

**No. 19-10461-C**

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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WADE STEVEN GARDNER, *et al.*,  
*Plaintiffs-Appellants*,

v.

WILLIAM MUTZ, *et al.*,  
*Defendants-Appellees*.

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Appeal from the United States District Court  
for the Middle District of Florida, Tampa Division  
D.C. No. 8:18-CV-02843-VMC-JSS

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**BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN  
IN SUPPORT OF APPELLANT WADE STEVEN GARDNER, *ET AL.***

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## **IDENTITY AND INTEREST OF AMICUS CURIAE<sup>1</sup>**

*Amicus Curiae* Foundation for Moral Law (“the Foundation”), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in this case because it believes the current attack on monuments is eroding Americans' understanding of our historical foundations and appreciation for those who have sacrificed in the defense of our constitutional republic.

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<sup>1</sup> 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. Amicus has simultaneously prepared and filed a motion for leave to file this brief.

## INTRODUCTION

*"Remove not the ancient landmark, which thy fathers have set."* Proverbs 22:28

First they came for the Confederate monuments. Next, they came for the Christopher Columbus monuments. Now they're coming for the Andrew Jackson, Woodrow Wilson, George Washington and Thomas Jefferson monuments, and, as the American Legion v. American Humanist Association, 139 S. Ct. 2067 (2019) case demonstrates, the military monuments with religious iconography.

What's next? Nobody knows, because it all depends on what temporary majority has control of government, media, and education. A radical Left municipal government may decide that Abraham Lincoln, Frederick Douglas, Booker T. Washington, and George Washington Carver are not "politically correct" because they were not sufficiently radical. Or, if the political winds were to shift in the opposite direction tomorrow, monuments commemorating Martin Luther King, Jr., Rosa Parks, and the Selma March might be threatened with elimination. Will Muslim Americans demand and succeed in the removal of 9-11 or Gulf War Veteran Monuments because they are "offensive"?

The U.S. Congress and President sought to protect these "ancient landmarks" through the National Historic Preservation Act of 1966. Florida's historic preservation laws include Monuments and Memorials as "Historical Resources" worthy of preservation. In the aftermath of WWII, a multi-national team known as

the “Monuments Men” set about to intercede in the Nazis’ cultural purge. Today, the United Nations Educational, Scientific and Cultural Organizations (UNESCO) seeks “protection and preservation of cultural and natural heritage around the world considered to be of outstanding value to humanity.”<sup>2</sup> One of our nation’s identified UNESCO sites is a collection of carved sculptures of the faces of four American Presidents in the Black Hills of Keystone, South Dakota known as Mount Rushmore.

But why do some people want to destroy monuments? More basically, why do monuments even matter? Probably for the same reasons we read the Bible to our children, tell them family stories, keep scrapbooks and preserve newspaper clippings and photographs—to remember. Monuments are a visible and larger public way to teach history, especially to those who are not inclined to read about it.

Conversely, taking down monuments is a way to make sure no one remembers that there was a time past during which people thought differently, when memorable events of human achievement and merit took place and when watershed moments in policy, politics, and change occurred.

The desire for historical destruction of a people and its culture is nothing new. New civilizations have often destroyed the records of the old. The Spanish conquistadors destroyed the writings of the conquered Aztecs, believing they were formulas for devil-worship. The Aztecs had destroyed the writings of the Toltecs

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<sup>2</sup>World Heritage Centre, UNESCO, <http://whc.unesco.org/en/about/>.

who preceded them, and so on. Nazis, Communists, and conquerors of every sort have tried to consolidate their control by burning books and eliminating memories of the past. Hitler's Reich Ministry of Public Enlightenment and Propaganda compiled an extensive list of items deemed "degenerate" which included sculptures, statues and monuments. Then, a cultural purge from state-owned museums and other public places began of all these works. Even in recent years, the Islamic terrorist group, ISIS, recorded its "blowing up" of the ancient Syrian city of Palmyra—destroying monuments, cemeteries and symbols of the city's rich history and multi-culturalism.<sup>3</sup>

