

GINSBURG, J., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 17–1717 and 18–18

THE AMERICAN LEGION, ET AL., PETITIONERS
17–1717 *v.*
AMERICAN HUMANIST ASSOCIATION, ET AL.; AND

MARYLAND-NATIONAL CAPITAL PARK AND
PLANNING COMMISSION, PETITIONER
18–18 *v.*
AMERICAN HUMANIST ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[June 20, 2019]

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR
joins, dissenting.

An immense Latin cross stands on a traffic island at the center of a busy three-way intersection in Bladensburg, Maryland.¹ “[M]onumental, clear, and bold” by day, App. 914, the cross looms even larger illuminated against the night-time sky. Known as the Peace Cross, the monument was erected by private citizens in 1925 to honor local soldiers who lost their lives in World War I. “[T]he town’s most prominent symbol” was rededicated in 1985 and is now said to honor “the sacrifices made [in] all wars,” *id.*, at 868 (internal quotation marks omitted), by “all veterans,” *id.*, at 195. Both the Peace Cross and the traffic island are owned and maintained by the Maryland-National Capital Park and Planning Commission (Commission), an agency of the State of Maryland.

¹A photograph of the monument and a map showing its location are reproduced in the Appendix, *infra*, at 19.

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Decades ago, this Court recognized that the Establishment Clause of the First Amendment to the Constitution demands governmental neutrality among religious faiths, and between religion and nonreligion. See *Everson v. Board of Ed. of Ewing*, 330 U. S. 1, 15 (1947). Numerous times since, the Court has reaffirmed the Constitution’s commitment to neutrality. Today the Court erodes that neutrality commitment, diminishing precedent designed to preserve individual liberty and civic harmony in favor of a “presumption of constitutionality for longstanding monuments, symbols, and practices.” *Ante*, at 16 (plurality opinion).²

The Latin cross is the foremost symbol of the Christian faith, embodying the “central theological claim of Christianity: that the son of God died on the cross, that he rose from the dead, and that his death and resurrection offer the possibility of eternal life.” Brief for Baptist Joint Committee for Religious Liberty et al. as *Amici Curiae* 7 (Brief for *Amici* Christian and Jewish Organizations). Precisely because the cross symbolizes these sectarian beliefs, it is a common marker for the graves of Christian soldiers. For the same reason, using the cross as a war memorial does not transform it into a secular symbol, as the Courts of Appeals have uniformly recognized. See

²Some of my colleagues suggest that the Court’s new presumption extends to all governmental displays and practices, regardless of their age. See *ante*, at 3 (KAVANAUGH, J., concurring); *ante*, at 6 (THOMAS, J., concurring in judgment); *ante*, at 9 (GORSUCH, J., concurring in judgment). But see *ante*, at 2 (BREYER, J., joined by KAGAN, J., concurring) (“[A] more contemporary state effort’ to put up a religious display is ‘likely to prove divisive in a way that [a] longstanding, pre-existing monument [would] not.’”). I read the Court’s opinion to mean what it says: “[R]etaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones,” *ante*, at 21, and, consequently, only “longstanding monuments, symbols, and practices” enjoy “a presumption of constitutionality,” *id.*, at 16 (plurality opinion).

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infra, at 10–11, n. 10. Just as a Star of David is not suitable to honor Christians who died serving their country, so a cross is not suitable to honor those of other faiths who died defending their nation. Soldiers of all faiths “are united by their love of country, but they are not united by the cross.” Brief for Jewish War Veterans of the United States of America, Inc., as *Amicus Curiae* 3 (Brief for *Amicus* Jewish War Veterans).

By maintaining the Peace Cross on a public highway, the Commission elevates Christianity over other faiths, and religion over nonreligion. Memorializing the service of American soldiers is an “admirable and unquestionably secular” objective. *Van Orden v. Perry*, 545 U. S. 677, 715 (2005) (Stevens, J., dissenting). But the Commission does not serve that objective by displaying a symbol that bears “a starkly sectarian message.” *Salazar v. Buono*, 559 U. S. 700, 736 (2010) (Stevens, J., dissenting).

