

Richard J. Douglas, U.S. Dist.Ct. Maryland Bar No. 12590

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ninety years. With their lawsuit Plaintiffs indicate an unwillingness to tolerate the peaceful repose of Prince George's County's war dead, or the unmolested remembrance of them by the living. The community has an obligation to challenge such intolerance.

3. Moreover, Plaintiffs' allegations of injury, if not challenged, will diminish the importance of the 42 U.S.C. Section 1983 remedy. Beyond unsupported recitations of 42 U.S.C. Section 1983 ("Section 1983"), the Complaint cites no authority for standing or for the demanded relief.

4. Movants do not seek approval to participate in discovery, depositions, or oral argument, other than argument on this Motion if necessary. Movants respectfully submit that it is within the inherent powers of this honorable Court to approve the Motion and that their participation will afford useful perspective and additional information beyond that which the lawyers for the parties are able to provide.

B. Plaintiffs' Complaint Mischaracterizes and Omits Facts

5. By demanding the removal of the Bladensburg World War One Peace Cross ("the Memorial"), Plaintiffs challenge a war memorial which has been part of the fabric of the community in which it stands for nearly a century. Plaintiffs ask the Court for grave and divisive relief which will do exceptional and unprovoked injury to public sensibilities.

6. The Movant Eleven Marylanders therefore requested leave to appear in this matter as *amici curiae* to invite the Court's attention to relevant facts omitted or mischaracterized by the Plaintiffs. Given the seriousness of the proceeding, Movants seek to contribute to the most accurate consideration possible of the allegations raised by Plaintiffs in the Complaint.

C. Public Interest in Peaceful Remembrance of War Dead

7. With all due respect to Defendant's counsel, Movants believe that their participation as

amici curiae will help defend the public's interest in honoring Prince George's County's war dead from unfounded attacks on their memory by organizations such as the Plaintiff American Humanist Association. Movants believe that approval of their Motion will add a measure of protection for the concerns and interests of Marylanders in Prince George's and Montgomery counties, and third parties not before the Court.

D. Movants are Marylanders, Most From Prince George's County

8. Movants are residents and citizens of Maryland; primarily Prince George's County, one of the two jurisdictions which created, finance, and oversee the Defendant. Movants' Counsel of Record, a Prince George's County resident, served in Iraq and the submarine force, and is an active member of the Maryland Bar and the bar of this Court.

E. Removal of the Memorial Would Offend the Community

9. Movants, for whom the Bladensburg World War One Memorial Peace Cross ("the Memorial") is a venerable and cherished part of daily life, would be deeply offended by its removal. Movants perceive this lawsuit as one of a growing number of intolerant efforts to cleanse the American public square of all objects with any trace of sacred meaning, without regard for primary purpose, context, longevity, proportion, or damage to public sensibilities.

10. The timing of Plaintiffs' lawsuit is unfortunate, as it was filed in the bicentennial year of the Battle of Bladensburg. In 1814, Marylanders and other Americans shed blood on and near the grounds where the Memorial stands to defend our nation from invasion.

II. DISCUSSION OF THE FACTS

A. The Memorial's Origins and Setting

11. In the wake of the First World War, private citizens in Prince George's County organized

to erect a monument to their war dead. The Memorial is situated on a small unmarked plot of government property in Bladensburg, Maryland. The form chosen for the war memorial was a latin cross.

12. Plaintiffs seek to portray the Memorial and its location as something on the order of a Christian cathedral forced upon an unwilling populace by a coercive state. Plaintiffs distort the character, context and meaning of the Memorial, and exaggerate what – to a reasonable observer – is scarcely perceptible government involvement in the Memorial’s ninety-year history.

B. Battlefield Grave Markers and the Latin Cross

13. Appreciated in full and proper context, the Memorial unmistakably resembles the battlefield grave marker widely used for American war dead who were interred in the foreign lands where they perished. When the Memorial was dedicated in Bladensburg in 1925, such markers were already ubiquitous in American military cemeteries in France, Belgium, and Great Britain. These and other American overseas cemeteries are maintained by a U.S. federal agency known as the American Battle Monuments Commission with no apparent constitutional violation (*see* www.abmc.gov).

14. At the American Military Cemetery in the Meuse Argonne region of France, over 14,000 markers resemble the Memorial. Nearly 1,500 such markers are in place at the Suresnes American Military Cemetery in France. At the Aisne-Marne American Military Cemetery approximately 2,000 such markers appear. In all, more than 30,000 Americans killed in World War One rest in France, Belgium, and the United Kingdom. The vast majority of their graves are marked with crosses similar in most respects to the Memorial.

15. After the Second World War, to honor the final resting places of most of their war dead

the people of the United States continued the First World War custom of using military grave markers resembling the latin cross. Thousands of such markers may also be seen today at massive American cemeteries at the Normandy landing beaches and at Margraten, Holland, where over 8,000 Americans rest who were killed in Europe in the year after the Normandy invasion. Markers resembling the Memorial were later used for American war dead interred in United Nations cemeteries in Korea during and after the Korean War.

16. For the Plaintiffs, evidently the fact that the Bladensburg Memorial takes the form of a latin cross ends the Establishment Clause inquiry. As explained below, however, U.S. Supreme Court treatment of war memorial latin crosses is contrary to that position.

