I think the theory is
14 and the real-world example I'd give is the
15 cross at Ground Zero. I'd point the Court to
16 the Second Circuit case.

17 JUSTICE KAGAN: I think that that's an
18 odd kind of case, so I -- I think let's --
19 let's not talk about that one. Let's just talk
20 about your ordinary decision to erect -- to --
21 you know, not anything that's found in a -- you
22 know, let's just talk about --

23 GENERAL WALL: Well, my point is just
24 that's a --

25 JUSTICE KAGAN: -- an ordinary

1 municipal decision to erect a cross as a way to
2 memorialize some group of citizens.

3 GENERAL WALL: And my -- my only point
4 was there aren't a lot of these war memorials
5 going up. That's a new cross that I think was
6 perfectly permissible because it presents no
7 greater dangers than the kinds of
8 acknowledgment of religion that have existed
9 since the founding.

10 But, if you took a new war memorial,
11 if Bladensburg tomorrow wanted to erect a
12 memorial like this one, we think that would be
13 perfectly permissible and, indeed, an honorable
14 thing for a locality to do.

15 JUSTICE KAGAN: And -- and I guess I
16 ask, why is that? Is it because the cross has
17 become a symbol that's universal? Is that what
18 your -- your claim is?

19 GENERAL WALL: I think because, as the
20 Buono plurality said, it has taken on a secular
21 meaning associated with sacrifice or -- or
22 death or commemoration. And a locality, a
23 state can decide to use it for that meaning.

24 JUSTICE KAGAN: I mean, it is the
25 foremost symbol of Christianity, isn't it? It

1 invokes the central theological claim of
2 Christianity, that Jesus Christ, the Son of
3 God, died on the cross for humanity's sins and
4 that he rose from the dead. This is why
5 Christians use crosses as a way to memorialize
6 the dead.

7 Is it because it connects to that
8 central theological belief, isn't that correct?

9 GENERAL WALL: So I'm not going to
10 dispute that, obviously, it's the preeminent
11 symbol of Christianity. I believe all of the
12 members of the plurality in Buono believe that
13 too.

14 The question is whether it's also
15 taken on a secular meaning, because to say the
16 cross has only that religious meaning I think
17 would condemn every cross in the public sphere,
18 including the ones that sit in Arlington, which
19 even Respondents say we don't have to take
20 down.

21 JUSTICE ALITO: And does it -- does it
22 matter --

23 GENERAL WALL: So we know that context
24 has to matter.

25 JUSTICE ALITO: -- does it matter in

1 this particular case that this cross was put up
2 to commemorate the deaths of 49 real people and
3 that this was done in the wake of World War I?

4 GENERAL WALL: I think, Justice Alito,
5 it makes it an easier case. But what I would
6 say is we have four basic buckets of litigation
7 over displays in the state and federal courts.
8 You've got war memorials, Ten Commandments,
9 holiday displays, and other forms of symbolic
10 expression, like mottos or seals.

11 I -- I -- I don't think the reasoning
12 here is specific just to the cross bucket,
13 though I do think it would take care of the
14 vast bulk of -- of war memorials that are being
15 litigated.

16 I think the -- the logic of Town of
17 Greece that we're urging the Court just to
18 apply in this related context is, do any of
19 those present greater dangers than the
20 acknowledgments of religion in the public
21 sphere that have existed since the founding?

22 We would say that because they do not,
23 we would ask the Court to allow the cross to
24 remain and to allow those it honors to rest in
25 peace.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 General.

3 Ms. Miller.

4 ORAL ARGUMENT OF MONICA L. MILLER
5 ON BEHALF OF THE RESPONDENTS

6 MS. MILLER: Mr. Chief Justice, and
7 may it please the Court:

8 I think we can all agree that the
9 Establishment Clause at the very least
10 prohibits the government from preferring one
11 religion over another religion.

12 And the Commission is arguing
13 essentially that its cross does not violate the
14 central command of the Establishment Clause
15 because it's essentially a non-religious,
16 non-Christian symbol that honors everyone,
17 irrespective of their religion.

18 Yet, I don't think anyone here would
19 deny that it would be unconstitutional and
20 inappropriate to go into Arlington and place a
21 Latin cross over the grave of every person
22 there, every fallen soldier, irrespective of
23 their religion.

24 In fact, in 1924, everyone in the
25 congressional debate about the overseas markers

1 was in agreement that it would be completely
2 inappropriate and even sacrilegious to put a
3 cross over the burial of a Jewish fallen
4 soldier.

5 But the Commission is here arguing
6 today, as well as the other Petitioners, that
7 it is, you know, telling Jews, telling Muslims,
8 telling humanists that the cross honors them,
9 when they emphatically say it does not.

10 And it's telling Christians that their
11 most preeminent and -- and sacred symbol of
12 Jesus Christ actually, in fact, also symbolizes
13 atheism.

14 JUSTICE ALITO: Could I -- could I ask
15 a question that picks up on a question that
16 Justice Ginsburg asked earlier?

17 MS. MILLER: Yes.

18 JUSTICE ALITO: So let's say there is
19 a shooting at a church, and Christians are
20 targeted and killed. There is a shooting at a
21 synagogue and Jews are targeted and killed.
22 There is a shooting at a mosque and Muslims are
23 targeted and killed.

24 In each case, the town says we are
25 outraged by this, we want to put up a monument

1 to express our sympathy and solidarity with the
2 families and with the communities that they
3 represent.

4 They ask those people what kind of
5 monument would you like, and they all say it's
6 very important for us to put up something of
7 religious significance.

8 And that -- the town does that. Those
9 towns do that.

10 Would that be a violation of the
11 Establishment Clause?

12 MS. MILLER: Your Honor, I think it
13 depends, of course, on the context. But I
14 think, for instance, if we're talking about a
15 45-foot cross in the middle -- or, sorry, a
16 45-foot Star of David in the middle of a
17 roadway, I think that that would be a problem.

18 If, say, like an obelisk with maybe a
19 Star of David, that's not as loud, you know,
20 not -- we're actually trying to, you know -- I
21 think the commemorative purpose would need to
22 predominate over the sectarian.