I
A

The First Amendment commands that the government “shall make no law” either “respecting an establishment of religion” or “prohibiting the free exercise thereof.” See *Everson*, 330 U. S., at 15. Adoption of these complementary provisions followed centuries of “turmoil, civil strife, and persecutio[n], generated in large part by established sects determined to maintain their absolute political and religious supremacy.” *Id.*, at 8–9. Mindful of that history, the fledgling Republic ratified the Establishment Clause, in the words of Thomas Jefferson, to “buil[d] a wall of separation between church and state.” Draft Reply to the Danbury Baptist Association, in 36 Papers of Thomas Jefferson 254, 255 (B. Oberg ed. 2009) (footnote omitted).

This barrier “protect[s] the integrity of individual conscience in religious matters.” *McCreary County v. American Civil Liberties Union of Ky.*, 545 U. S. 844, 876 (2005).

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It guards against the “anguish, hardship and bitter strife,” *Engel v. Vitale*, 370 U. S. 421, 429 (1962), that can occur when “the government weighs in on one side of religious debate,” *McCreary County*, 545 U. S., at 876. And while the “union of government and religion tends to destroy government and to degrade religion,” separating the two preserves the legitimacy of each. *Engel*, 370 U. S., at 431.

The Establishment Clause essentially instructs: “[T]he government may not favor one religion over another, or religion over irreligion.” *McCreary County*, 545 U. S., at 875. For, as James Madison observed, the government is not “a competent Judge of Religious Truth.” Memorial and Remonstrance Against Religious Assessments, 8 Papers of James Madison 295, 301 (R. Rutland, W. Rachal, B. Ripel, & F. Teute eds. 1973) (Memorial and Remonstrance). When the government places its “power, prestige [or] financial support . . . behind a particular religious belief,” *Engel*, 370 U. S., at 431, the government’s imprimatur “mak[es] adherence to [that] religion relevant . . . to a person’s standing in the political community,” *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 594 (1989) (internal quotation marks omitted). Correspondingly, “the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” *Engel*, 370 U. S., at 431. And by demanding neutrality between religious faith and the absence thereof, the Establishment Clause shores up an individual’s “right to select any religious faith or none at all.” *Wallace v. Jaffree*, 472 U. S. 38, 53 (1985).

B

In cases challenging the government’s display of a religious symbol, the Court has tested fidelity to the principle of neutrality by asking whether the display has the “effect of ‘endorsing’ religion.” *County of Allegheny*, 492 U. S., at

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592. The display fails this requirement if it objectively “convey[s] a message that religion or a particular religious belief is favored or preferred.” *Id.*, at 593 (internal quotation marks omitted; emphasis deleted).³ To make that determination, a court must consider “the pertinent facts and circumstances surrounding the symbol and its placement.” *Buono*, 559 U. S., at 721 (plurality opinion); *id.*, at 750–751 (Stevens, J., dissenting) (quoting plurality opinion).⁴

As I see it, when a cross is displayed on public property, the government may be presumed to endorse its religious content. The venue is surely associated with the State; the symbol and its meaning are just as surely associated exclusively with Christianity. “It certainly is not common for property owners to open up their property [to] monuments that convey a message with which they do not wish to be associated.” *Pleasant Grove City v. Sumnum*, 555 U. S. 460, 471 (2009). To non-Christians, nearly 30% of the population of the United States, Pew Research Center, *America’s Changing Religious Landscape 4* (2015), the

³JUSTICE GORSUCH’s “no standing” opinion is startling in view of the many religious-display cases this Court has resolved on the merits. *E.g.*, *McCreary County*, 545 U. S. 844; *Van Orden*, 545 U. S. 677; *Stone v. Graham*, 449 U. S. 39 (1980) (*per curiam*). And, if JUSTICE GORSUCH is right, three Members of the Court were out of line when they recognized that “[t]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall,” *Buono*, 559 U. S., at 715 (opinion of Kennedy, J., joined by ROBERTS, C.J., and ALITO, J.) (quoting *County of Allegheny*, 492 U. S., at 661 (second alteration in original), for no one, according to JUSTICE GORSUCH, should be heard to complain about such a thing. But see Brief for Law Professors as *Amici Curiae* (explaining why offended observer standing is necessary and proper).

⁴This inquiry has been described by some Members of the Court as the “reasonable observer” standard. See, *e.g.*, *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 806 (1995) (Stevens, J., dissenting); *County of Allegheny*, 492 U. S., at 630–631 (O’Connor, J., concurring in part and concurring in judgment).

