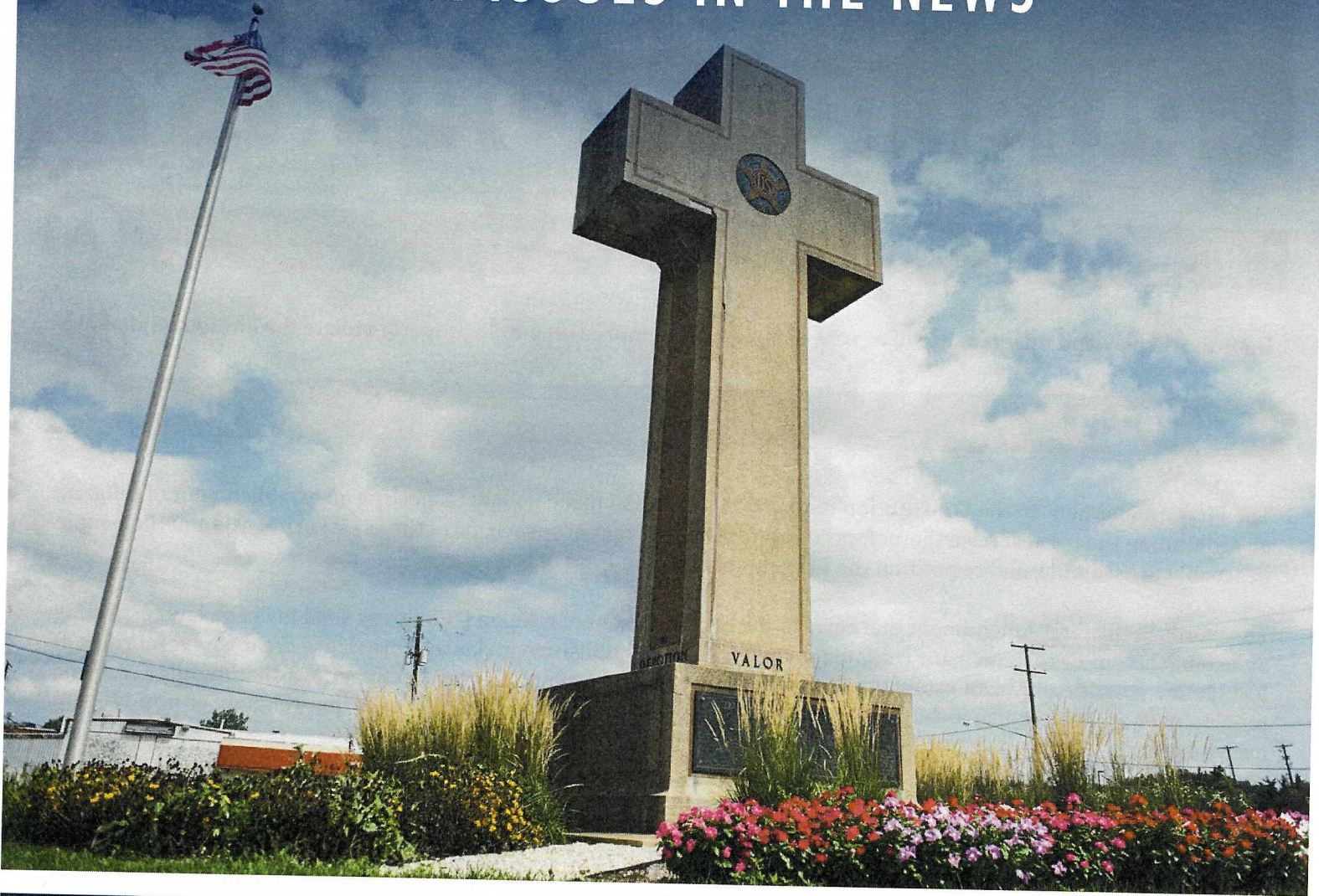
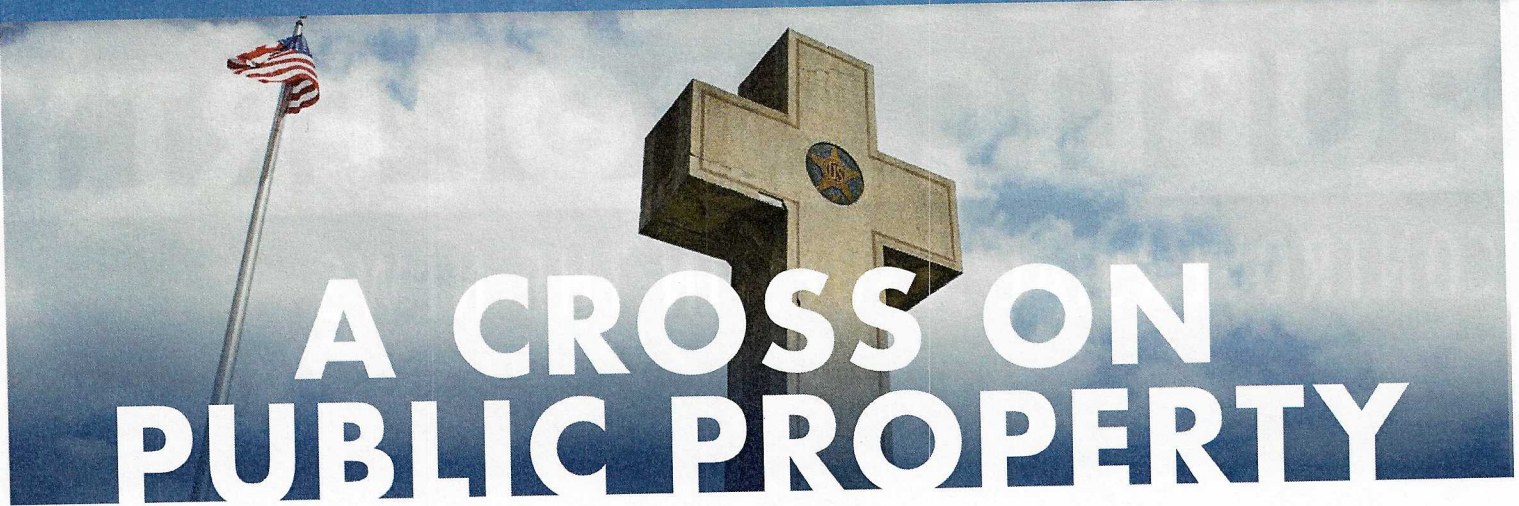