C. Plaintiffs' Omissions from the Complaint and Misstatements

a. U.S. Supreme Court on Establishment Clause Analysis: Context Matters

17. A proper understanding of context is vital to Establishment Clause analysis. To ensure this, the Movants wish to invite the Court's attention to important facts omitted from the Complaint. Movants also wish to correct numerous misstatements of fact in the Complaint. Omissions and mischaracterizations obscure and distort context.

18. The Complaint reaches to portray the Bladensburg War Memorial as a state-sponsored shrine, radiating Christian doctrine like a sun. But for nine decades its presence on a small grass island in the midst of local roadways in historic Bladensburg has been uncontroversial. The notion that the Memorial represents government conduct which violates the Establishment Clause is directly contradicted by objective facts. According to the U.S. Supreme Court, such objective facts must be taken into consideration. Indeed, in *Salazar v. Buono*, 559 U.S. 700 (2010) (the Mojave Desert memorial cross) a Supreme Court plurality wrote that an observer is

“deemed” to be aware of them (*Salazar* 559 U.S. at 728).

b. Facts Mischaracterized in the Complaint Distort Context

- **American Legion Emblem Mischaracterized**

19. The Complaint alleges that the Memorial bears a “gold star with the letters ‘U.S.’ in its center” which “appears to expressly affiliate the United States government with the” Memorial. Plaintiffs mischaracterize the well-known meaning of this emblem. In fact, what the Plaintiffs describe in their Complaint is unmistakably the symbol of the American Legion, a private nationwide veteran’s service organization formed after World War One renowned for its good works and assistance to veterans and their communities. Plaintiffs fail to state in the Complaint that the American Legion symbol is clearly visible also on the nearby monument to Prince George’s County’s World War Two combat dead.

20. The Gold Star within the emblem reminds Movants of “Gold Star Mothers” and families who have lost loved ones in combat. The solemn Gold Star tradition continues to the present day for families of service members lost in combat in Afghanistan and Iraq.

- **Access to the Memorial Mischaracterized**

21. The Complaint mischaracterizes the Memorial’s accessibility. From parking areas at the Old Bladensburg Port picnic area, the Bladensburg Waterfront Park, and elsewhere, the Memorial is accessible by pedestrians exercising care. There are no posted restrictions on access to the Memorial. Nothing at the Memorial site indicates closure to pedestrian visitors.

- **Chaplaincy, Protected Speech Mischaracterized**

22. The Complaint mischaracterizes religious invocations near the Memorial as coercive

state-sponsored endorsements of the Christian faith. Movants submit that Plaintiffs have never witnessed such invocations or ceremonies, and as such could never, by any physical or metaphysical agency, have been injured by them.

23. Movants submit that invocations at the foot of the Memorial described by the Plaintiffs, whenever they occurred, bear the hallmarks of a form of chaplaincy and protected speech which have been part of American armed forces and veteran traditions since the American Revolution. The office of chaplain is present in veteran and private organizations of every kind. When the chaplain of a private organization recalls Prince George's County's war dead at the foot of the Memorial and asks for the Creator's mercy on them, it is incorrect to portray what is clearly protected speech as a government endorsement offensive to the Constitution.

- **Quieting Title to Memorial Grounds: Prudent, Not Entangling**

24. The Complaint attaches sinister meaning to sporadic efforts over the years to quiet title to the Memorial site. Quieting title to real property in Maryland is prudence -- not government entanglement. The Plaintiffs' description of how title was quieted to the small plot where the Memorial stands and how it was eventually vested in the Defendant portrays decades of government confusion, even indifference, and not the active engagement of an endorser or coercer.

25. As stated above, at the Memorial site there is no indication of government ownership. Indeed, the Complaint's relation of events indicates the Memorial stands where it stands today, far from the seat of county government, because the people of Prince George's County bent now-deceased local authorities to their will in their quest to venerate the fallen. If anything, the events related in the Complaint indicate government acquiescence in heartfelt post-war

community sentiment, not coercion.

- **Diverse, Non-Religious Atmosphere of Memorial Area Not Portrayed**

26. The Complaint obscures the non-religious atmosphere of the immediate vicinity of the Memorial. Therefore Movant has annexed to this Motion an overhead view of the Memorial area, marked appropriately, to afford the Court a better understanding of the situation of sites and monuments there.

27. Taken as a whole, the Bladensburg crossroads area has a concretely historical atmosphere, suggesting to viewers the impact on Prince George's County of war and other catastrophes caused by the *absence* of religious values, rather than an endorsement of them.

- the Complaint failed to note the new, unfinished 1814 Battle of Bladensburg monument stone (75 paces from the Memorial) showing Americans in combat against British forces;
- the Complaint failed to note the presence, just 100 paces from the Memorial, of the George Washington House // Indian Queen Tavern, listed on the National Register of Historic Places;
- the Complaint failed to note that the Old Port of Bladensburg picnic area and parking area are just 200 paces from the Memorial;
- the Complaint failed to note the entrance to the Bladensburg Battlefield Visitors Center and parking area approximately 300 paces from the Memorial.
- the Complaint minimizes the size and extent of the spacious and well-tended 9/11 memorial garden just 100 paces from the Memorial. The memorial garden is also illuminated during darkness;
- the Complaint fails to note that the Korea/Vietnam memorial stone stands just 75 paces from the Memorial, and is also illuminated at night;
- the Complaint fails to note that the World War II memorial stone just 75 paces from the Memorial also bears an American Legion symbol identical to the symbol on the Memorial, and that this memorial stone is also illuminated at night;

- the Complaint states that the Memorial is 40 feet tall. In fact, its height is closer to 33 feet, measured from the base of the center column to the top of that column.

c. Facts Omitted from the Complaint Distort Context

- **Memorial is Far from County Government Grounds**

28. Relevant facts omitted from the Complaint here, for instance, are that the Memorial stands *not* at the Prince George's County seat of government, but more than *fifteen miles away* from it. The Memorial stands *over twenty miles* distant from the Montgomery County seat of government. This case is different from so-called "Ten Commandments" cases where monuments or images were placed directly upon the grounds (or walls) of courthouses or other government buildings.