23 JUSTICE GORSUCH: Well, that -- that
24 raises for me -- that -- that answer raises for
25 me a question about standing.

1 Is it too loud? Is the Star of David
2 too loud? Is it too offensive? There aren't
3 many places in the law where we allow someone
4 to make a federal case out of their
5 offensiveness about a symbol being too loud for
6 them. We accept that people have to sometimes
7 live in a world in which other people's speech
8 offend them. We have to tolerate one another.

9 This is the only area I can think of
10 like that where we allow people to sue over an
11 offense because, for them, it is too loud. And
12 we get into, as a result, having to dictate
13 taste with respect to displays.

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

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

19 MS. MILLER: Yes, Your Honor. Well, I
20 don't think that it's mere offense. It's --
21 it's about being a citizen in your own
22 community. And it's not private speech we're
23 talking about. We're talking about the
24 government being the speaker and essentially
25 giving you the message as the non-Christian in

1 your community that you are a lesser citizen.

2 And I think if you look at our record
3 and -- and the letters that were sent to the
4 Commission by self-proclaimed Christians that
5 were outraged by the notion that their cross
6 must have to be, you know, removed, you see
7 that monuments like this sort of contribute to
8 the idea that non-Christians are inferior. You
9 know, we are Christians. We can put a cross
10 wherever we want to.

11 CHIEF JUSTICE ROBERTS: Well, just to
12 follow up on Justice Gorsuch's question, what
13 if you had one letter from one person who
14 purported to be offended by it? Would that be
15 enough to support your argument?

16 MS. MILLER: Well -- well, no, Your
17 Honor. I think -- I think it would have to be
18 that you are a member of the community, that
19 you've witnessed the -- you've had the
20 encounter -- I mean, there's no -- you know,
21 Valley Forge says that you can't be someone in
22 another state that read about it in a
23 newspaper. You have to be personally affected
24 by the message.

25 And if you are a citizen in a

1 community, you are usually, you know, within
2 the zone of interest of someone that would take
3 offense or feel marginalized by the display.

4 And, here, all of the -- all of the
5 plaintiffs are individuals who are
6 non-Christian, who say that when they encounter
7 the government's symbol saying, you know, that
8 Christians have valor, Christians have courage,
9 Christians have devotion, Christians have
10 endurance, those words on the base, that says
11 something to them.

12 And I think, you know, when you look
13 back at the record in the 1920s, you know, Jews
14 were fighting immense discrimination. A lot of
15 them joined the war, you know, to combat the
16 stigma that they were considered cowards. And
17 I think one of the amicus briefs even had a
18 letter from a Jewish soldier who had to put on
19 his own Rosh Hashanah because they wouldn't
20 accommodate the Jewish soldiers with their
21 own --

22 JUSTICE ALITO: I mean, this would be
23 a different case if some of those 49 soldiers
24 whose names are associated with this monument
25 were Jewish or -- or Muslim or a member of some

1 other non-Christian faith and the town insisted
2 on putting their names on a monument in the
3 form of a cross. But there's no evidence that
4 that's what happened here.

5 MS. MILLER: Well --

6 JUSTICE ALITO: Is that right?

7 MS. MILLER: -- two things, Your
8 Honor: One, we don't know the names -- we
9 don't know the -- the religious beliefs of
10 those on the cross. What we know is that
11 there's about 14 of them, seven of whom are
12 buried in Arlington, that do not have a cross
13 on their headstone, even though Arlington had
14 the cross as an available emblem.

15 JUSTICE ALITO: All right. Well, it's
16 speculation, but we don't know that there was
17 anybody who objected, that there was any family
18 who objected to having this form of a
19 memorial --

20 MS. MILLER: There --

21 JUSTICE ALITO: -- for their fallen
22 family member, do we?

23 MS. MILLER: I think there's an
24 inference that can be made from the fact that
25 the government's records refer to 52 to 54

1 Prince Georgians who died in World War I and
2 they only have 49 names on the cross.

3 But I would also submit that the
4 government has basically forfeited that
5 argument by having this elaborate and public
6 rededication ceremony to rededicate the cross
7 as a memorial for all veterans of all wars.
8 That's how the town's treated it.

9 The Commission's here today saying
10 that this is an everyone memorial for --

11 JUSTICE ALITO: I mean, there are
12 cross monuments all over the country, many of
13 them quite old. Do you want them all taken
14 down?

15 MS. MILLER: No, Your Honor. And I
16 actually would submit that there's a lot of
17 exaggeration and distortion going on. I think
18 those people --

19 JUSTICE ALITO: So which ones do you
20 think can stand?

21 MS. MILLER: Well, certainly, the two
22 in Arlington. And there -- there are several
23 reasons. One is that much like -- you know,
24 much like the practice that was in Town of
25 Greece where the town created a, you know,

1 forum for private citizens to deliver prayers
2 of their own idiom, there is a statute that
3 governs monuments in Arlington that says that
4 -- it basically creates a non-discriminatory
5 religiously neutral opportunity for people to
6 place their own monuments in Arlington subject
7 to a lot of rules, but two of which are that
8 you have to --

9 JUSTICE ALITO: Yeah, and that's the
10 way this sort of thing is being handled today
11 in a pluralistic society in which ordinary
12 people get along pretty well and -- and are not
13 at each other's throats about religious
14 divisions.

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

18 MS. MILLER: Yes, Your Honor. Well,
19 it's one of, I think, something like 3,000
20 monuments within Gettysburg Park. It -- it
21 presents itself as -- as almost an object in a
22 museum. And it's not to say that museum
23 contexts can always negate the government's
24 imprimatur, but it seems in that context the
25 government is more like a curator of a museum

1 than it is putting it up.

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

4 CHIEF JUSTICE ROBERTS: What about --

5 JUSTICE KAGAN: May -- may I ask about
6 this cross -- I'm sorry.

7 CHIEF JUSTICE ROBERTS: I was just
8 going to ask, I understand Native American
9 totems have spiritual and religious
10 significance. If one of those is on a federal
11 -- on federal property, does it have to be torn
12 down?