# A CROSS ON PUBLIC PROPERTY

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# A CROSS ON PUBLIC PROPERTY

## CENTRAL QUESTION



Does the display and maintenance of a cross-shaped war memorial on public property violate the First Amendment?

## BACKGROUND



The First Amendment to the Constitution reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>1</sup>

The words in the First Amendment that refer to the establishment of religion (“Congress shall make no law respecting an establishment of religion”) are commonly known as the establishment clause. This clause creates several rules. It forbids the government from establishing an official religion. It prohibits government actions that unduly favor one religion over another. It also forbids government actions that unduly favor religion over non-religion, or non-religion over religion.<sup>2</sup>

Like much of the Constitution, however, the establishment clause is open to interpretation. Therefore, it is up to the Supreme Court to determine when a government action involving religion is constitutional and when it is not. In the past, the Court has allowed religious invocations to open legislative sessions and public funds to be used to bus students to private religious schools. Yet it has also ruled against religious displays at courthouses and state funding to supplement teachers’ salaries at religious schools.<sup>3</sup>

In early 2019, the Supreme Court will hear oral arguments in a dispute over a cross-shaped war memorial that sits on a piece of public property in Maryland. The justices’ job? To determine whether the cross is a secular war memorial or a government endorsement of Christianity.<sup>4</sup>

## FACTS OF THE CASE



In 1918, a group of private organizers began construction on a 40-foot-tall cross in Bladensburg, Maryland, to honor 49 soldiers from Prince George's County who were killed during World War I. In 1922, the local American Legion (a nonprofit veterans service organization) took over the project after the organizers ran out of money, using a fundraising drive that included a Christian prayer.<sup>5</sup>