- **Memorial Not Visible From Government or Religious Facilities**

29. Relevant facts omitted from the Complaint are that the Memorial grounds are not visible from -- and thus cannot be associated with -- any official town, county, state, federal, or religious facility.

- **Memorial Bears No Government Markings**

30. Also omitted is the fact that the Memorial's surface bears no emblem or badges of faith or government. Inscriptions chiseled into the Memorial's surface (and perfectly visible by passing drivers) refer only to the soldierly qualities of Courage, Devotion, Valor and Endurance, and the World War One armistice year of 1918. It is not possible to physically associate the Memorial's inscriptions or adornment with any government activity.

- **Memorial Area is Significant But Not a Religious Site**

31. A relevant fact omitted from the Complaint is that the Memorial is not part of a religious

display or site. The promoters built their Memorial on the historic Bladensburg 1814 battleground – not in the shadow or embrace of government. The Bladensburg battlefield is not a religious site, and the War of 1812 was not a war about religion. In fact, the Memorial is just one of a group of war and conflict memorials at the Bladensburg crossroads.

- **Memorial Vicinity is Not Identified as Government Property**

32. The Complaint omits the relevant fact that the Memorial's small plot is not identified as a government tract. Nothing in the vicinity of the Memorial identifies the location as government property, much less as the Defendant's property. Although the Bladensburg battlefield's dimensions are known, it is not a marked military preserve like battlefields in Gettysburg, Pennsylvania, Sharpsburg, Maryland, or the 1814 North Point battlefield near Baltimore.

- **No Prominent Government Control of Site**

33. Plaintiffs' Complaint recites numerous events occurring after erection of the Memorial in 1925, but no facts in the Complaint or on the ground indicate government action at any stage to limit access of non-Christians to the Memorial, assert control over ingress/egress from the 1918 Memorial, to post signs indicating that the property or Memorial are government owned or controlled, or to change its original purpose from that of a memorial to Prince George's County's fallen. Indeed, the named Defendant in this action did not exist at the time the Memorial was erected in 1925. Movants respectfully submit that merely holding title to real property is not sufficient in an Establishment Clause action to demonstrate an active government constitutional violation.

- **Prince George's County: Haven for Religious Diversity**

34. A last relevant fact missing from the Complaint is that from 1925, the year of the

Memorial's construction, across the intervening nine decades before Plaintiffs lawsuit, there was a virtual explosion of religious expression, freedom, toleration, and diversity in Prince George's County, Maryland.

35. Prince George's County, where the Memorial stands, is home to a great variety of faiths. In fact, the jurisdiction hosts what will be, upon completion in 2014, one of the Western Hemisphere's largest mosques, under construction now at the Turkish-American Cultural Center in Lanham.

36. The texture and diversity of religious expression in Prince George's County since 1925 has been neither hindered nor advanced by the Memorial's existence or the Defendant's negligible role in its long history.

37. The notion that in 2014, Prince George's County residents would tolerate a government effort to establish or endorse Christianity as an official religion, or that local government would dare to contemplate such an effort, is risible. Neither has occurred with regard to the Memorial.

38. Movants submit that knowledge of the foregoing facts is expected of reasonably informed observers who claim, like the Plaintiffs, to live in the Washington D.C. metropolitan area and have frequent contact with the Memorial and its surroundings. No significant research was required to discover and understand facts marshaled here by the Movants. All are easily discoverable general knowledge or visible in and around the Bladensburg crossroads.

III. ARGUMENT

A. Plaintiffs Demand Relief Which Constitution, Case Law, Reason Do Not Afford

1. Plaintiffs Have No 42 U.S.C. Section 1983 Claim, No Standing

a. No Section 1983 Harm Has Come to Plaintiffs

39. Plaintiffs assert a violation of Section 1983 but provide no support for the claim. Given the deeply divisive character and gravity of the relief which Plaintiffs demand of the Court, such support should not be presumed.

40. No Plaintiff has been incarcerated. No Plaintiff has been restrained. No Plaintiff has been physically restricted in any way by any state authority or agent. No state authority or agent has treated any Plaintiff unreasonably. No state authority or agent has treated any Plaintiff unlawfully. No Plaintiff has disclosed an effort to exhaust administrative remedies. No Plaintiff has stated that such an effort has been thwarted, let alone denied arbitrarily. No Plaintiff has alleged any harm to personal property caused by the state directly or under color of its authority.

b. No Plaintiff Coerced – Memorial Contact Voluntary

41. No Plaintiff contacts with the Memorial have been coerced. On the contrary: the Complaint makes clear that Plaintiffs' contacts with the Memorial have been voluntary. Plaintiffs voluntarily and knowingly have chosen to use a roadway leading directly to visible contact with the Memorial and have *avoided* alternative routes (not mentioned in the Complaint) which effortlessly would allow them to avoid contact with the Memorial.