13 MS. MILLER: I would say no, Your
14 Honor, but I -- I would -- I would think that
15 we'd need some sort of expert testimony to sort
16 of talk about what that means. I think in
17 common -- in --

18 CHIEF JUSTICE ROBERTS: Well, it has
19 spiritual and religious significance for Native
20 Americans, similar to, let's say, religious
21 symbols, a Star of David, a cross.

22 MS. MILLER: It -- it's difficult. I
23 know that the Ninth Circuit had a case that
24 dealt with an Aztec -- an ancient Aztec symbol,
25 and they concluded that it didn't violate the

1 Establishment Clause, in part because no one
2 would reasonably think that the government that
3 was predominantly, I think, Christian in that
4 community was erecting -- it was for -- it was
5 to commemorate Mexican culture -- you know,
6 would actually be trying to endorse the Aztec
7 religion. So I think context would matter.

8 I think that --

9 CHIEF JUSTICE ROBERTS: So, if the --
10 if the local government in the community were
11 Native American, whether it's on the
12 reservation or a -- a native village in Alaska,
13 that would make a difference?

14 MS. MILLER: You know, I think we
15 would have to understand more about the
16 symbolism and what it means if there is some
17 sort of dual secular meaning, such as with the
18 Ten Commandments, how it's basically shorthand
19 for law itself, so if, in context, it's
20 intended for the secular aspect to predominate,
21 perhaps, but I -- it's hard to say with --

22 JUSTICE KAGAN: So this cross,
23 Ms. Miller --

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

1 JUSTICE KAGAN: This cross, Ms.

2 Miller --

3 MS. MILLER: Yes.

4 JUSTICE KAGAN: -- it's very old, was
5 erected almost 100 years ago, right after World
6 War I. It does have -- it's two fallen
7 soldiers from World War I, and World War I does
8 have this history that this is how soldiers
9 were memorialized in World War I.

10 And it's true not all soldiers. When
11 you go into a World War I battlefield, there
12 are Stars of David there, but because those
13 battlefields were just rows and rows and rows
14 of crosses, the cross became, in people's
15 minds, the preeminent symbol of how to
16 memorialize World War I dead.

17 And then you have these other facts
18 that Mr. Katyal started us off with. There are
19 other war memorials around the park. There's
20 no -- there are no religious words on the
21 memorial, quite the opposite. All the words on
22 the memorial are words about military valor and
23 so forth.

24 So why in a case like that can we not
25 say essentially the religious content has been

1 stripped of this monument?

2 MS. MILLER: Well, Your Honor, I don't
3 think you can say that --

4 JUSTICE KAGAN: Or the particular
5 religious content?

6 MS. MILLER: I don't think -- I'm not
7 aware of any case or reason to say that a large
8 Latin cross can be stripped of its religious
9 meaning. I don't think it needs special words
10 to -- to announce that this is a -- a religious
11 symbol. I think that there was --

12 JUSTICE GORSUCH: Well, hold on. Just
13 a moment ago, you told us the Ten Commandments
14 can be stripped of their religious significance
15 and that an Indian totem pole may be stripped
16 of its religious significance. Why -- why not
17 so too here?

18 MS. MILLER: Well, as far as I'm
19 concerned, I'm not aware of any secondary
20 meaning that's derived from the Latin cross.
21 Its meaning as a war memorial is distinctly for
22 Christians. There is no evidence that any --

23 JUSTICE KAGAN: Well, I guess what I'm
24 -- what I'm suggesting --

25 MS. MILLER: Yes.

1 JUSTICE KAGAN: And I really did mean
2 to confine it to this World War I context,
3 because I think there's something quite
4 different about this historic moment in time
5 when -- so if you look -- you know, if you look
6 at all the crosses that are war memorials,
7 they're basically all World War I memorials,
8 that this was sort of the -- because of the
9 battlefields and the way the crosses were
10 erected there, this became the preeminent
11 symbol for how to memorialize the war dead at
12 that time.

13 Why isn't that important?

14 MS. MILLER: Well, Your Honor, I --
15 it's -- factually speaking, the doughboy statue
16 was by far the most common. In fact, on this
17 record, I'm only aware of six other crosses,
18 inclusive of Arlington, that are war memorial
19 -- World War I memorials on government land.
20 The few others that their -- that they cite are
21 actually on private land. The ones in
22 Baltimore, for instance, one has Jesus Christ
23 written on it, so that says to us at the same
24 time Bladensburg cross was being put up, other
25 World War I memorials were being put up in

1 direct recognition of Jesus Christ. That was
2 the understanding at the time. These are
3 Christian symbols.

4 Again, their -- the government's
5 argument in this case is not that this is a
6 Christian symbol anymore but that it, in fact,
7 represents Jews and atheists and Muslims. And
8 I think that there's no history whatsoever of
9 anyone using Latin crosses to honor Jews,
10 Muslims, and atheists.

11 And as the brief of the Joint Baptist
12 Community and -- and all the other, you know,
13 representative groups that represent millions
14 of Christians in this country, find that
15 argument deeply offensive and -- and could
16 potentially degrade their religion --

17 JUSTICE KAVANAUGH: I -- I take your
18 point that it's a religious symbol. I'm not
19 going to dispute that at all. But our cases
20 have upheld religious displays and religious
21 words in cases like Marsh, the chaplain in
22 Congress, and the prayer cases like Van Orden,
23 the Ten Commandments, cases like Town of
24 Greece, legislative prayer before a meeting.

25 How do you square your position in

1 this case with those cases, which have upheld
2 religious symbols, displays, or words in
3 government property or government events?

4 MS. MILLER: Yes, Your Honor. I would
5 start with Town of Greece because I think Town
6 of Greece is about as akin to, say, Arlington
7 Cemetery as any case can be.

8 There, the Court was saying that when
9 the government takes essentially a hands-off
10 position with respect to the sectarian content
11 of the prayers, you really -- it's not to say
12 that it's private speech, but the government
13 isn't being the mouthpiece for the sectarian
14 message.

