No. 24-5026

United States Court of Appeals for the D.C. Circuit

Defend Arlington, *et al.*,

Plaintiffs-Appellants

v.

U.S. Department of Defense, *et al.*

Defendants-Appellees.

On Appeal from 23-441, 23-2094 in the United States District Court for the District of Columbia, Judge Beryl A. Howell

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

Talmadge Butts*
**Counsel of Record*
John Eidsmoe
FOUNDATION FOR MORAL LAW
P.O. Box 148
Gallant, AL 35972
(334) 262-1245
talmadge@morallaw.org
eidsmoeja@juno.com
Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Under D.C. Circuit Rule 26.1 and Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, the *amicus* Foundation for Moral Law, Inc., certifies that it is not a subsidiary or affiliate of a publicly owned corporation.

/s/ Talmadge Butts
Talmadge Butts
FOUNDATION FOR MORAL LAW
P.O. Box 148
Gallant, AL 35972
talmadge@morallaw.org
Counsel for Amicus Curiae

August 23, A.D. 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes and Constitutions

Other Authorities

INTEREST OF THE *AMICUS*[1]

Amicus curiae Foundation for Moral Law ("Foundation") (www.morallaw.org) is a 501(c)(3) national public interest law firm based in Alabama dedicated to religious liberty, the strict interpretation of the Constitution as intended by its Framers, and to the defense of the history and heritage of our nation.

The Foundation is concerned that efforts to remove monuments in America, far from any purported aim of reconciliation, serve the function of erasing—and thereby controlling—history and ultimately have instigated more division and strife among Americans.

---

[1] No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

ARGUMENT

Death, dying, burial, and memorialization of the dead are inextricably intertwined with religion. David honored Saul and Jonathan after they died in battle, and he also honored his general Abner, saying "there is a prince and a great man fallen this day in Israel." (II Samuel 3:38). The universal law requiring us to honor the dead is not unique to Judaism and Christianity.

Think of Sophocles' play *Antigone,* written around 442 BC. The City of Thebes has been ravaged by civil war, and Eteocles and Polynices, brothers of Antigone, have died fighting on opposite sides. The victor and new ruler of Thebes, King Creon, has decreed that those who fought for him will be buried with full honors, while opponents will lie on the field unburied. Nevertheless, Antigone provides her brother with a burial. When she is brought before King Creon, it seems he wants to excuse her by pleading ignorance:

> Creon: . . . You knew the order not to do this thing?
>
> Antigone: I knew, of course I knew. The word was plain.
>
> Creon: And still you dared to overstep these laws?
>
> Antigone: For me it was not Zeus who made that order. Nor did that Justice who lives with the gods below mark out such laws to hold among mankind. Nor did I think your orders so strong that you, a mortal man, could over-run the gods' unwritten and

> unfailing laws. Not now, nor yesterday's, they always live, and no one knows their origin in time . . . .

Sophocles, *Antigone*, Wyckoff trans. (1954). Lines 446-57.

Antigone is saying there is a Higher Law, higher than any king's decree—our Declaration of Independence calls it "the laws of nature and of nature's God"—that requires that she honor her fallen brothers by burying them with military honors, even if King Creon forbids it. The Divine imperative to honor one's kinsmen, especially those who have died in battle, is universal. Creon's act of unburying and desecrating the body of Polynices constitutes, in the ancient Greek, *asebia*, which means desecrating the gods or dead ancestors, and the blind seer Teiresias exhorts him, "do not fight with a corpse," and warns him that his desecration has outraged the gods and will bring about his destruction and that of his family. As Antigone says, "It is the dead, not the living, who make the longest demands: We die for ever."

Respecting the dead is the truest act of kindness, respect, and love, because the dead cannot defend themselves. It is entirely fitting that we should remember our ancestors, especially those who died fighting for their homes and loved ones.

In this brief, the Foundation will explain that removal of the Arlington Reconciliation Memorial is an act of *asebia* (desecration) that tramples the

religious convictions of the dead and their descendants. But first, we will demonstrate the importance of religious liberty in our legal system.

I. The God-given right to religious liberty is the foremost of all rights protected by the U.S. Constitution.

Let us consider the high value the Framers of our Constitution placed upon religious freedom.