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State's choice to display the cross on public buildings or spaces conveys a message of exclusion: It tells them they "are outsiders, not full members of the political community," *County of Allegheny*, 492 U. S., at 625 (O'Connor, J., concurring in part and concurring in judgment) (internal quotation marks omitted). Cf. *Van Orden*, 545 U. S., at 708 (Stevens, J., dissenting) ("The adornment of our public spaces with displays of religious symbols" risks "'offend[ing] nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful.'" (quoting *County of Allegheny*, 492 U. S., at 651 (Stevens, J., concurring in part and dissenting in part))).⁵

A presumption of endorsement, of course, may be overcome. See *Buono*, 559 U. S., at 718 (plurality opinion) ("The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm."). A display does not run afoul of the neutrality principle if its "setting . . . plausibly indicates" that the government has not sought "either to adopt [a] religious message or to urge its acceptance by others." *Van Orden*, 545 U. S., at 737 (Souter, J., dissenting). The "typical museum setting," for example, "though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch v. Donnelly*, 465 U. S. 668, 692 (1984) (O'Connor, J., concurring). Similarly, when a public school history teacher discusses the Protestant Reformation, the setting makes clear that

⁵See also Jews and Christians Discussion Group in the Central Committee of German Catholics, *A Convent and Cross in Auschwitz*, in *The Continuing Agony: From the Carmelite Convent to the Crosses at Auschwitz* 231–232 (A. Berger, H. Cargas, & S. Nowak eds. 2004) ("We Christians must appreciate [that] [t]hroughout history many non-Christians, especially Jews, have experienced the Cross as a symbol of persecution, through the Crusades, the Inquisition and the compulsory baptisms.").

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the teacher’s purpose is to educate, not to proselytize. The Peace Cross, however, is not of that genre.

II

A

“For nearly two millennia,” the Latin cross has been the “defining symbol” of Christianity, R. Jensen, *The Cross: History, Art, and Controversy* ix (2017), evoking the foundational claims of that faith. Christianity teaches that Jesus Christ was “a divine Savior” who “illuminate[d] a path toward salvation and redemption.” *Lynch*, 465 U. S., at 708 (Brennan, J., dissenting). Central to the religion are the beliefs that “the son of God,” Jesus Christ, “died on the cross,” that “he rose from the dead,” and that “his death and resurrection offer the possibility of eternal life.” Brief for *Amici* Christian and Jewish Organizations 7.⁶ “From its earliest times,” Christianity was known as “*religio crucis*—the religion of the cross.” R. Viladesau, *The Beauty of the Cross: The Passion of Christ in Theology and the Arts, From the Catacombs to the Eve of the Renaissance* 7 (2006). Christians wear crosses, not as an ecumenical symbol, but to proclaim their adherence to Christianity.

An exclusively Christian symbol, the Latin cross is not emblematic of any other faith. *Buono*, 559 U. S., at 747 (Stevens, J., dissenting); Viladesau, *supra*, at 7 (“[T]he cross and its meaning . . . set Christianity apart from other world religions.”)⁷ The principal symbol of Christi-

⁶Under “one widespread reading of Christian scriptures,” non-Christians are barred from eternal life and, instead, are condemned to hell. Brief for *Amici* Christian and Jewish Organizations 2. On this reading, the Latin cross symbolizes both the promise of salvation and the threat of damnation by “divid[ing] the world between the saved and the damned.” *Id.*, at 12.

⁷Christianity comprises numerous denominations. The term is here used to distinguish Christian sects from religions that do not embrace the defining tenets of Christianity.

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anity around the world should not loom over public thoroughfares, suggesting official recognition of that religion's paramountcy.

B

The Commission urges in defense of its monument that the Latin cross “is not merely a reaffirmation of Christian beliefs”; rather, “when used in the context of a war memorial,” the cross becomes “a universal symbol of the sacrifices of those who fought and died.” Brief for Petitioner Maryland-National Capital Park and Planning Commission 34–35 (Brief for Planning Commission) (internal quotation marks omitted). See also Brief for United States as *Amicus Curiae* 25 (The Latin cross is “a Christian symbol . . . [b]ut it is also ‘a symbol often used to honor and respect [soldiers] heroic acts.’” (quoting *Buono*, 559 U. S., at 721 (plurality opinion); some internal quotation marks omitted)).