By controlling people's memory of the past, they attempt to shape people's view of the present and to dictate that of the future. Remember Winston Smith, the protagonist officer of the Ministry of Truth in George Orwell's 1984? "The frightening thing, [Winston] reflected for the ten thousandth time...[is if] the Party could thrust its hand into the past and say of this or that event, *it never happened*... And if all others accepted the lie which the Party imposed – if all records told the same tale – then the lie passed into history and became truth. 'Who controls the past,' ran the Party slogan, 'controls the future: who controls the present controls the past.'"<sup>4</sup>

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<sup>3</sup> Liam Stack, Islamic State Blows Up Temple at Palmyra Ruins in Syria, N.Y. TIMES, August 23, 2015, at Section A, Page 6

<sup>4</sup> George Orwell, 1984 36-67, (Enrich Spot 2016) (1949) (Emphasis added.)

## ARGUMENT

### I. THE UNITED STATES OF AMERICA HAS A SUBSTANTIAL INTEREST IN PRESERVING AMERICAN HISTORY

All three branches of the federal government, and state and local governments as well, have recognized the value of historical memorials and monuments and have made provisions for their creation and preservation.

At the federal level, Congress adopted the American Antiquities Act of 1906 "to preserve for present and future generations the historic, scientific, commemorative, and cultural values of the archeological and historic sites and structures on these lands. It also authorizes the President to protect landmarks, structures, and objects of historic or scientific interest by designating them as National Monuments."<sup>5</sup> The Executive Branch preserves historical monuments, usually through the Department of Interior which includes the National Park Service, but also through the Department of Defense and other branches.

The U.S. Supreme Court has recognized the value of historic preservation. In Penn Central Transportation Company v. New York City, 438 U.S. 104 (1978), the Court upheld New York City's Landmarks Preservation Law and the restrictions it imposed on developing property that has historic significance, against the property

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<sup>5</sup> American Antiquities Act of 1906, 34 Stat. 225, U.S.C. § 431-433 (1906). Also see About the Antiquities Act, ARCHAEOLOGY PROGRAM, <https://www.nps.gov/archeology/sites/antiquities/about.htm>, last accessed on April 15, 2020.

rights of those whose property the Law prohibited from development. As the Court said at 107-08,

Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.

(Emphasis added.) (Internal citation omitted.)

Other cases that recognize the importance of historic preservation include Maier v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975), A-S-P Assoc. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1971), and Figarsky v. Historic District Commission, 171 Conn. 198, 368 A.2d 163 (1976). And even most recently, as will be discussed infra, the judiciary has made it clear that “history and tradition” are vital components to an analysis of First Amendment challenges to monuments and displays. See Amanda Kondrat’yev v. City of Pensacola 949 F.3d. 1319 (11<sup>th</sup> Cir. 2020) infra at 1325.

History and the preservation of it is important for many reasons:

- History shows people how to understand our nation and our state and how they came into being.
- History helps people understand the nature of our laws, customs, and governmental institutions.
- History causes people to appreciate and honor the sacrifices made by many for the freedoms and the way of life we have today.
- History helps shape our identity as a state and nation.
- History develops critical thinking skills as we relate the events and personages of history to movements and ideas.
- History is valuable economically as a tourism attraction.
- History inspires people to civic action, making them realize they are part of a bigger picture of ongoing history.
- History motivates people to serve their state (and nation) and to sacrifice for it, even their lives, knowing that future generations will remember them as we now remember soldiers of the past.
- History encourages people to become civic leaders, seeing the recognition given to leaders of the past.