A. The Framers held a jurisdictional view of Church and State.

> *It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution.*

James Madison, *A Memorial and Remonstrance*, 1785, Works 1:163.

As Jefferson recognized in the Declaration of Independence, this nation is founded on the "laws of nature and of nature's God," and the "unalienable" rights to "life, liberty, and the pursuit of happiness" are "endowed by [the] Creator." The Framers viewed church and state as separate institutions with separate jurisdictions. When Jefferson spoke of a "wall of separation between church and state," he meant a jurisdictional separation.

B. The Framers derived their understanding of Church/State relations from the Bible and the Judeo-Christian tradition.

The Framers did not view Church and State simply as man-made institutions. They did not accept Rousseau's notion that the State is above

the Church and above all other institutions.[2] Like the people of their time and those of preceding generations, they understood Church and State as divinely established institutions, each with distinctive authority and distinctive limitations.

This institutional separation goes back to the ancient Hebrews. Going back to the time of Moses and perhaps further back to the time of Jacob's sons Judah and Levi, the Levites (descendants of Levi, the Tribe of Levi) served as Israel's religious authority, the priests. From the time of King David onward, Israel's kings came out of the tribe of Judah. These were separate offices and separate jurisdictions, but both were subject to the will of God and the Law of God. On several occasions, God disciplined kings severely for usurping the functions of the priesthood. For example, when King Saul offered sacrifices instead of waiting for Samuel the priest, God

---

[2] Dr. Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *American Political Science Review*, 189 (1984) 189-97, studied citations of European thinkers by American writers 1760-1805 and demonstrated that American writers most frequently cited Montesquieu (8.3%), Blackstone (7.9%), and Locke (2.9%), and cited much less frequently (0.9%). John Adams wrote, “If ever there existed a wise fool, a learned idiot, a profound deep-thinking coxcombe, it was David Hume. As much worse than Voltaire and Rousseau as a sober decent libertine is worse than a rake.” John Adams, handwritten notes on his copy of Historical and Moral View of the Origin and Progress of the French Revolution, reprinted in Zoltan Haraszti, *John Adams and the Prophets of Progress* 187 (Cambridge: Harvard University Press, 1952).

cut off his descendants from the kingship forever. When King Uzziah tried to usurp the functions of the priesthood by burning incense on the altar in the Temple, eighty "valiant" priests withstood him, saying

"It appertaineth not to thee, Uiziah, to burn incense to the Lord, but to the priests the sons of Aaron, that are consecrated to burn incense: go out of the sanctuary; for thou hast trespassed." (II Chronicles 26:16-18). When Uzziah persisted, God smote him with leprosy, and he remained a leper all the days of his life (II Chronicles 2:19-23).

This institutional separation continued in the New Testament. As Lord Action describes Christ's answer to the Pharisees about paying taxes to the Roman government, (Matthew 22:21),

> It was left for Christianity to animate old truths, to make real the metaphysical barrier which philosophy had erected in the way of absolutism. The only thing Socrates could do in the way of a protest against tyranny was to die for his convictions. The Stoics could only advise the wise man to hold aloof from politics and keep faith with the unwritten law in his heart. But when Christ said "Render unto Caesar the things that are Caesar's and unto God the things that are God's," He gave to the State a legitimacy it had never before enjoyed, and set bounds to it that had never yet been acknowledged. And He not only delivered the precept but He also forged the instrument to execute it. To limit the power of the State ceased to be the hope

> of patient, ineffectual philosophers and became the perpetual charge of a universal Church.[3]

It is neither surprising nor unreasonable to conclude that the Framers derived their understanding of Church/State relations from religious sources. On October 4, 1982, Congress passed, and the President then signed, Public Law 97-280, declaring 1983 the "Year of the Bible." The opening clause of the bill reads:

> Whereas, Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States...

The Bible, coupled with Church and Jewish tradition, is therefore relevant to the Framers' understanding of Church and State.

From the beginning, Church scholars understood that Church and State were distinct kingdoms, but they sometimes differed as to the relationship between them. Some, like the North African lawyer and Church Father Tertullian (c. AD 200), asked, "What concord hath Athens with Jerusalem?" Augustine of Hippo (AD 356-430), whose Civitas Dei "set the

---

[3] Lord Action, quoted by Gertrude Himmelfarb (London, 1955) p. 45 in Hebden Taylor, *The Christian Philosophy of Law, Politics, and the State* (Nutley, NJ: Craig Press, 1966) pp. 445-46.

very course of Western Civilization,"[4] wrote of the City of God and the City of Man, although he did not precisely identify the City of God as the Church or the City of Man as the State.