When the cross was completed in 1925, the dedication ceremony featured Christian prayers and no representation of other religions. The symbol of the American Legion (a small star inscribed with "U.S.") appears at the top of the cross. A plaque at the base includes the names of the fallen soldiers, a quote by President Woodrow Wilson, and the words "valor," "endurance," "courage," and "devotion."<sup>6</sup>

In 1961, the state government acquired the cross and the highway median that it sits on, due in part to concerns about traffic safety around the memorial. The state also gained the responsibility to maintain and repair the cross. The Maryland–National Capital Park and Planning Commission has spent approximately \$117,000 to maintain and repair the cross; in 2008, it set aside an additional \$100,000 for renovations. Today, the cross is part of a park that honors veterans and includes other, smaller memorials to the War of 1812, World War II, the Korean and Vietnam Wars, and the terrorist attacks of September 11, 2001.<sup>7</sup>

The presence of the cross has offended several non-Christian county residents. Together with the American Humanist Association (a nonprofit group that advocates the separation of church and state) they sued the Commission, arguing that the presence of the cross on public property and the state's maintenance of the cross violate the establishment clause. The plaintiffs asked a federal district court to order the state to remove the cross or to alter the memorial so it is no longer a cross.<sup>8</sup>

The district court rejected the plaintiffs' plea, finding that the Commission did not violate the First Amendment because (1) the cross has a non-religious purpose, (2) it neither advances nor inhibits religion, and (3) it does not have the primary effect of endorsing religion.<sup>9</sup> However, the U.S. Court of Appeals for the Fourth Circuit reversed that decision. The court concluded that the cross violates the First Amendment because it "has the primary effect of endorsing religion and excessively entangles the government in religion."<sup>10</sup>

On November 2, 2018, the Supreme Court announced that it would take up the case (*The American Legion v. American Humanist Association*).<sup>11</sup>

## QUESTIONS BEFORE THE COURT



Is the display and maintenance of the cross unconstitutional? Does the use of public funds to maintain the cross amount to excessive government entanglement with religion? What test should be used to determine the constitutionality of a display that incorporates religious symbolism?<sup>12</sup>



When the Supreme Court considers constitutional questions, it looks to previous cases—or precedents—to help guide its decisions. Consider the following cases:

***Lemon v. Kurtzman (1971)***. This case dealt with two state laws that provided government funding for certain aspects of non-public, non-secular education. In Pennsylvania, a law provided state funds for teachers' salaries, textbooks, and instructional materials for secular subjects at non-public schools. In Rhode Island, a law provided state funds for 15 percent of teachers' salaries at non-public elementary schools. When a group representing citizens and taxpayers sued, the Supreme Court found that Pennsylvania and Rhode Island had violated the establishment clause. The Court also created a three-part test that a law or practice must follow to avoid violating the establishment clause: (1) The law or practice must have a secular purpose; (2) its primary effect must be one that neither promotes nor inhibits religion; and (3) it must not foster "excessive government entanglement with religion."<sup>13</sup>

***Van Orden v. Perry (2005)***. This case began with a lawsuit by Thomas Van Orden, who argued that a Ten Commandments monument on the grounds of the Texas State Capitol violated the establishment clause. The Supreme Court disagreed. In a 5-4 decision, a majority of the Court concluded that the Texas monument was part of the nation's tradition of recognizing the historical meaning of the Ten Commandments, and that "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the establishment clause."<sup>14</sup> In his concurring opinion, Justice Stephen Breyer declined to apply the *Lemon* test in this case, arguing that there is "no single mechanical formula that can accurately draw the constitutional line in every case."<sup>15</sup>

***McCreary County v. American Civil Liberties Union of Kentucky (2005)***. This case began when the American Civil Liberties Union sued three Kentucky counties for displaying framed copies of the Ten Commandments in courthouses and public schools. This time, the Supreme Court concluded that the displays violated the establishment clause because their purpose had been to advance religion.<sup>16</sup>