15 When the government is this -- the
16 mouthpiece, when it is 100 percent the
17 government's speech --

18 JUSTICE KAVANAUGH: What about the Ten
19 -- the -- I'm sorry to interrupt --

20 MS. MILLER: Okay.

21 JUSTICE KAVANAUGH: -- but the Ten
22 Commandments then?

23 MS. MILLER: With respect to the Ten
24 Commandments, I realize that that is something
25 that this Court has routinely recognized as a

1 dual meaning symbol. Although, yes, there are
2 commandments that are certainly religious, the
3 Court has seen it as something that is more
4 ecumenical, embraced -- you know, as Justice --

5 JUSTICE SOTOMAYOR: Were those statues
6 built by private people and placed in the
7 parks? If I'm remembering --

8 MS. MILLER: The -- the Ten
9 Commandments?

10 JUSTICE SOTOMAYOR: Yes.

11 MS. MILLER: I believe the Eagles was
12 the primary donator of -- of most of the Ten
13 Commandments displays at issue, and my
14 understanding, especially in reading Justice
15 Breyer's concurrence, was that the fact that
16 the -- the Ten Commandments didn't predominate
17 in the setting, you know, they weren't the
18 largest, they were in line with all these other
19 displays, that the secular aspect of the Ten
20 Commandments, the one that says, you know, this
21 is how law was founded, this is symbolic of
22 law, predominated.

23 But there's nothing in either the
24 plurality or Justice Breyer's opinion that I
25 read to say that -- that -- that context can

1 somehow strip a Latin cross of its sectarian
2 meaning.

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

7 What do you think of saying, yes, look
8 at the historical context here? History
9 counts. And so, yes, okay, but no more.
10 That's what Justice Ginsburg, I think, was
11 bringing up. But no more. We're a different
12 country. We are a different country now, and
13 there are 50 more different religions, and,
14 therefore, no more. We're not going to have
15 people trying to tear down historical monuments
16 even here, okay?

17 Now what do you think of that? I'm
18 not suggesting I'm for it. I want to know what
19 you think of it.

20 MS. MILLER: Sure, Your Honor. I
21 mean, I -- I think two things. One is, again,
22 the exaggeration that's going on on the record
23 that there's somehow 50 or hundreds -- we've
24 gotten all sorts of numbers -- of crosses that
25 are on public land.

1 They -- they cite, for instance, 50
2 examples of something that's not a cross. What
3 -- it's a boot with a rifle and a helmet. And
4 it's cited in the Respondent's -- or the
5 Petitioner's reply brief, the -- the
6 Commission's reply brief, I think at page 17,
7 they refer to a cross in Lewisville, North
8 Carolina. It's not a cross. They cite about
9 50 examples of that.

10 They cite crosses in -- on private
11 land. I counted about 15 amongst the amicus
12 briefs on private land. So I'd say there's
13 something closer to about 10, maybe 20, not as
14 inclusive of -- of crosses that are quite
15 small.

16 With respect to history, there are a
17 lot of reasons why religious minorities in --
18 in Christian-dominated societies would not feel
19 safe challenging an actively used war memorial
20 that is the town's most prominent symbol.

21 You know, my clients have been
22 threatened. I've received death threats. And
23 I bet you it was not safer 90 years ago than it
24 was -- it is today.

25 Also, I don't think that you can say

1 that this is just some sort of passive display
2 that people don't take note of. Like I said,
3 if you look in the record, look at the letters
4 that people -- how people are processing a
5 monument like this, sort of like a billboard.

6 It kind of ingrains in your mind that
7 there is this association between having --
8 being Christian and having valor, having
9 courage, and what message that sends to the
10 religious minorities, and Christian, you know,
11 members of the society that are the majority.

12 CHIEF JUSTICE ROBERTS: Well, but
13 that's one of the main criticisms of the -- of
14 the Lemon test, that different people are going
15 to process that in different ways.

16 I mean, you heard from one of your
17 friends on the other side that one of the major
18 fundraisers of this was a Jewish individual.
19 So he was obviously observing it or
20 anticipating it in a different way.

21 MS. MILLER: Well, Your Honor, I -- I
22 think that we cannot take one person's example,
23 again, someone who's probably one of maybe the
24 only Jewish people in that county at a time
25 when there was an active Klan burning crosses,

1 burning Jewish buildings or Jewish, you know,
2 businesses at a time when atheists couldn't run
3 for office, Jews had to swear that they
4 believed in an after-life in order to qualify,
5 I mean --

6 JUSTICE KAGAN: Ms. Miller --

7 JUSTICE ALITO: There were 12 --

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

9 JUSTICE KAGAN: -- why does it even
10 matter --

11 JUSTICE ALITO: -- there were 12 --
12 are there 12 African-American soldiers among
13 the 49?

14 MS. MILLER: I believe there are. And
15 I believe that the --

16 JUSTICE ALITO: And do you think that
17 the -- that the -- the -- the situation of --
18 of African Americans in Prince George's County
19 at that time was worse -- was better than the
20 situation for Jews?

21 MS. MILLER: Here's what I'll say to
22 the plaque. They -- the names that are on the
23 plaque are the same names that are put up on
24 the one in Upper Marlboro. I don't believe
25 there's any evidence that -- that the Town of

1 Bladensburg knew who was on the cross.

2 About a third of the men actually have
3 no apparent connection to Prince George's
4 County. They named some guy in, like,
5 Philadelphia who had no connection here. So I
6 don't think how they got the names there.

7 JUSTICE KAGAN: Ms. -- Ms. Miller, I
8 -- I've been struck, some of these questions
9 about how people process these symbols and what
10 messages they convey, that you've sort of
11 accepted this idea that that's what we should
12 be thinking about.

13 But why isn't it enough to just say:
14 Does erecting a symbol like this align the
15 government with a particular religion and not
16 align it with every other religion?

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

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

25 We're saying look at the facts. There

1 is a 40-foot cross. It's in the middle of the
2 highway. It dominates all of the other newer
3 displays that the city has put up or the town's
4 put up recently.

5 You know, there's bushes obscuring the
6 plaque. There are no walkways, by the way, to
7 the cross. You have to risk life and limb to
8 get over the -- the lanes of traffic.