42. Alternative north-south routes include U.S. Route 1 through College Park, Kenilworth Avenue through Riverdale to Greenbelt, and the Baltimore Washington Memorial Parkway. The Memorial is not visible from any point on any of the indicated alternative routes. All are less than a mile from roadways chosen by Plaintiffs to go to or from Bladensburg.

43. Plaintiffs' use of a roadway leading to voluntary contact with the Memorial suggests a

litigation pretext to maintain an Establishment Clause action, not genuine unavoidable harm.

c. Plaintiff Edwards Public Silence on Section 1983 Injury

44. Movants believe it is significant that on April 3, 2014, in The Gazette newspaper published in this Court's jurisdiction, Plaintiff Edwards voluntarily indicated in a letter to the Gazette's editors that his primary concern with the Memorial is safe pedestrian access (see Annex B). In his letter to The Gazette's editors about the lawsuit, Plaintiff Edwards was silent on deprivation of any federal rights under color of state authority.

45. Although Plaintiff Edwards is under no legal duty to address alleged section 1983 injuries in a letter to the editor, Movants submit that exposition of the section 1983 claim, if genuine, would have been reasonably expected of Mr. Edwards in a public discussion which he initiated concerning his lawsuit. Movants submit respectfully that his failure to do so undermines the credibility of the claim and tends to indicate a litigation pretext.

46. In his letter to The Gazette, Plaintiff Edwards also protests unspecified charges that his lawsuit is offensive to veterans. Such protests make clear that Plaintiff Edwards is well aware of the offense which his intentional effort to disturb the Memorial will give to many veterans and local citizens (like Movants) who cherish the Memorial as a tangible reminder of the sacrifices made by local service members in World War One.

47. On the whole, Plaintiffs have failed to describe genuine constitutional injury cognizable under Section 1983. Section 1983 is most commonly used to challenge conduct by police, corrections systems, or other state actors by a plaintiff who alleges wrongful physical deprivation of property, liberty, and even life. The Plaintiffs here allege nothing of the kind.

48. Section 1983 is a product of the American Civil War, enacted as a result of Ku Klux Klan atrocities in the wake of that conflict. No circumstance alleged by the Plaintiffs in this case can cloak this lawsuit in the dignity which the post-war U.S. Congress contemplated in enacting Section 1983. Without a Section 1983 injury, the Plaintiffs have no standing to demand that the Court dismantle the Memorial. Movants respectfully urge the Court to decline to supply a cause of action and remedy to the Plaintiffs that is plainly not supported by the facts.

2. The Constitution

49. As Plaintiffs surely realize, the black-letter text of the Constitution provides no remedy for their alleged injury. The First Amendment provides that “Congress shall make no law respecting an establishment of religion” but it is silent on remedies and enforcement. The Fourteenth Amendment (which applied the First to the States) also provides no black-letter relief for the Plaintiffs. It is silent on remedies and enforcement.

3. Establishment Clause Jurisprudence

50. In their Complaint, Plaintiffs did not identify U.S. Supreme Court Establishment Clause jurisprudence which supports their claim. But U.S. Supreme Court commentary on the latin cross in war memorials is substantial, and uniformly unhelpful to the Plaintiff’s position.

a. *Salazar v. Buono* (Mojave Desert War Memorial): Eradication of All Religious Symbols in Public Realm Not Required

51. In 1934, private citizens placed a latin cross on federal land in a remote section of the Mojave Desert to honor American soldiers killed in World War One.

In *Salazar v. Buono* 599 U.S. 700 (2010) (“Salazar”), the U.S. Supreme Court decided only Buono’s challenge to a federal statute which Congress enacted to transfer the cross and land to a private party and preserve it. The Court overturned lower rulings which invalidated the congressionally-mandated transfer.

52. But *Salazar* is no less significant to the Bladensburg Memorial because the U.S. Supreme Court also provided in the opinion extensive and invaluable insight into its thinking on the presence of a war memorial latin cross on public land. This insight is directly relevant – and unhelpful – to Plaintiffs’ effort to dismantle the Bladensburg Memorial.

53. In *Salazar*, decided in April, 2010, there was pervasive, visible, even militant federal government involvement with the Mojave Desert war memorial cross, going far beyond government’s nearly indiscernible role with the Bladensburg Memorial. But even then, the U.S. Supreme Court plurality wrote that

[t]he goal of avoiding governmental endorsement *does not require eradication of all religious symbols in the public realm.*” (italics added) (*Salazar v. Buono*, 599 U.S. 700 (2010)). “A cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs. The Constitution does not oblige government to avoid any acknowledgment of religion’s role in society.

[*Salazar* 599 U.S. at 719]

54. The Supreme Court in *Salazar* also recalled its 2005 opinion in *Thomas Van Orden v. Rick Perry* 545 U.S. 677 (2005) and Justice Breyer’s concurring opinion to the effect that that “the Establishment Clause inquiry “must take account of context and consequences” (*Van Orden*, 545 U.S. at 700).

55. Movants recall that the religious context of the Framing of our Constitution included mandatory participation in and support for state churches in Great Britain, the American colonies, and France. In spite of the Plaintiffs’ nationwide efforts to deny it, that context disappeared with British domination of North America, and so the U.S. Supreme Court’s Establishment Clause jurisprudence rightly “has refrained from making sweeping pronouncements” (*Salazar*, 599 U.S. at 722) in Establishment Clause cases.