Still others, such as John of Damascus (ca. 670-ca. 750), declared that

> Kings have no right to make laws for the church. As the apostle says, "God has appointed in the church first apostles, second prophets, third pastors and teachers" (I Cor. 12:28) "for the equipment" of the church (Eph 4:12). No mention of kings!
> . . .
> Saul tore the cloak of Samuel, and what became of him? God tore the kingdom from him, and gave it to David, a man of self-restraint. Jezebel pursued Elijah, and the swine and dogs licked up her blood , and the prostitutes washed in it. . . . Herod destroyed John, and was eaten by worms and perished.
> . . .
> [H]e said, "Give to Caesar what is Caesar's, and to God what is God's (Matthew 22:15-21). We defer to you, o king, in the affairs of life, in tax and revenue and privileges, and in all of our affairs that are your responsibility. In the management of the church we have pastors who have spoken the word of God to us, and have given form to the law of the church.[5]

The Protestant Reformation took force in Northern Europe in the 1500s, a century before the settlement of the English colonies in North America. The Reformers' understanding of the Two Kingdoms of Church

---

[4] Martin Luther describes Augustine's masterpiece as "one of the most influential works of the Middle Ages." quoted at http://grantian.blogspot.com/2006/11/tale-of-two-men.html; *Encyclopedia Britannica*, https://www.britannica.com/topic/The-City-of-God

[5] John of Damascus, *Second Speech against Those Who Reject Images*, reprinted in O'Donovan, 213-15.

and State is therefore instrumental in understanding the views of the Framers. Most of them were children of the Reformation,[6] and as such they understood that God had established two kingdoms, Church and State, each with distinctive authority. As Luther said,

> . . . these two kingdoms must be sharply distinguished, and both be permitted to remain; the one to produce piety, the other to bring about external peace and prevent evil deeds; neither is sufficient in the world without the other.[7]

And as John Calvin stated in his Institutes of the Christian Religion,

> Let us first consider that there is a twofold government in man: one aspect is spiritual, whereby the conscience is instructed in piety and in reverencing God; the second is political, whereby man is educated for the duties of humanity and citizenship that must be maintained among men. These are usually called the 'spiritual' and the 'temporal' jurisdiction (not improper terms) by which is meant that the former sort of government pertains to

---

[6] As Dr. M.E. Bradford established in *A Worthy Company: Brief Lives of the Framers of the United States Constitution* (Marlborough, ND: Plymouth Rock Foundation, 1982) pp. iv-v, the fifty-five delegates to the Constitutional Convention included 28 Episcopalians, 8 Presbyterians, 2 Lutherans, 2 Dutch Reformed, 2 Methodists, 2 Roman Catholics, one uncertain, and 3 who might be Deists. Yale History Professor Sydney E. Ahlstrom has said: "If one were to compute such a percentage on the basis of all the German, Swiss, French, Dutch, and Scottish people whose forebears bore the 'stamp of Geneva' in some broader sense, 85 or 90 percent would not be an extravagant estimate." Sydney E. Ahlstrom, *A Religious History of the American People* (Garden City, NY: Doubleday & Co., Image Books, 1975) I:169.

[7] Martin Luther, "Secular Authority: To What Extent It Should Be Obeyed," 1523, reprinted in *Works of Martin Luther* (Grand Rapids: Baker Book House, 1982), III:237.

> the life of the soul, while the latter has to do with the concerns of the present life - not only with food and clothing but with laying down laws whereby a man may live his life among other men holily, honorably, and temperately. For the former resides in the inner mind, while the latter regulates only outward behavior. The one we may call the spiritual kingdom, the other, the political kingdom. Now these two, as we have divided them, must always be examined separately; and while one is being considered, we must call away and turn aside the mind from thinking about the other. There are in man, so to speak, two worlds, over which different kings and different laws have authority.[8]

This understanding of Church and State as two separate kingdoms, both established by God but with separate spheres of authority, shaped the legal and political thinking of the Reformers, of the colonists, and of the Framers of the Declaration of Independence, the Constitution, and the Bill of Rights. As Yale History Professor Sydney E. Ahlstrom has noted,