The Commission’s “[a]ttempts to secularize what is unquestionably a sacred [symbol] defy credibility and disserve people of faith.” *Van Orden*, 545 U. S., at 717 (Stevens, J., dissenting). See, e.g., Brief for *Amici* Christian and Jewish Organizations 7 (“For Christians who think seriously about the events and message that the cross represents, [the Commission’s] claims are deeply offensive.”). The asserted commemorative meaning of the cross rests on—and is inseparable from—its Christian meaning: “the crucifixion of Jesus Christ and the redeeming benefits of his passion and death,” specifically, “the salvation of man.” *American Civil Liberties Union of Illinois v. St. Charles*, 794 F.2d 265, 273 (CA7 1986) (internal quotation marks omitted).

Because of its sacred meaning, the Latin cross has been used to mark Christian deaths since at least the fourth century. See Jensen, *supra*, at 68–69. The cross on a grave “says that a Christian is buried here,” Brief for

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Amici Christian and Jewish Organizations 8, and “commemorates [that person’s death] by evoking a conception of salvation and eternal life reserved for Christians,” Brief for *Amicus* Jewish War Veterans 7. As a commemorative symbol, the Latin cross simply “makes no sense apart from the crucifixion, the resurrection, and Christianity’s promise of eternal life.” Brief for *Amici* Christian and Jewish Organizations 8.⁸

The cross affirms that, thanks to the soldier’s embrace of Christianity, he will be rewarded with eternal life. *Id.*, at 8–9. “To say that the cross honors the Christian war dead does not identify a secular meaning of the cross; it merely identifies a common application of the religious meaning.” *Id.*, at 8. Scarcely “a universal symbol of sacrifice,” the cross is “the symbol of one particular sacrifice.” *Buono*, 559 U. S., at 748, n. 8 (Stevens, J., dissenting).⁹

⁸The Court sets out familiar uses of the Greek cross, including the Red Cross and the Navy Cross, *ante*, at 3, 22, and maintains that, today, they carry no religious message. But because the Latin cross has never shed its Christian character, its commemorative meaning is exclusive to Christians. The Court recognizes as much in suggesting that the Peace Cross features the Latin cross for the same reason “why Holocaust memorials invariably include Stars of David”: those sectarian “symbols . . . signify what death meant for those who are memorialized.” *Ante*, at 30.

⁹Christian soldiers have drawn parallels between their experiences in war and Jesus’s suffering and sacrifice. See, e.g., C. Dawson, *Living Bayonets: A Record of the Last Push 19–20* (1919) (upon finding a crucifix strewn among rubble, a soldier serving in World War I wrote home that Jesus Christ “seem[ed] so like ourselves in His lonely and unhallowed suffering”). This comparison has been portrayed by artists, see, e.g., 7 *Encyclopedia of Religion* 4348 (2d ed. 2005) (painter George Rouault’s 1926 *Miserere* series “compares Christ’s suffering with twentieth-century experiences of human sufferings in war”), and documented by historians, see, e.g., R. Schweitzer, *The Cross and the Trenches: Religious Faith and Doubt Among British and American Great War Soldiers* 28–29 (2003) (given the horrors of trench warfare, “[t]he parallels that soldiers saw between their suffering and Christ’s make their identification with Jesus both understandable and reveal-

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Every Court of Appeals to confront the question has held that “[m]aking a . . . Latin cross a war memorial does not make the cross secular,” it “makes the war memorial sectarian.” *Id.*, at 747.¹⁰ See also *Separation of Church*

ing”); Lemay, *Politics in the Art of War: The American War Cemeteries*, 38 *Int’l J. Mil. History & Historiography* 223, 225 (2018) (“[T]he [cross] grave markers assert the absolute valour and Christ-like heroism of the American dead . . .”).