56. In *Salazar*, the Supreme Court plurality also noted – with clear disapproval – a lower court’s failure to take account of such context and consequences surrounding the Mojave Desert World War One latin cross. Instead, the Court wrote:

[T]he District Court concentrated solely on the religious aspects of the cross, divorced from its background and context. But a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving, help secure an honored place in history for this Nation and its people. [In *Buono*], one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

[*Salazar*, 599 U.S. at 721].

57. In *Salazar*, Justice Alito pointed out as well that

the cross is of course the preeminent symbol of Christianity ... [b]ut, as noted, *the original reason for the placement of the cross was to commemorate American war dead* (italics added) and, particularly for those with searing memories of The Great War, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict.

[*Salazar*, 559 U.S. at 725].

58. Movants are aware of cases where U.S. District Courts in California have ruled that war memorials incorporating different versions of a memorial cross violate the Establishment Clause. For instance, in December, 2013, in the latest chapter of a hard-fought case, the U.S. District Court for the Southern District of California ruled that the Mt. Soledad Korean War memorial cross near San Diego, California, violates the Establishment Clause and must be removed (*Judgment In a Civil Case, Trunk v. City of San Diego, No. 06-cv-1597-LAB (WMc) (S.D. Cal. Dec. 12, 2013), ECF No. 366.*). Proponents of the Mt. Soledad cross petitioned the U.S. Supreme Court directly for a Writ of Certiorari, arguing (in summary) that lower court action on the case directly conflicts with the Supreme Court's latin cross guidance in *Salazar*. That petition is pending as of the date of filing of the instant Motion.

59. Another California was case decided on the same day Plaintiffs filed their lawsuit in Maryland. The U.S. District Court for the Central District of California in *American Humanists Association v. City of Lake Elsinore* 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. Feb. 25, 2014) forbade inclusion of a latin cross image next to a kneeling soldier on a granite war memorial design produced by the Lake Elsinore City Council after significant debate and on-the-record discussion of the portrayal of Christian symbols.

60. The *Salazar* and the Bladensburg Memorial cases are fundamentally different from the Mt. Soledad and Lake Elsinore cases.

61. Unlike crosses on Mt. Soledad between 1913 and the Korean War, the Bladensburg Memorial continuously and unambiguously has been known as a World War One memorial to the fallen since the day of its dedication ninety years ago.

62. The Lake Elsinore controversy involved a monument not yet built. Plaintiffs there challenged a plan conceived by City Council itself to fund, design, and manufacture the monument, and then display it prominently in front of a city stadium. The Bladensburg Memorial case is different. In Bladensburg, private citizens were the promoters of the noncontroversial Memorial challenged by the Plaintiffs ninety years after placement, and it was situated far from any municipal or other government structure. Moreover, the primary message conveyed by the Bladensburg Memorial is and always has been solemnly, unmistakably, even hauntingly, *remembrance*.

63. In *Salazar*, the Supreme Court plurality also tells us that public sensibilities matter in Establishment Clause cases. Justice Alito noted that removal of the Mojave cross “which had stood on Sunrise Rock for nearly 70 years” (compare with the Bladensburg Memorial’s ninety years in place)

[w]ould have been viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor. The demolition of this venerable if unsophisticated monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country’s religious heritage.

[*Salazar*, 559 U.S. at 726]

64. Justice Alito’s humane respect and attentiveness to the “brave soldiers whom the cross was meant to honor” is poignant. This humane attitude toward remembrance mattered in 1918, and it matters in 2014, as Marylanders continue to return to their homes from service in Iraq and Afghanistan and Russian forces are massed on the Ukrainian border.

65. In the case of the Bladensburg Memorial, the kind of “sweeping pronouncement” avoided by the U.S. Supreme Court in *Van Orden* seems to be precisely what the Plaintiffs demand from the U.S. District Court of Maryland.

**b. Bladensburg Memorial and Lemon v. Kurtzman:
Secular Purpose, Neutral, No Entanglement**

66. Plaintiffs recite in their Complaint but do not explain three Causes of Action which mirror the three prongs of the test for Establishment Clause violations enunciated by the U.S. Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (“*Lemon*”):

- Whether the alleged government conduct has a secular purpose;
- Whether the conduct has a principal or primary effect that neither advances nor inhibits religion; and
- Whether the conduct fosters an excessive government entanglement with religion.

i. Secular Purpose is Clear

67. **In the Bladensburg case, does the Defendant’s alleged conduct have a secular purpose?** Yes. Plaintiffs do not make clear in their Complaint whether they challenge the 1918 conduct of a handful of long-deceased Bladensburg town officials, or Defendant’s conduct in 2014. Either way, seen from the perspective of a reasonable observer, to the extent that there has been “government conduct” at all concerning the Bladensburg Memorial, such conduct can be described fairly as *barely discernible*.

68. The Plaintiffs’ own Complaint illustrates that private citizens were the prime movers of the Memorial initiative. They raised the funds which built it. The purpose of the promoters was principally and inarguably to render homage to their World War One dead and ensure

remembrance through the years. Town government was, at best, an onlooker. Government conduct from the beginning, such as it was, amounted at most to *submission* to this purpose. The same quality of government submission was visible after the attacks of September 11, 2001, when an outpouring of grief led thousands of Americans to erect, on government property (a substantial section of Arlington Cemetery fence line), a spontaneous display of religious faith and remembrance in honor of the men and women who perished in the attack on the Pentagon. Americans also grieved for their 1917-1918 war dead.