> No factor in the "Revolution of 1607-1760" was more significant to the ideals and thought of colonial Americans than the Reformed and Puritan character of their Protestantism; and no institution played a more prominent role in the molding of colonial culture than the church. Just as Protestant convictions were vitally related to the process of colonization and a spur to economic growth, so the churches laid the foundations of the educational system, and stimulated most of the creative intellectual endeavors, by nurturing the authors of most of the books and the faculties of most of the schools. The churches offered the best opportunity for architectural expression and

[8] John Calvin, *Institutes of the Christian Religion*, 1537, III:19:15.

> inspired the most creative productions in poetry, philosophy, music, and history.[9]

C. The Framers held a jurisdictional understanding of Church/State relations.

Long before Jefferson would speak of the "wall of separation between church and state," Rhode Island founder Roger Williams wrote of a "gap in the hedge or wall of separation between the garden of the church and the wilderness of the world," and George Washington declared to the General Committee of United Baptist Churches in Virginia that "no one would be more zealous than myself to establish effectual barriers against the horrors of spiritual tyranny, and every species of religious persecution."[10]

Reflecting this same jurisdictional view of Church and State, James Madison as President vetoed "an Act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia":

> Because the bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious functions, and violates in particular the article of the Constitution of the United States which declares that "Congress shall make no law respecting a religious establishment." The bill enacts into and establishes by law

---

[9] Sydney E. Ahlstrom, *A Religious History of the American People* (Doubleday, 1975), I:423.

[10] George Washington, May 1789; quoted by Paul F. Boller, Jr., *George Washington and Religion* (Dallas: Southern Methodist University Press, 1963) 169-70.

> sundry rules and proceedings relative purely to the organization and polity of the church incorporated, and comprehending even the election and removal of the minister of the same, so that no change could be made therein by the particular society or by the general church of which it is a member, and whose authority it recognizes. This particular church, therefore, would so far be a religious establishment by law, a legal force and sanction being given to certain articles in its constitution and administration.[11]

Madison's veto was consistent with his jurisdictional view of Church and State. In his "Memorial and Remonstrance Against Religious Assessments" (1785), he objected to a proposed tax for the support of Christian churches and pastors, not because he opposed the Church, but because Christianity is "the Religion which we believe to be of divine origin." Christianity, he said, is a religion of "innate excellence" and a religion that enjoys the "patronage of its Author." Christianity therefore does not need the aid of the State:

> ...the establishment proposed by this Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian Religion itself: for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid [the New Testament period and shortly thereafter], but long after it had been left to its on

---

[11] James Madison, Veto Message, February 21, 1811, http://baptiststudiesonline.com/wp-content/uploads/2018/03/Madison-VetoMessageCongress.pdf

> evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a Religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy.[12]

Jefferson's "wall of separation" must be viewed in this context, as a jurisdictional separation between the two kingdoms, Church and States. As he wrote in 1808,

> I consider the government of the United States as interdicted by the Constitution from intermeddling in religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the states the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise or to assume authority in religious discipline has been delegated to the General Government. It must rest with the States, as far as it can be in any human authority.[13]

The first Supreme Court Establishment Clause case, *Everson v. Board of Education*, 330 U.S. 1 (1947), is consistent with this jurisdictional understanding of the kingdoms of Church and State. As the Court explained at 18 (emphasis added):

---

[12] James Madison, "Memorial and Remonstrance Against Religious Assessments," 1785, reprinted in Norman Cousins, "*In God We Trust*" (New York: Harper & Brothers, 1958) 308-14. https://founders.archives.gov/documents/Madison/01-08-02-0163

[13] Thomas Jefferson, Letter to Samuel Miller, January 23, 1808; "Thomas Jefferson on Separation of Church and State," https://candst.tripod.com/tnppage/qjeffson.htm.

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go to or to remain away from church against his will* or force him to profess a belief or disbelief in any religion. *No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.* No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. *Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.*

Everson did not address issues of strict scrutiny, compelling interest, or rational basis. Nor did the Court discuss specific types of state regulation of churches. Rather, the Court stated as an absolute that "neither a state nor the Federal Government" can "force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion."