¹⁰See 874 F. 3d 195, 207 (CA4 2017) (case below) (“Even in the memorial context, a Latin cross serves not . . . as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ.”); *American Atheists, Inc. v. Davenport*, 637 F. 3d 1095, 1122 (CA10 2010) (“[A] memorial cross is not a *generic* symbol of death; it is a *Christian* symbol of death that signifies or memorializes the death of a *Christian*.”); *Trunk v. San Diego*, 629 F. 3d 1099, 1102 (CA9 2011) (“Resurrection of this Cross as a war memorial does not transform it into a secular monument.”); *Separation of Church and State Comm. v. Eugene*, 93 F. 3d 617, 619 (CA9 1996) (*per curiam*) (“[T]he City urges that the cross is no longer a religious symbol but a war memorial. This argument . . . fails to withstand Establishment Clause analysis.”); *Gonzales v. North Twp. of Lake Cty.*, 4 F. 3d 1412, 1418 (CA7 1993) (“[W]e are masters of the obvious, and we know that . . . the Latin cross . . . is [the] unmistakable symbol of Christianity as practiced in this country today.” (quoting *Harris v. Zion*, 927 F. 2d 1401, 1403 (CA7 1991))). See also *Jewish War Veterans of the United States v. United States*, 695 F. Supp. 3, 11 (DC 1988) (“[D]efendants are unable to cite a single federal case where a cross such as the one at issue here has survived Establishment Clause scrutiny.”).

The Courts of Appeals have similarly concluded that the Latin cross remains a Christian symbol when used for other purposes. See, e.g., *Robinson v. Edmond*, 68 F. 3d 1226, 1232 (CA10 1995) (city seal depicting the cross) (“The religious significance and meaning of the Latin or Christian cross are unmistakable.”); *Carpenter v. City and County of San Francisco*, 93 F. 3d 627, 630 (CA9 1996) (103-foot cross in public park) (“The Latin cross . . . [r]epresents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity.”); *American Civil Liberties Union of Ill. v. St. Charles*, 794 F. 2d 265, 272–273 (CA7 1986) (35-foot cross displayed atop a fire house during the Christmas season) (“The cross . . . is ‘the principal symbol of the Christian religion, recalling the crucifixion of Jesus Christ and the redeeming benefits of his passion and death.’”); *Friedman v. Board of Cty. Comm’rs of Bernalillo*

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and State Comm. v. Eugene, 93 F. 3d 617, 626 (CA9 1996) (O’Scannlain, J., concurring in result) (“[T]he City’s use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans.”).

The Peace Cross is no exception. That was evident from the start. At the dedication ceremony, the keynote speaker analogized the sacrifice of the honored soldiers to that of Jesus Christ, calling the Peace Cross “symbolic of Calvary,” App. 449, where Jesus was crucified. Local reporters variously described the monument as “[a] mammoth cross, a likeness of the Cross of Calvary, as described in the Bible,” *id.*, at 428; “a monster [C]alvary cross,” *id.*, at 431; and “a huge sacrifice cross,” *id.*, at 439. The character of the monument has not changed with the passage of time.

C

The Commission nonetheless urges that the Latin cross is a “well-established” secular symbol commemorating, in particular, “military valor and sacrifice [in] World War I.” Brief for Planning Commission 21. Calling up images of United States cemeteries overseas showing row upon row of cross-shaped gravemarkers, *id.*, at 4–8; see *ante*, at 4–5, 21–22; Brief for United States as *Amicus Curiae* 26, the Commission overlooks this reality: The cross was never perceived as an appropriate headstone or memorial for Jewish soldiers and others who did not adhere to Christianity.

1

A page of history is worth retelling. On November 11, 1918, the Great War ended. Bereaved families of Ameri-

City., 781 F. 2d 777, 782 (CA10 1985) (county seal depicting Latin cross) (“[T]he seal . . . conveys a strong impression to the average observer that Christianity is being endorsed.”).

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can soldiers killed in the war sought to locate the bodies of their loved ones, and then to decide what to do with their remains. Once a soldier's body was identified, families could choose to have the remains repatriated to the United States or buried overseas in one of several American military cemeteries, yet to be established. Eventually, the remains of 46,000 soldiers were repatriated, and those of 30,000 soldiers were laid to rest in Europe. American Battle Monuments Commission, Annual Report to the President of the United States Fiscal Year 1925, p. 5 (1926) (ABMC Report).