69. May the Court conclude that the government took a secondary, even passive role with regard to the Bladensburg Memorial? Easily. The Memorial and its surroundings show no government markings or signs. There are no government buildings visible from the Memorial. There is no identifiable government activity nearby.

70. The Memorial site chosen by the private citizens who promoted and erected the Memorial is far from the seat of Prince George's County government. There are private commercial sites near the Memorial: a pawn shop, and a defunct nightclub. Until the Plaintiffs filed their lawsuit on February 25, few of the Movants were aware of Defendant's responsibility for the small grass plot where the Memorial stands.

71. The Plaintiffs place enormous emphasis on the fact that the Memorial was illuminated by the Defendant in 1965 – forty years after its emplacement, a full half-century prior to this lawsuit, and in the depths of the Cold War. Leaving the impression that only the Memorial is

illuminated, Plaintiffs fail to disclose in their Complaint that the World War Two, Korea/Vietnam, and 9/11 memorials at the Bladensburg crossroads are also illuminated at night.

72. Movants are confident that none of the Plaintiffs personally witnessed the work to illuminate the Memorial or were aware of government's role in it until they performed significant research. Plaintiffs fail to indicate whether the American Legion or other private citizens requested the illumination, had a role in it, or for what purpose (e.g., traffic safety) the Memorial was illuminated. But to a reasonable observer or passerby, nothing at the site indicates that the lighting system was installed or is maintained by a government authority; much less an authority on a nocturnal quest to forcibly evangelize unwilling commuters.

73. Plaintiffs claim injury under Section 1983 because on a single occasion during ninety years, a Maryland state senator invited by the Memorial's promoters to speak at the Memorial's dedication allegedly invoked the Creator and Calvary during his remarks; that a handful of later religious invocations at the foot of the Memorial were recorded in the local press; and that on a handful of occasions, governmental authority took notice of the Memorial long enough to quiet title to the small plot on which it stands, to patch the Memorial up, and to illuminate it.

74. By invoking Section 1983, Plaintiffs ask the Court to attach to such sporadic local events in Bladensburg the same infamy and gravity present in the Reconstruction-era terrorist violence which led Congress to enact Section 1983 in the first place. Movants submit that the former fails completely to rise to the gravity of the latter, and that Section 1983 is unavailable to the Plaintiffs for purposes of their lawsuit.

75. In *Lemon*, several challenged statutes specifically enacted by different state legislatures created a direct financial benefit to religious schools, a complex government oversight mechanism, and direct government review of religious school activity and finances. Nothing remotely like *Lemon* occurred with the Memorial.

76. In fact, there are light years of difference in degree between the modest solicitude shown to the Bladensburg Memorial by local government in Prince George's County and the entangling and concrete government endorsements of religion which led to the American Revolution in the 1770s and the *Lemon* result in the 1970s. Plaintiffs can marshal no facts to narrow that gap.

77. Plaintiffs seem to argue that a government which is not in scorched-earth retreat from the slightest traces of faith somehow is transformed into a quasi-theocracy improperly embarked upon a full-throated endorsement of religion. Such logic is flawed. It is not grounded in the Constitution, Establishment Clause jurisprudence, or the facts. But such is the logic which Plaintiffs appear to ask the Court to adopt.

ii. Defendant's Neutrality is Clear

78. **Did the Defendant's conduct have a principal or primary effect that neither advances nor inhibits religion?** If the Court first decides that Defendant's conduct in this case is perceptible at all, then it should be apparent that for ninety years, the principal or primary role of local government has been to refrain from becoming an obstacle to First World War remembrance in Prince George's County. That local authorities have for nine decades raised no obstacle to such remembrance is not offensive to the Constitution – it is fitting, humane, and commendable.

79. Local government's general pattern of inaction vis-à-vis the Memorial is not government endorsement offensive to the Establishment Clause. It neither advanced nor inhibited religion in Prince George's County. In reality, the litigant in this case demanding an end to ninety years of government neutrality is the American Humanist Association and co-Plaintiffs. In the name of their own faith – i.e., no faith -- on February 25, 2014, they called upon the judicial machinery of the state to help them dismantle the Memorial, and cast aside historical sentiment, sensibilities, and a desire of ordinary people to remember the fallen in peace. In short, the Plaintiffs urge the government, through the agency of the judicial branch, to abandon neutrality and adopt animus.

iii. Entanglement: Nearly Indiscernible

80. Does the Defendant's conduct foster an excessive government entanglement with religion? No. The conduct of the Defendant and its predecessors is barely perceptible insofar as the Memorial is concerned.

81. In the Mojave and Mt. Soledad cases, the U.S. Congress took concrete, targeted, and numerous steps to establish or to preserve the memorial crosses in question. In contrast, the Plaintiffs effort to dismantle the Bladensburg Memorial apparently has not drawn a single public statement from any member of Maryland's delegation to the U.S. Congress.

82. The Plaintiffs here filed their lawsuit while the Maryland General Assembly was in the midst of its brief annual session. The General Assembly adjourned *sine die* without a single comment on the lawsuit.

83. Neither of the two governments which constitute the Defendant entity – Prince George’s and Montgomery Counties – appears to have issued a single official statement about the Plaintiffs’ lawsuit.