***Town of Greece v. Galloway (2014)***. In this case, two residents sued the town of Greece, New York, alleging that the town board was showing preferential treatment to Christianity in the prayers that opened monthly public meetings. The town did not adopt any policy regarding who could lead the prayer, but Christian clergy members delivered the vast majority of the prayers at the town's invitation. The Supreme Court ruled in favor of the town, with the majority arguing that the establishment clause was never meant to outlaw legislative prayer, which merely acknowledges religion's role in society and does not need to be non-sectarian (because such a requirement would put the government in the position of policing prayer).<sup>17</sup>



## DOES THE DISPLAY AND MAINTENANCE OF A CROSS-SHAPED WAR MEMORIAL ON PUBLIC PROPERTY VIOLATE THE FIRST AMENDMENT?



**YES:** This cross amounts to a government endorsement of Christianity.

The cross in Bladensburg was erected for a noble purpose—to honor 49 soldiers who died fighting for their country. But as the U.S. Court of Appeals for the Fourth Circuit explained, a cross does not cease to be a Christian symbol when a war-related plaque is attached to it. “Even in the memorial context, a Latin cross serves not simply as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ,” the Fourth Circuit said.<sup>18</sup> For this reason, the Supreme Court must rule that the government’s display and maintenance of the Bladensburg cross is unconstitutional.

The Supreme Court should look to the Fourth Circuit’s decision when considering this case. According to the Fourth Circuit, the cross in Bladensburg violates the establishment clause (and the test outlined in *Lemon v. Kurtzman*) because it “has the primary effect of endorsing religion and excessively entangles the government in religion.” The court ruled that it is impossible to “ignore the fact that for thousands of years the Latin cross has represented Christianity.” Second, the cross is so much larger than the other war memorials in the park that “the historical meaning and physical setting of the Cross overshadows its secular elements.” As a result, the Fourth Circuit concluded that the average citizen “would fairly understand the Cross to have the primary effect of endorsing religion.”<sup>19</sup>

Furthermore, the fact that the state owns and maintains the cross on public property (and has already spent \$117,000 to maintain it with another \$100,000 budgeted) suggests that the state “either places Christianity above other faiths, views being American and Christian as one in [*sic*] the same, or both,” the Fourth Circuit said in its opinion.<sup>20</sup>

“Symbols have power. They communicate complex ideas, often more effectively and more forcefully than mere words. They are remembered for decades or even centuries. They speak to the heart, not just the head. And what is true for symbols is doubly so for religious ones: They convey at a glance millennia of shared history, collective aspirations, and triumphs to those who hold them dear,” wrote Richard Katskee, legal director of Americans United for Separation of Church and State. “For people of other faiths, however, being confronted with an official display of a Latin cross may be a profound experience in a quite different way: It is not sacred to them, yet the government is telling them to venerate it.”<sup>21</sup>

In the end, there is no escaping the overt religious message of this statue. As David Niose of the American Humanist Association said, “If you were approaching in a motor vehicle, you wouldn’t think, ‘Oh, there’s a cross-shaped memorial.’ You’d think, ‘There’s a huge Christian cross.’”<sup>22</sup>



**NO:** This cross is a constitutional memorial to soldiers who died to protect freedom.

“This Memorial stands in witness to the VALOR, ENDURANCE, COURAGE, and DEVOTION of the forty-nine residents of Prince George’s County, Maryland, ‘who lost their lives in the Great War for the liberty of the world,’” wrote Chief Judge Roger Gregory of the U.S. Court of Appeals for the Fourth Circuit in his separate opinion. “I cannot agree that a monument so conceived and dedicated and that bears such witness violates the letter or spirit of the very Constitution these heroes died to defend.”<sup>23</sup>