After providing that "Congress shall make no law respecting an establishment of religion," the First Amendment adds an equally important clause, "or prohibiting the free exercise thereof."

Like the Establishment Clause, the Free Exercise Clause is also jurisdictional, because there is a jurisdiction—"our duty to God and the manner of discharging it"—that is beyond the jurisdiction of government.

D. This jurisdictional understanding of Church/State relations also applies to the Free Exercise clause.

The Framers held a jurisdictional understanding of Free Exercise. Certainly, foremost among the rights included in the term "liberty" in the Declaration of Independence is the right to free exercise of religion.

As the Declaration makes clear, this nation was founded upon Higher Law. The Supreme Court said in *Zorach v. Clauson,* 343 U.S. 306, 313 (1952), "We are a religious people whose institutions presuppose a Supreme Being." The Court found that recognition is completely compatible with statements such as "We guarantee the freedom to worship as one chooses," *id.* at 314, and "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal." *Id.* at 312.

And in *McGowan v. Maryland* (1961), Justice Douglas, the author of the *Zorach* opinion, stated in dissent:

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

This is entirely consistent with Madison's understanding of free exercise. As he said in the Remonstrance,

> We remonstrate against the said Bill,
> Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." [quoting from Article XVI of the Virginia Declaration of Rights of 1776]. The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.[14]

---

[14] Madison, Remonstrance, https://founders.archives.gov/documents/Madison/01-08-02-0163.

Establishment and Free Exercise go together. In the term "free exercise thereof," the word "thereof" refers back to "religion" in the Establishment Clause. The very punctuation of the First Amendment sets these clauses apart from the rest. There are three parts to the First Amendment, separated by semicolons, and each of these parts consists of two clauses, separated by commas:

> "Congress shall make no law"
>
> (1) "respecting an establishment of religion, or prohibiting the free exercise thereof;"
> (2) "or abridging the freedom of speech, or of the press;"
> (3) "or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Note, also, that the one verb "abridging" introduces the last two parts and sub-parts, thus further setting these last four cluses from the first two, the religion clauses which contain the verbs "respecting" and "prohibiting."

Jefferson's words in his letter to Samuel Miller, quoted earlier, pertain to both Establishment and Free Exercise:

> *Certainly, no power to prescribe any religious exercise or to assume authority in religious discipline has been delegated to the General Government.* It must rest with the States, as far as it can be in any human authority.

Supra note 13 (emphasis added). The Court's explanation of the Establishment Clause in *Everson* applies in part to Free Exercise as well:

"Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance." Each of these directives is focused on the exercise of religion.

In *United States v. Macintosh,* 283 U.S. 605, 633-35 (1931), the Court recognized in a case involving a person seeking citizenship who held conscientious objections to military service:

> Much has been said of the paramount duty to the state, a duty to be recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the state exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one's belief collides with the power of the state, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. As was stated by Mr. Justice Field, in *Davis v. Beason*, 133 U. S. 333, 342: 'The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.' . . . The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law, and also, in

> part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience.

The Court said the conflict between the power of the state and what the person believes to be his duty to God must be resolved on jurisdictional grounds. In areas in which the state has jurisdiction, its needs must take precedence, but in areas in which the state does not have jurisdiction, the individual conscience must take precedence.

The Court has sometimes recognized the power of the State to regulate certain religious practices. But at least within the area of church doctrine and church worship and attendance, the Court has recognized a jurisdictional limit to the Free Exercise Clause. In *Employment Division v. Smith,* 494 U.S. 872 (1990), Justice Scalia recognized that jurisdictional limit in his majority opinion at 877-78:

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

(Emphasis added) (internal citations omitted).

This is not surprising. Over the years, the courts have wrestled with what practices are protected by the Free Exercise Clause. But one thing has been clear from the beginning: If the Free Exercise Clause protects nothing else, it protects the right to go to church and worship, and the right to believe and speak in accordance with one's religious convictions. Even the concurrence in *Smith* recognized that

> [t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 903 (O'Conner, J., concurring).