- History helps people understand the mistakes and even evils of the past and points people toward finding ways to avoid making those mistakes in the future. "Those who cannot remember the past are condemned to repeat it."<sup>6</sup>
- History causes people to study toward understanding why others believed and acted as they did and why people believe and act as they do. (As David Hume said, history's "chief use is only to discover the constant and universal principles of human nature."<sup>7</sup>)
- "Man is explicable by nothing less than all his history."<sup>8</sup>

Florida has articulated its own state policy for protecting its “ancient landmarks” by adopting its State Policy Relative to Historic Properties. Florida Statute § 267.061(1)(a) provides: “The rich and unique heritage of historic properties in this state, representing more than 10,000 years of human presence, is an important legacy to be valued and conserved for present and future generations. Destruction of these nonrenewable historical resources will engender a significant loss to the state’s quality of life, economy, and cultural environment.” (Emphasis added.) Accordingly, one of the Executive Branch’s enumerated duties thereunder is to

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<sup>6</sup> This statement, or variations of it, has been attributed to George Santayana, Winston Churchill, Edmund Burke, and others. The Foundation cites it for its own intrinsic merit.

<sup>7</sup>David Hume, *An Enquiry Concerning Human Understanding* 55 (Eric Steinberg, Hackett Publishing Company 2d. Edition 1993) (1748).

<sup>8</sup> Ralph Waldo Emerson, *Essays, First Series* 7 (Literary Society 2004) (1841).

“[p]rovide leadership in the preservation of the state’s ‘Historic Resources.’” Florida’s definitions of “historic property” and “historic resource” include monuments and memorials. See Fla. Stat. § 267.021(3).

For all of these and arguably other reasons, Appellants have compelling arguments for preserving Munn Park’s history.

## **II. HONORING FALLEN ANCESTORS IS A MORAL IMPERATIVE**

“Honor thy father and thy mother” is one of the Ten Commandments in the Hebrew Bible. The commandment is regarded in Christian and Jewish sources as the fifth in both the list in Exodus 20:1-21 and in Deuteronomy (or D’varim) 5:12. Those who believe in Judeo-Christian principles understand the moral imperative of honoring antecedents. The commandment requires no value assessment to determine whether mother or father was good or bad, worthy or not. The words are simple and precise. Honor.

There is a reason that war memorials and monuments are erected by a religious people: to honor and remember those who have fought and died for them.

“Today no cemetery is without tombstones, no grave remains unmarked. Even in holocausts resulting from conflagration, explosion, earthquake or flood, where identification of individual bodies must sadly fail, a general monument is raised to the common dead. Over every military grave the Cross or the Star of David blesses the named martyr beneath. And where large numbers are interred in a common grave because an exploding shell commingled the remains beyond

separation, a cenotaph rises to honor the Unknown Dead.

It is unthinkable today that anyone should be consigned to the earth without a shaft, big or small, naming him who has departed forever from his mourning kin and friends. Those who have no respect for the dead can have but little appreciation of the dignity of man, either living or dead. Kotal v. Goldberg 375 Pa. 397 (1953) at 404-405. (Emphasis added.)

As the State of Florida affirms supra, the visibility of American culture and her history is exterminated if these monuments and memorials are removed from the civic landscape. They tell the history of a people and what they felt was worth memorializing. Open and public memorials are erected with fanfare, grandeur, and with the expectation of permanency. Consistent with the Commandment “Honor thy father and thy mother” (Exodus 20:12), which has a parallel in almost every religious tradition, they are not to be changed like a fashion trend, a decorator’s taste, or temporary mores. They are to be treated with a “spirit of stewardship and trusteeship.” See Fla. Stat. § 267.061(2).

The moral imperative to honor one's ancestors, especially those who have fallen in battle, seems universal. David honored Saul and Jonathan after they died in battle. He also honored his general Abner, saying “there is a prince and a great man fallen this day in Israel.” See II Samuel 3:38. No political handwringing. No judgmental wrangling. Honor.

And 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 ruler of Thebes, King Creon, has decreed that Eteocles will be buried with full honors while Polynices will lie on the field unburied. Nevertheless, Antigone provides her brother with a burial. When she is brought before King Creon, the following exchange takes place:

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....<sup>9</sup>

Antigone is saying there is a Higher Law, higher than any governmental authority – 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 war-dead kinsmen should be heeded. By restoring the Munn Park Cenotaph, this Court would require the City of Lakeland only to act in accord with this universal moral imperative.