Since 1925, this cross has stood as a solemn memorial to soldiers who gave their lives in battle. “This is a monument that was conceived for civic, not religious purposes: Sponsored by the American Legion and a committee of mothers whose children died fighting overseas ... it was built with private funds and on then-privately owned land,” wrote West Virginia solicitor general Lindsay See, who filed a brief in support of the American Legion. “It was designed as a type of surrogate gravesite, with its shape chosen in conscious reflection of the fields of crosses in Europe that marked the actual gravesites of the soldiers it commemorates. ... It has been used consistently and exclusively for the secular purpose of honoring those who died fighting for the United States. And since it was completed in 1925, the community has surrounded it with several other war memorials.”<sup>24</sup>

If the Supreme Court finds the cross to be unconstitutional, it would be removed or, as one judge suggested, stripped of its arms. And other sacred monuments, including a famous cross in Arlington National Cemetery, could become targets as well.<sup>25</sup> “If we erase all religious references from the public square, that would tell a false story about who we are as human beings,” said Luke Goodrich, senior counsel for the Becket Fund for Religious Liberty.<sup>26</sup>

Even Justice Breyer has said that the establishment clause does not require the government to remove all traces of religion from public life. “Such absolutism is not only inconsistent with our national traditions ... but would also tend to promote the kind of social conflict the establishment clause seeks to avoid,” he wrote in his opinion in *Van Orden v. Perry*. In that case, he agreed that a Ten Commandments monument in Texas had been displayed in a secular context for 40 years without challenge, suggesting that the public sees it as “a broader moral and historical message reflective of cultural heritage.”<sup>27</sup>

The same applies to the Bladensburg cross. “For nearly 100 years, the memorial has stood to honor these 49 sons of Prince George’s County who made the ultimate sacrifice for their country,” said Michael Carvin, lead counsel for the American Legion. “The Supreme Court should not allow their memory to be bulldozed.”<sup>28</sup>



### **Concurring opinion**

A concurring opinion is an opinion written by one or several judges that agrees with the decision made by the majority of the court but states different reasons as the basis for the decision.

### **Establishment clause**

The establishment clause is another name for the opening words of the First Amendment (“Congress shall make no law respecting an establishment of religion”).

### **First Amendment**

The First Amendment to the Constitution reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

### **Plaintiff**

A plaintiff is a person who brings a case against another in a court of law.

### **Religious invocation**

A religious invocation is the act of calling upon a deity or spirit for aid, protection, or inspiration. An invocation is often said at the beginning of a religious service or public ceremony.

### **Secular**

Secular attitudes and activities are those that have no religious or spiritual basis.

## QUESTIONS TO CONSIDER



1. How would the Supreme Court rule in *The American Legion v. American Humanist Association* if the justices followed the precedent of *Lemon v. Kurtzman*? How would the Court rule if the justices followed the precedent of *Van Orden v. Perry*?
2. Would the Court ruling differ depending on which case the justices used as precedent?
3. Which of the precedent cases mentioned do you believe to be most relevant to *The American Legion v. American Humanist Association*?
4. If you were a justice on the Court, how would you rule in this case?