Clearly, religious liberty is at the apex of our constitutional system, and laws and regulations which infringe religious liberty must be narrowly construed or invalidated. Monuments, grave-markers, and epitaphs are the expressions of the dead, and oftentimes, like the Arlington Reconciliation Monument, the expression is religious. The Americans who raised and dedicated the monument exercised their religious liberty in doing so. The Department of Defense, *et al.*, have desecrated not only a monument, but the religious liberty of both the deceased Americans who sought to honor and

memorialize their ancestors by building the monument and the living Americans who have been prevented from honoring their ancestors by maintaining and respecting the monument.

II. By removing the Reconciliation Memorial from Arlington National Cemetery, Defendants have trampled on not only the graves of deceased veterans but also upon their religious liberty and that of their surviving descendants.

The Commandment, "Honor thy father and thy mother" is the first commandment dealing with our relationships with other people. It applies at all stages of life, and even at and after death. The Jews were and are especially careful to honor this commandment, including burial after death. Joseph was careful to bring his father Jacob's body back home in Canaan rather than in Egypt (Genesis 50:4-13). The dying Joseph directed that he not be buried in Egypt but that his body be buried with his fathers in Canaan (Genesis 50:22-26), and the Jews kept his body in a coffin in Egypt for 400 years until after the Exodus they could bury him with his fathers in Canaan (Exodus 13:19).

As Kaufmann Kohler writes in *The Jewish Encyclopedia*, "To be denied burial was the most humiliating indignity that could be offered to the deceased, for it meant 'to become food for beasts of prey' (Deut. 28:26; I

Kings 13:22, 14:11, 21:24; II Kings 9:34-37; Jer. 7:33; 81, 2; 9:21 [22]; 14: 16; Ezek. 29:5; Ps. 29:2, 3)."[15]

Kohler says further, "The burial-place received its chief sanctity from the fact that it was the resting-place of the members of the family. To the ancient Hebrew, to die was "to be gathered unto his people" and "to lie with his fathers" (Gen. 49:29; Num. 27:13; Judges 2:10, and elsewhere); to be buried in the grave of his father and mother was his fondest wish.[16]

Moses Jacob Ezekiel, the Jewish Confederate veteran who sculpted the Memorial, is buried beside it, as is his brother, as the gathering of his extended family, his fellow Confederate veterans.

The Jewish Virtual Library provides similar information:

> Decent burial was regarded to be of great importance in ancient Israel, as in the rest of the ancient Near East.
> . . .
> In the same way one can measure the importance that Israelites attached to burial by the frequency with which the Bible refers to the fear of being left unburied. Thus, one of the curses for breach of the covenant is: "Thy carcasses shall be food unto all fowls of the air, and unto the beasts of the earth" (Deut. 28:26). Again and again the prophets use this threat, especially Jeremiah. He says, in judgment on King Jehoiakim, "He shall be buried with the burial of an ass, drawn and cast forth beyond the gates of Jerusalem" (22:19).

---

[15] Kaufmann Kohler, "Burial," *The Jewish Encyclopedia* https://jewishencyclopedia.com/articles/3842-burial

[16] *Id.*

. . .
There is also abundant positive evidence for the importance of burial. Abraham's purchase of the cave at Machpelah as a family tomb (Gen. 23) and the subsequent measures taken by later patriarchs to ensure that they would be buried there (Gen. 49:29–33; 50:25–26) occupy a prominent place in the patriarchal narratives. Biblical biographies ordinarily end with the statement that a man died, and an account of his burial (e.g., Josh. 24:30), especially if this was in some way unusual (e.g., that of Uzziah, the leprous king, II Chron. 26:23); this is not only a literary convention, but reflects the value assigned to proper interment. To give a decent burial to a stranger ranks with giving bread to the hungry and garments to the naked (Tob. 1:17–18).
. . .
The one thing expressed most clearly by Israelite burial practices is the common human desire to maintain some contact with the community even after death, through burial in one's native land at least, and if possible with one's ancestors. “Bury me with my fathers,” Jacob's request (Gen. 49:29), was the wish of every ancient Israelite.
. . .
Maimonides ruled that even a testamentary direction not to be buried is to be overruled by the scriptural injunction of burial (Maim. Yad, Evel, 12:1 and *Sefer ha-Mitzvot*, Positive Commandments no. 231). The Talmud (Git. 61a) rules that the burial of gentiles is also a religious duty (cf. Tosef., Git. 5:5 and TJ, Git. 5:9, 47c).
. . .
The rabbinic injunction (Sanh. 47a) that neither the righteous and the sinners, nor two enemies (Jeroham b. Meshullam, *Sefer Adam ve-Ḥavvah* (Venice, 1553), 231d, *netiv* 28) should be buried side by side is the origin of the custom of reserving special rows in the cemetery for rabbis, scholars, and prominent persons.
. . .
Josephus records that it is forbidden to let a corpse lie unburied (Apion, 2:211), and consideration for the dead is one of the central features of Tobit (2:8).