9 JUSTICE GORSUCH: You do --

10 MS. MILLER: There's --

11 JUSTICE GORSUCH: -- you do suggest we
12 -- at various points we should consider how
13 people process things and whether they're
14 offended and elsewhere you don't.

15 And I guess I am curious in response
16 to Justice Kagan, you say we shouldn't apply
17 Lemon in this case. It's been a long time
18 since this Court has applied Lemon, but yet the
19 courts of appeals continue to cite it and use
20 it. And -- and, there, reasonable observers
21 process things in all sorts of different ways.
22 And it has resulted in a welter of confusion, I
23 think, by anyone's admission, including your
24 own.

25 Is it time for this Court to thank

1 Lemon for its services and send it on its way?

2 (Laughter.)

3 MS. MILLER: No, Your Honor, I do not
4 think so. I think there's a difference between
5 Lemon and the reasonable observer. The
6 reasonable observer is an overlay that comes
7 from Justice O'Connor, who's trying to
8 acknowledge and reconcile the complexity of the
9 cases.

10 And I think the reasonable observer is
11 one that --

12 JUSTICE GORSUCH: But, if you don't
13 find it useful in this case and you don't want
14 the Court to apply it in this case, what about
15 all those poor court of appeals judges who are
16 left still with confusion?

17 We haven't overruled it, but we never
18 use it anymore, except for when we might have
19 25 years ago. And I -- I -- I think a majority
20 of this Court, though never at the same time,
21 has advocated for Lemon's dismissal.

22 So what do -- I mean, is it really
23 fair on the lower court judges struggling to
24 apply this Court's dictates if we don't provide
25 an answer on Lemon?

1 MS. MILLER: On the contrary, Your
2 Honor, I think that Lemon is very useful. I
3 think when you -- you heard the arguments
4 earlier today, they talked about context, they
5 talked about purpose, they talked about effect.
6 Those -- that's the crux of Lemon.

7 I don't think that --

8 JUSTICE KAVANAUGH: But how --

9 MS. MILLER: -- Lemon --

10 JUSTICE KAVANAUGH: -- how can it be
11 useful when we haven't used it in the most
12 important cases that are on point here, cases
13 like Town of Greece, it's not used. Van Orden,
14 Marsh v. Chambers, those are the cases that are
15 on point. Those go back 40 years, and we
16 haven't used the test.

17 And to Justice Gorsuch's point, the
18 lower courts need some clarity about that. If
19 the test isn't being used, that would suggest
20 that the test doesn't work for this context.

21 MS. MILLER: Your Honor, I would
22 submit that the Court really hasn't had the
23 proper opportunity to apply Lemon since Van
24 Orden, although remember that Van Orden was
25 decided as a --

1 JUSTICE KAVANAUGH: Well, Town of
2 Greece was certainly a case, and that's about
3 prayer before a legislative meeting.

4 MS. MILLER: Well, Town of Greece was
5 -- was extending Marsh, which had jettisoned
6 Lemon, but there's -- but the Court comes back
7 to saying in, for instance, Trump versus Hawaii
8 that reiterating the large -- the Larson test,
9 which is that, you know, the clearest command
10 of the Establishment Clause is one denomination
11 can't be preferred to another, that case relies
12 on Lemon.

13 But, more importantly, I think that,
14 like I said, I think everyone agrees that
15 purpose and effect are critical inquiries under
16 the Establishment Clause. They long predated
17 Lemon.

18 I think there was something like 14
19 cases pre-Lemon that were purpose and effect
20 cases. Lemon just enshrined those out of the
21 Third from Walz --

22 JUSTICE KAVANAUGH: I think you --

23 MS. MILLER: -- about entanglement.

24 JUSTICE KAVANAUGH: -- I think you
25 alluded to this earlier, but I wanted to ask it

1 so I'm clear. The distinction between the Ten
2 Commandments and the cross?

3 MS. MILLER: Is -- is twofold. One is
4 that it has this dual meaning as, you know, a
5 symbol of law. And so, when it's conveyed,
6 say, for instance, you know, alongside, you
7 know, Moses with 18 other lawmakers, the clear
8 effect is or -- or impression is this is a law
9 symbol.

10 When it's displayed in isolation or is
11 for one denomination, I think Justice Scalia
12 had a lot of good points about this in his
13 McCreary dissent about how he perceived the Ten
14 Commandments as being for -- embraced by
15 Judaism, Islam, and Christianity, but, for
16 instance, if it was just the Christian version,
17 which I'm not sure what that looks like, but
18 assuming such could be the case, that might be
19 a problem.

20 What -- the reason why we say the
21 Court doesn't need to reach Lemon in this case
22 is because there's a -- there's an easier
23 route, and that is the notion of one religion
24 over another can't be preferred.

25 JUSTICE ALITO: Well, along those

1 lines, would it be a violation of the
2 Establishment Clause for the state to promote
3 secularism or humanism as opposed to religion?

4 MS. MILLER: Human -- humanism, yes.
5 If the government decided to put up a giant
6 happy humanist symbol, that's our -- it's like
7 this man with little hands. If they decided to
8 replace the cross with the happy humanist, 40
9 feet tall, and they said this is the humanist
10 monument, I think that would be a problem.

11 JUSTICE ALITO: Well, let me take you
12 back to Justice Breyer's question, which is an
13 interesting question to me, and your response
14 was he's wrong on the numbers. But I don't
15 know. I've got pictures of lots of crosses
16 that are on public land.

17 So, you know, assuming for the sake of
18 argument that there are 50 or there are --
19 there are a lot of them, and we say you got to
20 take down all of the crosses, what message does
21 that send when people see that on -- on TV,
22 they see crosses all over the country being
23 knocked down?

24 MS. MILLER: Well, I don't think, Your
25 Honor, that they need to be knocked down at

1 all. In fact, our preferred remedy, I think,
2 is the least divisive in -- you know, outcome
3 of this case, which is to -- to move it to
4 private land.

5 Now I know that --

6 JUSTICE ALITO: All right, take --
7 move -- moved, taken down, but they're --
8 they're taken down one way or the other. What
9 -- what message is that?