84. In short, far from an image of government entanglement with religion in the case of the Bladensburg Memorial, we see in reality an image of indifference. Unlike fact patterns in a long line of Establishment Clause cases (see *Lemon*), in our case evidently little is (or should be) expected, much less demanded, of the Defendant at all vis-à-vis the Memorial beyond preventing vandalism and performing general upkeep of the wider grounds around the Bladensburg crossroads. To cast such minimal contact as excessive entanglement offensive to the Establishment Clause would be an exaggeration of the term and would go well beyond existing Establishment Clause jurisprudence.

c. Bladensburg Memorial and *Lynch v. Donnelly*: Passing the O’Connor Endorsement Test

85. The U.S. Supreme Court itself has noted confusion in Establishment Clause jurisprudence. But there is no confusion about the inoffensiveness of the Bladensburg Memorial under any of the Court’s post-*Lemon* Establishment Clause opinions.

86. For instance, the 1984 Supreme Court opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984) was significant in at least two respects: first because it stated clearly that the Constitution does not require complete separation of church and state, and because in *Lynch*, Associate Justice Sandra Day O’Connor introduced an additional yardstick of government conduct under the Establishment Clause: namely, the Endorsement Test. This Test examines whether government action amounts to an endorsement of religion. As explained above, in the Bladensburg

Memorial's case the key role of the Defendant's successors has been to refrain from obstructing remembrance of Prince George's County's war dead. That was accomplished with apparently minimal involvement in the creation and maintenance of the Memorial across ninety years, against a background of exploding religious diversity and tolerance in the surrounding County.

d. Bladensburg Memorial and *Lee v. Weisman*: No Coerced Religious Participation or Support

87. In 1992's *Lee v. Weisman* opinion (505 U.S. 577), the Supreme Court took a clear position in favor of the proposition (penned by Justice Kennedy) that government conduct could violate the Establishment Clause only if it *coerces religious participation or support* (italics added). Justice Kennedy wrote that "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so."

88. None of the conduct outlawed in *Lee* has occurred with regard to the Bladensburg Memorial. The Defendant has coerced no one, and the Plaintiffs have not plausibly alleged coercion. Indeed, the Plaintiffs contact with the Memorial appears to have been voluntary, for the purpose of establishing a litigation pretext.

e. Bladensburg Memorial and *Capitol Square v. Pinette*: Reasonable Observer Aware of all Facts Wouldn't Perceive Government Endorsement of Christianity

89. In 1995, in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), Justice O'Connor clarified the *Lynch* Endorsement Test when she said it must be applied against a "reasonable observer" standard not unlike the "reasonable person" of tort law.

90. The Endorsement Test would invalidate a government action if it creates a perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion. The “reasonable observer” standard was also analyzed in *Salazar*. As noted above, the notion that the Memorial represents government conduct which violates the Establishment Clause is directly contradicted by objective facts. In *Salazar*, the plurality wrote that an observer is “deemed” to be aware of such facts (see *Salazar*, 559 U.S. at 728).

91. Here, Movants submit that a proper understanding of the facts relevant to the Memorial’s provenance, context, and maintenance over ninety years will lead a reasonable observer to conclude that there has been no impermissible endorsement of or entanglement with religion by the Defendant.

92. No matter which approach is applied, Plaintiffs are unlikely to prevail. The conduct of the Defendant and the Defendant’s predecessors insofar as the Memorial is concerned barely registers on the Establishment Clause scale. Even assuming that the degree of government conduct here was sufficient to merit the attention of the Courts, the Endorsement Test fails to show impermissible action.

f. Key Inquiry: Government Intent

93. The key inquiry is whether (as Justice O’Connor put it in *Lynch*) “the government intends to convey a message of endorsement or disapproval of religion.” Here, government’s role across nearly a century has been non-interference with the Memorial’s place in *remembrance*.

IV. COMPLAINT CITES NO AUTHORITY FOR DEMANDED RELIEF

94. Plaintiffs cite no legal authority for their demand that the Bladensburg Memorial be dismantled. They recite Section 1983 but do not explain their reliance upon it. They allude to the *Lemon* Establishment Clause test indirectly but without explanation. The Complaint cites only Plaintiff Lowe's agreement with Thomas Jefferson's well-known private correspondence with the Danbury Baptists on the separation of church and state. But the Jefferson reference is offered in isolation. In his *public* correspondence – chiefly, the Declaration of Independence – Jefferson invoked the Creator explicitly as well as the fact that all persons are “endowed by the Creator with certain inalienable rights.” If Jefferson had reservations about acknowledging the Creator as the source of American “inalienable rights” and liberties, he failed to show it in life or death.

95. As a general matter, Plaintiff's failure to cite authority for the proposition that the Bladensburg Memorial should be dismantled is understandable because there is no such authority.

V. CONCLUSION

96. Neither Jefferson nor any other Framers can be shown to have supported the proposition that the Constitution compels the *erasure* of faith or its incidents from the public square. This is what Plaintiffs demand of the Court, over the objections of the citizens of Prince George's and Montgomery Counties.