While overseas cemeteries were under development, the graves of American soldiers in Europe were identified by one of two temporary wooden markers painted white. Christian soldiers were buried beneath the cross; the graves of Jewish soldiers were marked by the Star of David. See L. Budreau, *Bodies of War: World War I and the Politics of Commemoration in America, 1919–1933*, p. 120 (2010). The remains of soldiers who were neither Christian nor Jewish could be repatriated to the United States for burial under an appropriate headstone.¹¹

When the War Department began preparing designs for permanent headstones in 1919, “no topic managed to stir more controversy than the use of religious symbolism.” *Id.*, at 121–122. Everyone involved in the dispute, however, saw the Latin cross as a Christian symbol, not as a universal or secular one. To achieve uniformity, the War Department initially recommended replacing the tempo-

¹¹For unidentified soldiers buried overseas, the American Battle Monuments Commission (ABMC) used the cross and the Star of David markers “in ‘proportion of known Jewish dead to know[n] Christians.’” App. 164. The ABMC later decided that “all unidentified graves would be marked with a [c]ross.” *Id.*, at 164, n. 21. This change was prompted by “fear [that] a Star of David would be placed over an [u]nknown Christian,” not by the belief that the cross had become a universal symbol. *Ibid.*

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rary sectarian markers with plain marble slabs resembling “those designed for the national cemeteries in the United States.” Van Duyne, *Erection of Permanent Headstones in the American Military Cemeteries in Europe*, *The Quartermaster Review* (1930) (Quartermaster Report).

The War Department’s recommendation angered prominent civil organizations, including the American Legion and the Gold Star associations: the United States, they urged, ought to retain both the cross and Star of David. See *ibid.*; Budreau, *supra*, at 123. In supporting sectarian markers, these groups were joined by the American Battle Monuments Commission (ABMC), a newly created independent agency charged with supervising the establishment of overseas cemeteries. ABMC Report 57. Congress weighed in by directing the War Department to erect headstones “of such design and material as may be agreed upon by the Secretary of War and the American Battle Monuments Commission.” *Ibid.* (internal quotation marks omitted). In 1924, the War Department approved the ABMC’s “designs for a Cross and Star of David.” Quartermaster Report; ABMC Report 57.¹²

Throughout the headstone debate, no one doubted that the Latin cross and the Star of David were sectarian gravemarkers, and therefore appropriate only for soldiers who adhered to those faiths. A committee convened by the War Department composed of representatives from “seven prominent war-time organizations” as well as “religious bodies, Protestant, Jewish, [and] Catholic” agreed “unanimous[ly] . . . that marble crosses be placed on the graves of all *Christian* American dead buried abroad, and that the graves of the Jewish American dead be marked by the six-pointed star.” *Durable Markers in the Form of Crosses*

¹²A photograph depicting the two headstones is reproduced in the Appendix, *infra*, at 21.

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for Graves of American Soldiers in Europe, Hearings before the Committee on Military Affairs of the House of Representatives, 68th Cong., 1st Sess., 24 (1924) (emphasis added). The Executive Director of the Jewish Welfare Board stated that “if any religious symbol is erected over the graves, then Judaism should have its symbol over the graves of its dead.” *Id.*, at 19. Others expressing views described the Latin cross as the appropriate symbol to “mar[k] the graves of the *Christian* heroes of the American forces.” *Id.*, at 24 (emphasis added). As stated by the National Catholic War Council, “the sentiment and desires of all Americans, Christians and Jews alike, are one”: “They who served us in life should be honored, as they would have wished, in death.” *Ibid.*¹³

Far more crosses than Stars of David, as one would expect, line the grounds of American cemeteries overseas, for Jews composed only 3% of the United States population in 1917. J. Fredman & L. Falk, *Jews in American Wars* 100 (5th ed. 1954). Jews accounted for nearly 6% of U. S. forces in World War I (in numbers, 250,000), and 3,500 Jewish soldiers died in that war. *Ibid.* Even in Flanders Field, with its “‘crosses, row on row,’” *ante*, at 5 (quoting J. McCrae, *In Flanders Fields, In Flanders Fields and Other Poems* 3 (G. P. Putnam’s Sons ed. 1919)), “Stars of David mark the graves of [eight American soldiers] of Jewish faith,” American Battle Monuments Commission, *Flanders Field American Cemetery and Memorial Visitor Booklet* 11.¹⁴

¹³As noted, *supra*, at 12, the bodies of soldiers who were neither Christian nor Jewish could be repatriated to the United States and buried in a national cemetery (with a slab headstone), Quartermaster Report, or in a private cemetery (with a headstone of the family’s choosing).