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

11 JUSTICE ALITO: That -- that my
12 promote a particular world view, but is that --
13 is that consistent with the Establishment
14 Clause?

15 MS. MILLER: Your Honor, with respect,
16 I think you're forgetting the third option,
17 which is transferring the underlying property,
18 which this Court sanctioned in *Buono*, as well
19 as the Ninth Circuit sanctioning in --

20 JUSTICE GORSUCH: Wait a minute --

21 MS. MILLER: -- the *Trunk* case.

22 JUSTICE GORSUCH: -- let -- let's just
23 take that.

24 MS. MILLER: Okay.

25 JUSTICE GORSUCH: I mean, we're

1 fighting the hypothetical, counsel.

2 MS. MILLER: Okay.

3 JUSTICE GORSUCH: Now I love doing
4 that too.

5 MS. MILLER: Yeah.

6 (Laughter.)

7 JUSTICE GORSUCH: But let's just stick
8 with the hypothetical.

9 MS. MILLER: Sure.

10 JUSTICE GORSUCH: You can't transfer
11 it. You can't move it. You have to tear it
12 down. Road-side crosses along public highways,
13 for example, those are many. And in some
14 places, they've been ruled to be
15 unconstitutional, including in my old court.

16 MS. MILLER: That's right.

17 JUSTICE GORSUCH: Because they endorse
18 religion, proselytize. So back to --

19 MS. MILLER: Yes.

20 JUSTICE GORSUCH: -- Justice Alito's
21 question.

22 MS. MILLER: Sure.

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

25 MS. MILLER: Yes.

1 JUSTICE GORSUCH: That would help me.

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

6 But, with respect to bulldozing, you
7 say, 50 crosses, I mean, certainly, people will
8 get the message that you can't prefer
9 Christianity. But this Court has always
10 rejected the idea that restoring the government
11 to a place of neutrality is hostile to
12 religion.

13 In fact, I think that argument cuts
14 directly against their argument that says this
15 isn't a religious symbol.

16 To say that it would be so hostile to
17 religion, to move it to private land, to
18 transfer the land underneath it, I think,
19 really damages their argument in a way that,
20 you know, it -- it --

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

24 Okay. So I'm interested in your
25 reaction, which now that Justice Alito mentions

1 it, I did, and I didn't hear an answer.

2 MS. MILLER: With respect to -- well,
3 I think the hypothetical is so difficult
4 because I don't believe --

5 JUSTICE BREYER: It's not a
6 hypothetical.

7 MS. MILLER: Okay.

8 JUSTICE BREYER: I'm saying, a very
9 good book, the Law & Its Compass, Lord
10 Radcliffe, all our liberties come from freedom
11 of religion. You have your religion. I have
12 mine. And we're not going to kill each other.
13 Okay? So we say history counts.

14 Now what he raised is a problem. So
15 what about saying past is past, if you go back
16 93 years, but no more. We're now 54 religions.
17 We're now everything under the sun. And people
18 will take offense.

19 Now how do I do that? Is that
20 sensible? Is it ridiculous? What do you
21 think?

22 MS. MILLER: Well, I think that there
23 are ways to display a historical cross in a way
24 that isn't the government currently being the
25 mouthpiece for that sectarian speech.

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

5 I think that if this were not being
6 actively used by the town as an annual war
7 memorial that every year after year the town is
8 saying this is how we honor our veterans, this
9 giant cross, that's a constant message. It's
10 not --

11 JUSTICE GORSUCH: What if --

12 MS. MILLER: -- a historical artifact.

13 JUSTICE GORSUCH: -- what if -- what
14 if -- what if other cities replicated the 9/11
15 cross? It's a different world. It's a
16 different time. History's changed. But here's
17 an example of a cross that has very
18 contemporary meaning and to a lot of people.

19 Would -- would you prohibit cities and
20 states from duplicating that cross on -- on
21 their -- on their public memorials to 9/11?

22 MS. MILLER: So just so I understand,
23 you're saying they commission a cross that
24 looks like the rubble -- a piece of rubble, and
25 then -- you know, I think it depends on how

1 they're displaying it. If it's --

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

4 MS. MILLER: Exactly. It does not
5 exist in isolation, yes, it's -- it's in a
6 museum.

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

9 MS. MILLER: Yes.

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

13 MS. MILLER: Yes, Your Honor. Well,
14 then that would certainly be a problem. That
15 would be a cross that's being displayed as the
16 government's war memorial, not as a piece of
17 artifact that is in an exhibit, as a museum, in
18 a museum context.

19 JUSTICE SOTOMAYOR: Can we go back
20 outside of hypotheticals to this case?

21 MS. MILLER: Yes, Your Honor.

22 JUSTICE SOTOMAYOR: Mr. Katyal said
23 that the only way to have a remedy here is to
24 destroy -- change the cross or destroy it. He
25 says you can't move it because it'll fall

1 apart, and you can't give it to the Legion
2 because of safety concerns.

3 Do you agree with his position on
4 this?

5 MS. MILLER: I don't agree. For one,
6 with respect to moving it, we don't have any
7 statements that say -- we -- there's one
8 statement in the deposition that says it might
9 be hard to move.

10 But we also have deposition testimony
11 saying that the state has moved large historic
12 houses, so we have a hard time imagining that a
13 house is more difficult to move. There's two
14 World War I memorials that were in the center
15 of medians.

16 The -- the reality is that --

17 JUSTICE SOTOMAYOR: I do understand
18 also that the cross is falling apart and has to
19 be fixed anyway.

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

21 JUSTICE SOTOMAYOR: So whether it's
22 fixed in a move or fixed in place in situ is
23 irrelevant. It still has to be fixed.

24 MS. MILLER: That's -- that's right.
25 Exactly. And I think that they're ignoring the

1 key problem that their own experts have -- have
2 warned them about, which is that the current
3 location is causing its demise. And that's why
4 I say that I think our preferred remedy, which
5 is moving it somewhere else, is the best
6 situation for the cross.