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<sup>9</sup>Sophocles, *Antigone*, as quoted in John Eidsmoe, *Historical and Theological Foundations of Law*, Volume II, 511 (2d ed. 2016).

The subject Monument was erected in Munn Park by the daughters of fallen veterans in honor of their fathers and ‘given’ in 1910 to those who still survived at the time of its erection. In 1906, General Steven D. Lee, then leader of the Confederate nationwide veterans’ organization, the United Confederate Veterans, had spoken at the UCV convention. Reflecting on the great losses in the ranks over the previous year, General Lee discussed the meaning and importance of monuments just three years before the erection of the Munn Park Cenotaph.

Comrades, there is one thing committed to our care as a peculiar trust—the memory of the Confederate soldier. So far as lies in our power, we have striven that history may not lack the evidence of his purity of motive, his fortitude, his heroism. ...

There are three things peculiarly left for our concern. One of these is the erection of public monuments to our Confederate dead; not only to our leaders, but, above all, to these private soldiers who made our leaders immortal. We must not overtask posterity by expecting those who come after us to build monuments to heroes whom their own generation were unwilling to commemorate. The South has reached a position of material prosperity which justifies both State and private beneficence to honor the faithful dead.<sup>10</sup>

After setting the stage for who must see to the memorialization, Gen. Lee then described why memorials are important to veteran service:

In all human lot there has nothing better been found for man than to die for his country. If there be any virtue, if there be any praise, this fate is to be preferred above all others. We feel it is well with those who have thus fulfilled the highest of all trusts, the duty of a citizen to his native

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<sup>10</sup> “General S.D. Lee’s Address at New Orleans.” Confederate Veteran. Vol. XIV. No. 1. 1906. <https://archive.org/details/confederateveter1419conf>.

land, and whatever may have been their private faults, their public service on the field of battle has rightly given them a place with the immortals. Theirs was the martyr's devotion without the martyr's hope. Their generation and their country imposed upon them this high service. They fulfilled it without flinching. They felt that the issue of the battle was with God, the issue of their duty was with themselves. . . . I urge monuments to the Confederate soldier first for the sake of the dead, but most for the sake of the living, that in this busy industrial age these stones to the Confederate soldier may stand like great interrogation marks to the soul of each beholder.<sup>11</sup>

A few years earlier, in 1898, President William McKinley had addressed the Georgia General Assembly for the Peace Jubilee following the Spanish-American War. A Civil War veteran himself<sup>12</sup>, he remarked:

[E]very soldier's grave made during our unfortunate Civil War is a tribute to American valor.

...

[T]he time has now come in the evolution of a sentiment and feeling under the Providence of God, when in the spirit of fraternity we should share with you in the care of the graves of the Confederate Soldiers.<sup>13</sup>

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<sup>11</sup> Id.

<sup>12</sup> Presidents Grant (18<sup>th</sup>), Hayes (19<sup>th</sup>), Garfield (20<sup>th</sup>), Arthur (21<sup>st</sup>), Harrison (23<sup>rd</sup>) and McKinley (25<sup>th</sup>) were all Civil War veterans. President Cleveland (22<sup>nd</sup> and 24<sup>th</sup>) hired a substitute to serve for him. President Teddy Roosevelt (26<sup>th</sup>) did as well, but his uncle, James Bulloch, served in the Confederate Navy and was instrumental in commissioning the *C.S.S. Alabama* and the *C.S.S. Florida*. See David McCullough, *Mornings on Horseback* 44 (Simon and Schuster 2003) (1981). See also Theodore Roosevelt's Confederate Uncles, THEODORE ROOSEVELT CENTER, August 16, 2013, last accessed April 15, 2020: <https://www.theodorerooseveltcenter.org/Blog/Item/Theodore%20Roosevelts%20Confederate%20Uncles>.

<sup>13</sup>McKinley Addressed Georgia General Assembly, ATLANTA CONSTITUTION, December 15, 1898, Page 6.