¹⁴Available at https://www.abmc.gov/sites/default/files/publications/FlandersField_Booklet.pdf (all Internet materials as last visited June 18, 2019). For the respective numbers of cross and Star of David

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Reiterating its argument that the Latin cross is a “universal symbol” of World War I sacrifice, the Commission states that “40 World War I monuments . . . built in the United States . . . bear the shape of a cross.” Brief for Planning Commission 8 (citing App. 1130). This figure includes memorials that merely “incorporat[e]” a cross. App. 1130.¹⁵ Moreover, the 40 monuments compose only 4% of the “948 outdoor sculptures commemorating the First World War.” *Ibid.* The Court lists just seven free-standing cross memorials, *ante*, at 6, n. 10, less than 1% of the total number of monuments to World War I in the United States, see App. 1130. Cross memorials, in short, are outliers. The overwhelming majority of World War I memorials contain no Latin cross.

In fact, the “most popular and enduring memorial of the [post-World War I] decade” was “[t]he mass-produced *Spirit of the American Doughboy* statue.” Budreau, *Bodies of War*, at 139. That statue, depicting a U. S. infantryman, “met with widespread approval throughout American communities.” *Ibid.* Indeed, the first memorial to World War I erected in Prince George’s County “depict[s] a doughboy.” App. 110–111. The Peace Cross, as Plaintiffs’ expert historian observed, was an “aberration . . . even in the era [in which] it was built and dedicated.” *Id.*, at 123.

Like cities and towns across the country, the United States military comprehended the importance of “pay[ing] equal respect to all members of the Armed Forces who perished in the service of our country,” *Buono*, 559 U. S., at 759 (Stevens, J., dissenting), and therefore avoided

headstones, see ABMC, Flanders Field American Cemetery and Memorial Brochure 2, available at https://www.abmc.gov/sites/default/files/publications/Flanders%20Field_Brochure_Mar2018.pdf.

¹⁵No other monument in Bladensburg’s Veterans Memorial Park displays the Latin cross. For examples of monuments in the Park, see the Appendix, *infra*, at 20–21.

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incorporating the Latin cross into memorials. The construction of the Tomb of the Unknown Soldier is illustrative. When a proposal to place a cross on the Tomb was advanced, the Jewish Welfare Board objected; no cross appears on the Tomb. See App. 167. In sum, “[t]here is simply ‘no evidence . . . that the cross has been widely embraced by’—or even applied to—‘non-Christians as a secular symbol of death’ or of sacrifice in military service” in World War I or otherwise. *Trunk v. San Diego*, 629 F.3d 1099, 1116 (CA9 2011).

D

Holding the Commission’s display of the Peace Cross unconstitutional would not, as the Commission fears, “inevitably require the destruction of other cross-shaped memorials throughout the country.” Brief for Planning Commission 52. When a religious symbol appears in a public cemetery—on a headstone, or as the headstone itself, or perhaps integrated into a larger memorial—the setting counters the inference that the government seeks “either to adopt the religious message or to urge its acceptance by others.” *Van Orden*, 545 U. S., at 737 (Souter, J., dissenting). In a cemetery, the “privately selected religious symbols on individual graves are best understood as the private speech of each veteran.” Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 Case W. Res. L. Rev. 1211, 1242 (2011). See also *Summum*, 555 U. S., at 487 (Souter, J., concurring in judgment) (“[T]here are circumstances in which government maintenance of monuments does not look like government speech at all. Sectarian identifications on markers in Arlington Cemetery come to mind.”). Such displays are “linked to, and sho[w] respect for, the individual honoree’s faith and beliefs.” *Buono*, 559 U. S., at 749, n. 8 (Stevens, J., dissenting). They do not suggest governmental endorsement

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of those faith and beliefs.¹⁶

Recognizing that a Latin cross does not belong on a public highway or building does not mean the monument must be “torn down.” *Ante*, at 2 (BREYER, J., concurring); *ante*, at 1 (GORSUCH, J., concurring in judgment).¹⁷ “[L]ike the determination of the violation itself,” the “proper remedy . . . is necessarily context specific.” *Buono*, 559 U. S., at 755, n. 11 (Stevens, J., dissenting). In some instances, the violation may be cured by relocating the monument to private land or by transferring ownership of the land and monument to a private party.