7 It can be placed in a place where
8 people don't have to risk their lives to cross
9 the street. They can actually come pay their
10 respects. They can do so maybe a little bit
11 more privately.

12 JUSTICE SOTOMAYOR: May -- may I go
13 back to the question that's been underlying
14 some of my colleagues' points and points you've
15 been trying to make.

16 It is contextual, the endorsement test
17 is always contextual, and, according to you,
18 contextually, the 50 crosses that Justice Alito
19 and Breyer are worried about, you don't think
20 it's 50?

21 MS. MILLER: I --

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

24 Can we, given the nature of the right
25 at issue, given that the other side concedes

1 that there's extreme proselytization, that
2 there is -- and there has to be, because the
3 First Amendment -- there has to be de facto
4 coercion to make any sense of the Establishment
5 Clause. And defining that is always going to
6 involve context.

7 You were giving up the reasonable
8 observer test. You were talking about an
9 objective factors test. Could you go into that
10 a little bit more?

11 MS. MILLER: Yes, Your Honor. I think
12 Part 1 of our brief details those factors, and
13 I think all the factors relate to the
14 government's imprimatur.

15 So we -- once you've accepted that we
16 have a symbol that only honors one religion --
17 because I see it as sort of two prongs. You're
18 testing how -- you know, is this a sectarian
19 symbol? Does it, you know, prefer one religion
20 to another? And then, if so, is it the
21 government putting its hands on it?

22 I'd say the Arlington crosses, it's
23 not, because one's donated by Canada. It's
24 pursuant to this, like I said, statute that
25 allows anyone to put them up. So the factors

1 relate to how much government support is there.

2 When you see it in the -- you know,
3 the size of it can matter insofar as it says
4 how enthusiastic the city is about it.

5 If you had a 90-foot cross and a
6 two-foot Star of David, it says we really like
7 Christians, we're okay with -- with Jews, you
8 know, and so I think the size, the placement of
9 it, obviously, in the most prominent parcel of
10 land, the more prominent it is, the more it
11 begs the question why is it there? Why did the
12 government allow this?

13 JUSTICE KAVANAUGH: Can I --

14 CHIEF JUSTICE ROBERTS: Well, I was
15 just going to say, if -- if I were, I once was,
16 a lower court judge and I get that type of
17 analysis, I'm just going to throw my hands up.
18 Those are 20 different facts, how big is it,
19 where, you know, is it located. And maybe
20 that's the best we can do.

21 But do you -- do you have like
22 something more concise about the test you would
23 apply beyond looking at all the contextual
24 factors and history and all that?

25 MS. MILLER: I mean, I think it's very

1 difficult and I think that's why the Court
2 hasn't come up with that one, you know,
3 singular test, because the cases are complex.
4 That's the Establishment Clause.

5 And I think it actually helps us, you
6 know, deal with each cross. That's why it's
7 easy to say you don't have to tear down any
8 other crosses after this. Each one is
9 evaluated with its specific facts.

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

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

15 JUSTICE ALITO: You raised -- so you
16 just said no other cross has to be torn down,
17 just this one. Would you like us to write that
18 in the opinion?

19 (Laughter.)

20 MS. MILLER: I mean, with respect,
21 this Court has done that. I mean, in its
22 cases, it says, you know, we're not -- we're
23 not deciding anything more. Buono is a perfect
24 example. I don't --

25 JUSTICE ALITO: Say we're going to

1 write an opinion and we're going to say this
2 cross is particularly bad. This one has to be
3 moved, torn down, transferred, so forth. But
4 every other cross is fine.

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

6 JUSTICE ALITO: Is that what you just
7 said?

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

10 JUSTICE ALITO: Okay. I
11 misunderstood.

12 MS. MILLER: -- that this Court says,
13 you know, cases are ill-suited for sweeping
14 pronouncements and categorical rules.

15 So, when the Court says that it says,
16 you know, not every cross is going to be torn
17 down, not every cross is going to be held --
18 upheld, and I think that's an appropriate way
19 to leave room for exceptions or leave --

20 JUSTICE KAVANAUGH: Your -- your
21 argument sounds in liberty. You raise an
22 important liberty argument. In thinking about
23 a liberty claim, I think the Constitution tilts
24 toward liberty in its structure, and one of the
25 ways it does so is there are lots of avenues

1 for you to -- the Bladensburg counsel could
2 change its approach here.

3 The Maryland legislature could say no
4 more. The Maryland constitution, as Judge
5 Sutton would remind us, could, or the Maryland
6 courts could prohibit it.

7 With that in mind, the Establishment
8 Clause test referenced a historical practice
9 can be thought of as setting a floor, an
10 important one, but there are other ways the
11 Constitution tilts toward liberty and other
12 avenues.

13 How should we think about that, or
14 should we think about that at all, or is that
15 irrelevant to us?

16 MS. MILLER: I mean, liberty's
17 absolutely important. And I think that's where
18 the -- the brief of the Baptist Joint Committee
19 and all of the Christian groups, you know,
20 joined saying that a ruling upholding this
21 cross would definitely degrade and damage their
22 -- their free exercise of their religious
23 liberty beliefs.

24 With respect to a test, even in Town
25 of Greece, the Court talks about not allowing a

1 policy that excludes or discriminates against
2 non-believers.

3 And I think, in that regard, it
4 actually even goes farther in favor of
5 non-believers than Marsh, because I believe
6 some Justices interpreted Marsh to mean you can
7 disregard atheists, and in Town of Greece, the
8 Court said, no, you can't.

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

12 Should it matter that we know that the
13 Bladensburg council, the state legislature of
14 Maryland, the Maryland constitution, are all
15 there, or is that irrelevant to how we think
16 about this?

17 MS. MILLER: May I?

18 CHIEF JUSTICE ROBERTS: You have a
19 couple minutes left.

20 MS. MILLER: Okay. How -- how
21 Maryland decides to -- I guess I'm just not
22 quite understanding the question. Is it how --

23 JUSTICE KAVANAUGH: The fact that
24 there are other ways in which the cross --
25 other bodies that can decide the cross is too

1 much, the Maryland -- the local council could,
2 the Maryland legislature. And I'm not saying
3 that's the right answer. I'm just saying, is
4 that relevant to how we think about our role in
5 a case like this or not?