> . . .
> The duty of burial, although primarily an obligation incumbent on the heirs (Gen. 23:3 and 25:9; Ket 48a), ultimately rests with the whole community.[17]

For Jews like Moses Ezekiel and his brother, for non-Jewish veterans, and for their survivors and loved ones, as well, burials and burial markers are very tied in with their religious beliefs. Furthermore, the Reconciliation Memorial is one of only a very few markers at Arlington National Cemetery that has a Scripture verse: "They shall beat their swords into ploughshares and their spears into pruning hooks." (Isaiah 2:4).

Given the high place religious liberty holds in the American constitutional system and in American public life, any interpretation of the laws and regulations at issue in this case should be with strong deference to the religious liberty guaranteed by the First Amendment.

CONCLUSION

Plaintiffs-Appellants have capably argued that the decision of the lower court is ripe for judicial review, that agency mandates are not exempted from judicial review, that the Department of Defense acted arbitrarily and capriciously in removing the Reconciliation Monument and in

---

[17] "Death & Bereavement in Judaism: Ancient Burial Practices," *Jewish Virtual Library: A Project of AICE* *https://www.jewishvirtuallibrary.org/ancient-burial-practices*

so doing exceeded the authority delegated to it by Congress, and that the removal of the Reconciliation Monument was an abuse of power administrative agencies under the Executive Branch. Rather than repeating these arguments, the Foundation stresses the more foundational issue—religious liberty as applied to burials and grave markers—underlies all of the other legal issues of this case and requires that the laws and regulations be construed strictly in favor of Plaintiffs-Appellants and the preservation or restoration of the Reconciliation Monument.

Sadly, the Reconciliation Monument—erected in 1914 to reconcile and bring closure to harsh feelings about the War, and to honor those who fought bravely for their homes and families—is now being sacrificed on an altar of political correctness. Not only is Arlington National Cemetery being deprived of what is arguably its most impressive and beautiful work of art, but the relatives and survivors of those who are buried in that section of the Cemetery are also being deprived of this Monument to their ancestors, all because someone thinks they should not have to be exposed to ideas with which they disagree.

In a very real sense, old monuments—especially those that are currently out of fashion—are voices of dissent. Whatever course we are embarked upon today, monuments remind us that there was a time when

intelligent, thoughtful, and decent people believed differently.

Is it really wise to silence the past in order to re-write the future? Remember those chilling words of George Orwell in *1984:*

> "Who controls the past," ran the Party slogan, "controls the future: who controls the present controls the past."[18]

The Foundation prays we as a nation do not go down that path. We urge this Court to reverse the District Court's decision.

Respectfully submitted,

/s/ Talmadge Butts
Talmadge Butts
John Eidsmoe
FOUNDATION FOR MORAL LAW
P.O. Box 148
Gallant, AL 35972
334-262-1245
talmadge@morallaw.org
eidsmoeja@juno.com
Counsel for Amicus Curiae

August 23, A.D. 2024

[18] George Orwell, *1984* (1949).

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Rule 32(a)(7), Fed. R. App. P., because, excluding the parts of the document exempted by Rule 32(f), Fed. R. App. P., this document contains 6,343 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word in 14-point Times New Roman.

/s/ Talmadge Butts
Talmadge Butts
FOUNDATION FOR MORAL LAW
P.O. Box 148
Gallant, AL 35972
talmadge@morallaw.org
Counsel for Amicus Curiae

August 23, A.D. 2024

CERTIFICATE OF SERVICE

I certify that on August 23, A.D. 2024, a true copy of this document is being filed electronically (via CM/ECF) and will thereby be served on all counsel of record.

/s/ Talmadge Butts
Talmadge Butts
FOUNDATION FOR MORAL LAW
P.O. Box 148
Gallant, AL 35972
talmadge@morallaw.org
Counsel for Amicus Curiae