* * *

In 1790, President Washington visited Newport, Rhode Island, “a longtime bastion of religious liberty and the home of one of the first communities of American Jews.” *Town of Greece v. Galloway*, 572 U. S. 565, 636 (2014) (KAGAN, J., dissenting). In a letter thanking the congregation for its warm welcome, Washington praised “[t]he citizens of the United States of America” for “giv[ing] to mankind . . . a policy worthy of imitation”: “All possess alike liberty of conscience and immunities of citizenship.” Letter to Newport Hebrew Congregation (Aug. 18, 1790), in 6 Papers of George Washington 284, 285 (D. Twohig ed. 1996). As Washington and his contemporaries were

¹⁶As to the Argonne Cross Memorial and the Canadian Cross of Sacrifice in Arlington National Cemetery, visitors to the cemetery “expect[t] to view religious symbols, whether on individual headstones or as standalone monuments.” Brief for *Amicus* Jewish War Veterans 17.

¹⁷The Court asserts that the Court of Appeals “entertained” the possibility of “amputating the arms of the cross.” *Ante*, at 24. The appeals court, however, merely reported Plaintiffs’ “desired injunctive relief,” namely, “removal or demolition of the Cross, or removal of the arms from the Cross ‘to form a non-religious slab or obelisk.’” 874 F.3d, at 202, n. 7. See also *id.*, at 212, n. 19 (noting that the parties remained “free to explore alternative arrangements that would not offend the Constitution”).

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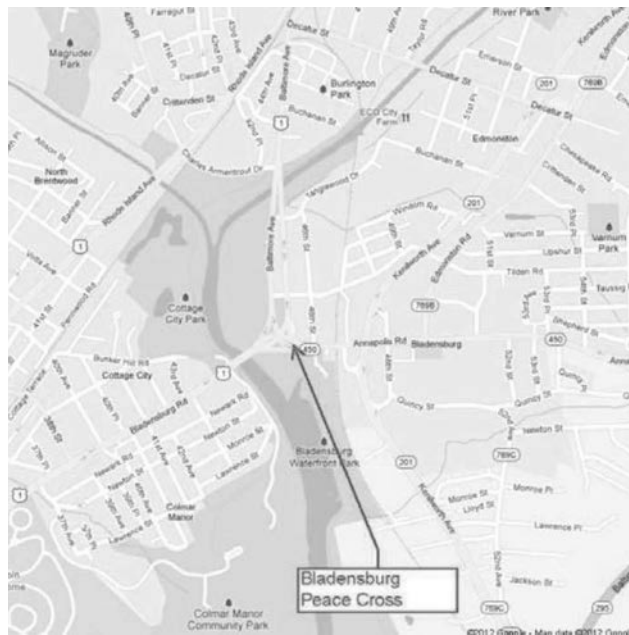
aware, “some of them from bitter personal experience,” *Engel*, 370 U. S., at 429, religion is “too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate,” *id.*, at 432 (quoting Memorial and Remonstrance). The Establishment Clause, which preserves the integrity of both church and state, guarantees that “however . . . individuals worship, they will count as full and equal American citizens.” *Town of Greece*, 572 U. S., at 615 (KAGAN, J., dissenting). “If the aim of the Establishment Clause is genuinely to uncouple government from church,” the Clause does “not permit . . . a display of th[e] character” of Bladensburg’s Peace Cross. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 817 (1995) (GINSBURG, J., dissenting).

Appendix to opinion of GINSBURG, J.

APPENDIX



The Bladensburg Peace Cross. App. 887.



Map showing the location of the Peace Cross. App. 1533.

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The World War II Memorial in Veterans Memorial Park. App. 891.



Plaque of the World War II Memorial. App. 891.

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The Korea-Vietnam Veterans Memorial in Veterans Memorial Park. App. 894.



Headstones in the Henri-Chappelle American Cemetery and Memorial in Belgium. American Battle Monuments Commission, Henri-Chappelle American Cemetery and Memorial 16 (1986).