6 MS. MILLER: So if, like, the Maryland
7 legislator decides that the cross is universal
8 or?

9 JUSTICE KAVANAUGH: No, that the cross
10 should come down.

11 MS. MILLER: I see.

12 JUSTICE KAVANAUGH: In other words,
13 the Bladensburg council could transfer the
14 property --

15 MS. MILLER: Oh.

16 JUSTICE KAVANAUGH: -- to the Maryland
17 legislature. The Maryland state courts, the
18 Maryland court of appeals could decide.

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

21 JUSTICE KAVANAUGH: Yeah.

22 MS. MILLER: Yes. I mean, I think the
23 remedy is certainly relevant to considering
24 that -- that it doesn't need to be torn down,
25 but I don't know if that plays into the

1 question of --

2 JUSTICE SOTOMAYOR: I think the
3 question --

4 MS. MILLER: -- is this
5 constitutional.

6 JUSTICE SOTOMAYOR: -- is different.
7 I think the question is do we think that --
8 since there are other avenues available, that
9 the Constitution doesn't require this floor --

10 MS. MILLER: I see -- I see.

11 JUSTICE SOTOMAYOR: -- as a
12 constitutional floor for an Establishment
13 Clause violation. I think that's the question
14 that's being asked.

15 MS. MILLER: Oh, then the answer is
16 no, I don't think that that's relevant at all.
17 I mean, the Establishment Clause is -- you
18 know, trumps statutes and -- and so forth. So
19 I think that would be -- yes.

20 So we ask that this Court affirm.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Three minutes, Mr. Katyal.

24

25

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

3 MR. KATYAL: Thank you.

4 Ours is a middle path between my
5 three excellent friends. The easiest way to
6 resolve this case in the -- is to say, in the
7 wake of World War I, crosses like this one have
8 an independent secular meaning.

9 As Justice Kavanaugh said before, this
10 Court's decisions recognize that symbols,
11 including religious symbols, have dual
12 meanings, and you can look to Van Orden for
13 that or you could just look up. And --

14 JUSTICE GINSBURG: But does --

15 JUSTICE SOTOMAYOR: Mr. Katyal, how --

16 JUSTICE GINSBURG: -- the cross really
17 have a dual meaning, Mr. Katyal? It is the
18 preeminent symbol of Christianity. People wear
19 crosses as -- to show their devotion to the
20 Christian faith.

21 MR. KATYAL: We don't disagree with
22 any of that, Justice Ginsburg. Our only point
23 -- it's the same one that the Buono plurality
24 made -- is that crosses, particularly World War
25 I ones, have a -- have a second meaning, and

1 that meaning is what makes it constitutional.

2 That's why we disagree with my friends
3 here, because we think that their approach
4 would -- what -- would risk the destruction of
5 this 93-year-old memorial, which, you know --
6 which -- which has that real long tradition
7 going back to the Field of Flanders --

8 JUSTICE SOTOMAYOR: Mr. Katyal --

9 MR. KATYAL: -- and the like.

10 JUSTICE SOTOMAYOR: -- there's a call
11 and a discussion about undoing Lemon
12 altogether.

13 MR. KATYAL: Right.

14 JUSTICE SOTOMAYOR: Substituting
15 something like a coercion test, whatever, with
16 or without limits. What position are you
17 taking --

18 MR. KATYAL: We profound --

19 JUSTICE SOTOMAYOR: -- on behalf of
20 the commission -- of --

21 MR. KATYAL: We profoundly disagree.
22 We think it's unnecessary and unwise. It's
23 unnecessary because, as their own briefs say --
24 the best evidence of this is the last pages of
25 each of the briefs by solicitor general and the

1 Legion. They say the existing tests make this
2 an easy case to save the cross. So it's not
3 presented here.

4 If, Justice Gorsuch, you're concerned
5 about Lemon, wait for a case in which it has
6 some bite. Here, every test, whatever test you
7 apply --

8 JUSTICE GORSUCH: Well --

9 MR. KATYAL: -- yields the same
10 result.

11 JUSTICE GORSUCH: -- you're -- you're
12 -- you're in the same boat, though, saying
13 apply Lemon -- keep Lemon, keep it -- keep it
14 around for a rainy day, but please, please,
15 please, do not apply Lemon to this case.

16 MR. KATYAL: Well, we're happy with
17 you applying Lemon. Our brief says that that
18 would be constitutional. We just think this
19 Court in Van Orden has said you didn't -- for
20 passive monuments, which aren't necessarily --

21 JUSTICE KAVANAUGH: What if we think
22 --

23 MR. KATYAL: -- the most important
24 ones --

25 JUSTICE KAVANAUGH: -- what if we

1 think it's unconstitutional under Lemon?

2 What's your view then?

3 MR. KATYAL: Well, I think it would be
4 very impossible for reasons that the -- for --
5 for reasons our brief explains to find it.

6 JUSTICE KAVANAUGH: And what if --
7 what if it's unconstitutional under Lemon?

8 JUSTICE GORSUCH: Yeah. The other
9 side so argues. So I -- I'd appreciate an
10 answer to that question.

11 MR. KATYAL: Yeah, so, I mean, we --
12 if it's unconstitutional, then -- you know,
13 then I think we would say, you know, you should
14 take a look at Lemon because then it would be
15 necessarily presented.

16 (Laughter.)

17 JUSTICE KAVANAUGH: Right.

18 MR. KATYAL: Right. But we think
19 you'd have to do so much work to get there,
20 Justice Kavanaugh, that it would be a
21 distortion of Lemon. And my friends say that
22 there are, you know, disagreements in the lower
23 courts. Our cert petition outlines the
24 disagreements in the lower courts. They're
25 largely on crosses.

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

11 The one thing we do know it means is
12 that it's going to permit crosses like the Lake
13 County cross with Jesus nailed to the center of
14 it in public parks. And that, to me, is a
15 radical change in the law.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 11:35 a.m., the case
19 was submitted.)

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