And, in the years following the Munn Park dedication, as the ranks of veterans both North and South thinned further, another President, Woodrow Wilson, voiced these words at the acceptance of the Confederate Monument at Arlington National Cemetery in 1914:

I assure you that I am profoundly aware of the solemn significance of the thing that has now taken place. The Daughters of the Confederacy have presented a beautiful memorial of their dead to the government of the United States.<sup>14</sup> I hope that you noted the history of the conception of this idea. It was proposed by a president of the United States, who had himself been a distinguished officer in the Union Army. It was authorized by an act of Congress of the United States. The corner stone of the monument was laid by a president of the United States, elevated to his position by the votes of the party which had chiefly prided itself upon sustaining the war for the Union. And, now, it has fallen to my lot to accept, in the name of the great government which I am privileged for the time to represent, this emblem of a reunited people.

I am not so much happy as proud to participate in this capacity on such an occasion,—proud that I should represent such a people. Am I mistaken ladies and gentlemen in supposing, that nothing of this sort could have happened in anything but a democracy? The people of a democracy are not related to their rulers as subjects are related to a government. They are themselves the sovereign authority and they are neighbors of each other, quickened by the same passions and moved by the same motives, they can understand each other. They are shot through with some of the deepest and profoundest instincts of human sympathy. They choose their governments; they select their rulers; they

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<sup>14</sup>Interestingly, but not simply fortuitous, while the Confederate Monument in Arlington was authorized in 1906, Confederate soldiers had been buried there as early as June 1864 and honored with a monument in 1865. See Confederate Memorial, ARLINGTON NATIONAL CEMETERY, <https://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials/Confederate-Memorial>, last accessed April 15, 2020.

live their own life and they will not have that life disturbed and discolored by fraternal misunderstandings...

My privilege is this, ladies and gentlemen: to declare this chapter in the history of the United States closed and ended, and I bid you turn with me your faces to the future, quickened by the memories of the past, but with nothing to do with the contests of the past, knowing, as we have shed our blood upon opposite sides, we now face and admire one another...

The generosity of our judgment was made up soon after this great struggle was over. Men came and sat together again in the Congress and united in all the efforts of peace and of government, and our solemn duty is to see that each one of us is his own consciousness and in his own conduct a replica of this great reunited people. It is our duty and our privilege to be like the country we represent, and speaking no word of malice, no word of criticism even, stand shoulder to shoulder to life the burdens of mankind in the future and show paths of freedom to all the world.<sup>15</sup>

Wedged between these poetic tributes and during the same score, the daughters of Lakeland fulfilled their Honoring Commandment. But, despite the pleas of those who believe the honorific speech was not single-generational, the City of Lakeland decided to interfere.

One of the arguments for the Munn Park monument removal was the loud clamor of a special interest who sought to attribute heretofore unknown malevolent

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<sup>15</sup> Woodrow Wilson, Weekly Independent. [volume] (Elko, Nev.), 12 June 1914. Chronicling America: Historic American Newspapers. Lib. Of Congress. <https://chroniclingamerica.loc.gov/lccn/sn86076366/1914-06-12/ed-1/seg-4/>

meaning to the chiseled granite.<sup>16</sup> Such an argument ignores three central facts: (1) At the turn of the twentieth century, Confederate veterans were dying in large numbers and their descendants thought it was time to memorialize them; (2) The same period saw a rise in the construction of monuments to Union veterans; (3) The South was recovering from the economic effects of the War such that they could finally afford such memorials. Their argument also assumes that those who dedicated these monuments spoke falsely about their motives defying the presumption entertained in courts and in daily life that when people speak, they ordinarily say what they mean and mean what they say.