- <sup>1</sup> U.S. Constitution. Amendment I.
- <sup>2</sup> Legal Information Institute. "Establishment Clause." Web. 13 Dec. 2018.
- <sup>3</sup> Ibid.
- <sup>4</sup> Howe, Amy. "Justices to Consider Constitutionality of Cross-Shaped War Memorial on Public Land: In Plain English." SCOTUSblog. 10 Dec. 2018. Web. 13 Dec. 2018.
- <sup>5</sup> Oyez. "*The American Legion v. American Humanist Association*." Web. 13 Dec. 2018. Howe, Amy. "Justices to Consider Constitutionality of Cross-Shaped War Memorial on Public Land: In Plain English." SCOTUSblog. 10 Dec. 2018. Web. 13 Dec. 2018.
- <sup>6</sup> Howe, Amy. "Justices to Consider Constitutionality of Cross-Shaped War Memorial on Public Land: In Plain English." SCOTUSblog. 10 Dec. 2018. Web. 13 Dec. 2018. Marimow, Ann. "Federal Court Upholds Ruling that Cross-Shaped Monument on Public Land in Md. Is Unconstitutional." *Washington Post*. 2 Mar. 2018. Web. 14 Dec. 2018.
- <sup>7</sup> Oyez. "*The American Legion v. American Humanist Association*." Web. 13 Dec. 2018. Howe, Amy. "Justices to Consider Constitutionality of Cross-Shaped War Memorial on Public Land: In Plain English." SCOTUSblog. 10 Dec. 2018. Web. 13 Dec. 2018.
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- <sup>9</sup> Oyez. "*The American Legion v. American Humanist Association*." Web. 13 Dec. 2018.
- <sup>10</sup> Howe, Amy. "Justices to Consider Constitutionality of Cross-Shaped War Memorial on Public Land: In Plain English." SCOTUSblog. 10 Dec. 2018. Web. 13 Dec. 2018.
- <sup>11</sup> Ibid.
- <sup>12</sup> Oyez. "*The American Legion v. American Humanist Association*." Web. 13 Dec. 2018.
- <sup>13</sup> Oyez. "*Lemon v. Kurtzman*." Web. 13 Dec. 2018.
- <sup>14</sup> Oyez. "*Van Orden v. Perry*." Web. 13 Dec. 2018.
- <sup>15</sup> Howe, Amy. "Justices to Consider Constitutionality of Cross-Shaped War Memorial on Public Land: In Plain English." SCOTUSblog. 10 Dec. 2018. Web. 13 Dec. 2018.
- <sup>16</sup> Oyez. "*McCreary County v. American Civil Liberties Union of Ky*." Web. 13 Dec. 2018.
- <sup>17</sup> Oyez. "*Town of Greece v. Galloway*." Web. 13 Dec. 2018.
- <sup>18</sup> Dallas, Kelsey. "Is a Cross Always Religious?" *Deseret News*. 15 Aug. 2018. Web. 14 Dec. 2018.
- <sup>19</sup> Howe, Amy. "Justices to Consider Constitutionality of Cross-Shaped War Memorial on Public Land: In Plain English." SCOTUSblog. 10 Dec. 2018. Web. 13 Dec. 2018.
- <sup>20</sup> Ibid.
- <sup>21</sup> Katskee, Richard. "Symposium: Cross Purposes—Why a Christian Symbol Can't Memorialize All War Dead." SCOTUSblog. 13 Dec. 2018. Web. 14 Dec. 2018.
- <sup>22</sup> Dallas, Kelsey. "Is a Cross Always Religious?" *Deseret News*. 15 Aug. 2018. Web. 14 Dec. 2018.
- <sup>23</sup> Martin, Mark. "Court Sides with Humanists Who Want to Destroy or Tear Off the Arms of WWI Memorial Cross." CBN News. 19 Oct. 2017. Web. 14 Dec. 2018.
- <sup>24</sup> See, Lindsay. "Symposium: Crosses and Constitutional Clarity." SCOTUSblog. 13 Dec. 2018. Web. 14 Dec. 2018.
- <sup>25</sup> Barnes, Robert, and Ann Marimow. "Supreme Court Will Take Case on Constitutional Challenge to Maryland's Peace Cross." *Washington Post*. 2 Nov. 2018. Web. 14 Dec. 2018.
- <sup>26</sup> Dallas, Kelsey. "Is a Cross Always Religious?" *Deseret News*. 15 Aug. 2018. Web. 14 Dec. 2018.
- <sup>27</sup> Howe, Amy. "Justices to Consider Constitutionality of Cross-Shaped War Memorial on Public Land: In Plain English." SCOTUSblog. 10 Dec. 2018. Web. 13 Dec. 2018.
- <sup>28</sup> Barnes, Robert, and Ann Marimow. "Supreme Court Will Take Case on Constitutional Challenge to Maryland's Peace Cross." *Washington Post*. 2 Nov. 2018. Web. 14 Dec. 2018.





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The main body of the page contains several paragraphs of text that are extremely faint and illegible. The text appears to be organized into sections, but the specific content cannot be read. There are some very faint lines and shapes that suggest the presence of text, but they do not form any recognizable words or sentences.