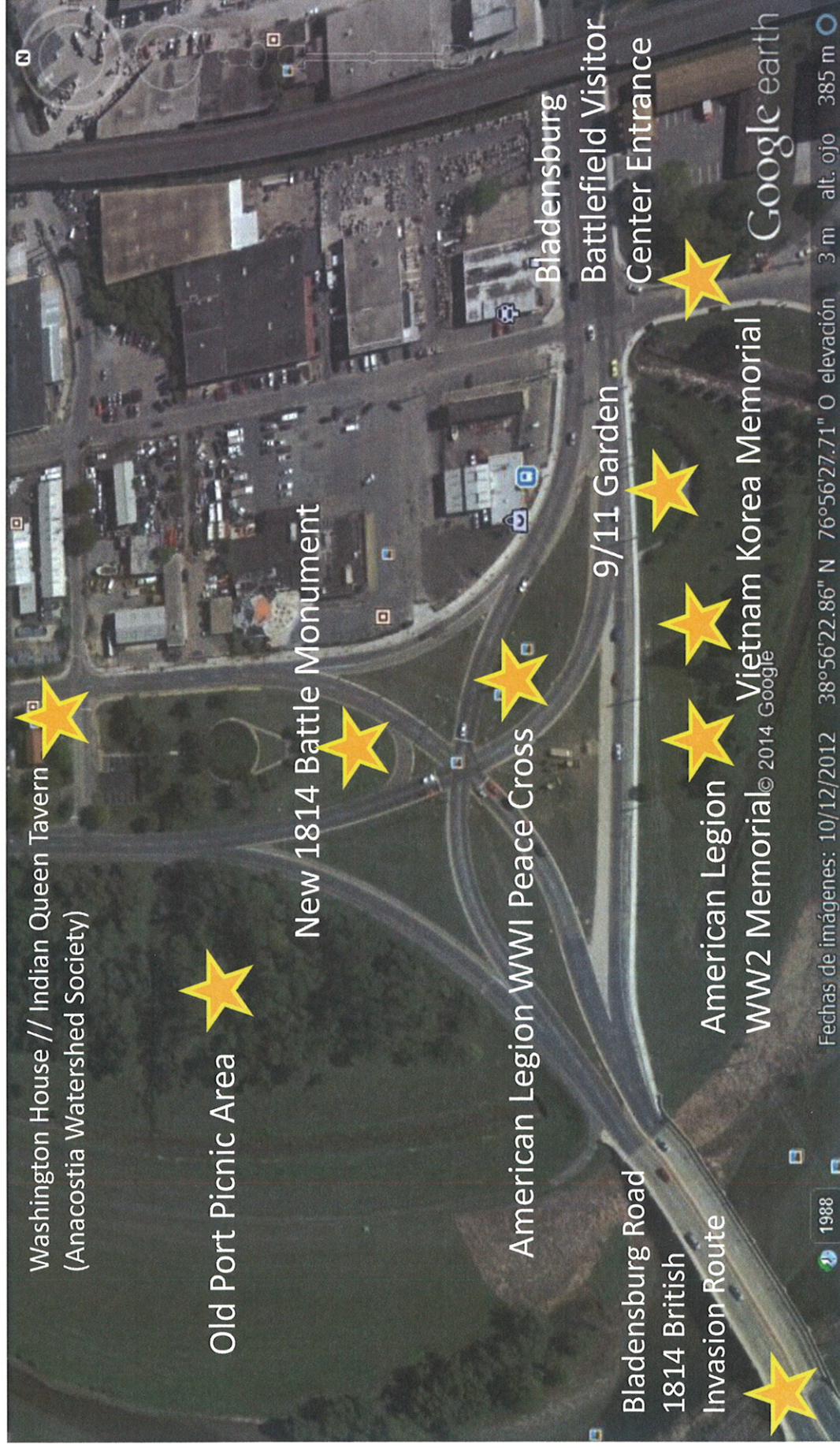
97. Plaintiffs are free to reject our nation's history and traditions. But they are not free to compel others to do the same. The Plaintiffs' movement, as reflected in this lawsuit, to purge all

traces of faith from the American public square is a modern invention squarely *in conflict* with independent America's legal and historical traditions. The Plaintiffs' philosophy is, however, *in harmony* with the militant anti-clerical theories of the French Revolution. Today in France that conflict's philosophical legacy is visible in government efforts to force Muslim women of faith to remove head coverings in public places.

98. Unchecked, the Plaintiffs' efforts will force the United States in the same anti-democratic direction. Plaintiffs would turn the Establishment Clause into a sword of oppression, rather than a shield against the brand of militant religious coercion directly experienced by the Framers and unknown today in Prince George's County, Maryland.

ANNEX A -- Bladensburg Crossroads

Slide Prepared by *Amicus Eleven Marylanders*



Gazette Forum

ANNEX B

Thursday, April 3, 2014 | Page A-10

LETTERS TO THE EDITOR

Move Bladensburg cross to church property

As one of the individual plaintiffs in the Bladensburg cross lawsuit, I'd like to make it plain that nothing in our action dishonors veteran sacrifices, despite a common statement otherwise. After all, we wholly support the purely secular war memorials on public land across the street.

But the cross is a Christian cross, not a mere "geometric shape" like a plus sign. At its dedication in 1925, it was declared "symbolic of Calvary,"

the site of Christ's sacrifice. Moreover, when illuminated at night, its character as a war memorial isn't readily clear as it broadcasts to the casual motorist Maryland state preference for the Christian faith above all others. Ask a non-Christian.

Should it be torn down then? No. I would rather see it moved to church property. It has historic and artistic value. And I trust the faithful to do a better job preserving it than the state

of Maryland. Signs of deterioration are clearly visible that haven't been addressed.

So I anticipate that, if our lawsuit succeeds, the Bladensburg cross will not only be saved, but placed in more caring hands and in a location allowing people to read the memorial plaque without having to illegally and unsafely cross a busy traffic interchange.

Fred Edwards, Greenbelt

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