What would the ladies who labored and toiled to fulfill the Honoring Commandment say about the removal? Would they say “oh well, we tried”? Would they say “that’s okay, we don’t want to offend anyone”? The Foundation does not believe so. In the official History of the United Daughters of the Confederacy, it succinctly pronounces the purpose statement for memorialization:

Out of the abundance of their love and pride in the South and the

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<sup>16</sup> In a similar vein of ingratitude and false history, recall the April 22, 1971, testimony of 27-year-old John Kerry who described the Vietnam War soldier as one who committed “crimes... on a day-to-day basis, with the full awareness of officers at all levels of command.” “[W]e cannot consider ourselves America’s best men when we are ashamed of and hated what we were called on to do in Southeast Asia.” See Vietnam Veterans against the War Statement by John Kerry to the Senate Committee on Foreign Relations, THE SIXTIES PROJECT, (April 23, 1971), [https://www2.iath.virginia.edu/sixties/HTML\\_docs/Resources/Primary/Manifestos/VVAW\\_Kerry\\_Senate.html](https://www2.iath.virginia.edu/sixties/HTML_docs/Resources/Primary/Manifestos/VVAW_Kerry_Senate.html).

Southern Confederacy, and all who served and suffered for them, the women of the South have tried to make marble and bronze tell in chiseled words the glory of the men who wore the gray.<sup>17</sup>

Florida was a relatively small state during the armed conflict referenced in the Munn Park Cenotaph. Over time, its population swelled with immigrants from other states and other countries, as continues to be the case today. Many of those immigrants had and still have shared experiences to the Florida soldier remembered by the marker. By injecting derogatory judgments about those who died but also those who risked doing so suffering many privations at the call of duty, opponents of Munn Park cheapen the lives and commitment of those American soldiers.

No better illustration can be found of common conduct worthy of honor than North Carolina soldier Louis Leon, who kept a diary during his service. In 1913 at age seventy-two, he decided to publish it because, he had "read so many histories written by our officers, but have never seen in print a history written by a private," and "to the younger generation of Southern-born it will show how we endured and suffered, but still fought on for the cause we know was right."<sup>18</sup>

A few excerpts from Private Leon's diary are presented for this Court's consideration of the sacrifice and service honored by the Munn Park Cenotaph:

June 10 [1861] - At three o'clock this morning the long roll woke

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<sup>17</sup> United Daughters of the Confederacy, *The History of the United Daughters of the Confederacy*, Volumes I and II 49 (1993)

<sup>18</sup> L. Leon, *Diary of a Tar Heel Soldier*, (Stone Publishing Company, Charlotte, N.C. 1913) at i

us up. We fell in line, marched about five miles, then counter-marched, as the Yankees were advancing on us. We got to our breastworks a short time before the Yankees came, and firing commenced. We gave them a good reception with short and shell. The fight lasted about four hours....

This is the first battle of the war, and we certainly gave them a good beating, but we lost one of our regiment, Henry Wyatt [the first Confederate soldier killed in battle], who was killed while gallantly doing a volunteer duty. Seven of our men were wounded. ... After the fight some of the boys and myself went over the battlefield, and we saw several of the Yankee dead - the first I had ever seen, and it made me shudder....

From now on I will never again grumble about digging breastworks. If it had not been for them many of us would not be here now.

August 30 [1862] - Our company went to work to-day throwing up breastworks.

August 31 - Still digging dirt....

September 19 - Left Wakefield at 9 P.M. and marched twenty miles - laid in the woods without shelter and it raining very hard. Therefore did not need to wash myself in the morning.

September 20 - Resumed our march at 6 o'clock this morning. Arrived at Blacks Church after three hours' march, then turned about and tramped nine miles and camped for the night at Joyner's Church....

December 21 - I went to the creek to wash my clothing and myself, and when I got back the water had frozen on my head so that I was obliged to hold my head by the fire so as to thaw it out. Wortheim's eyes are so bad that he can hardly see. Sam Wilson broke his shoulder blade.

December 25 - There is nothing new up to to-day, Christmas. We moved our camp a little piece. Eigenbrun came to see us to-day from home, and brought me a splendid cake from Miss Clara Phile. This is certainly a hard Christmas for us - bitter cold, raining and snowing all the time, and we have no tents. The only shelter we have is a blanket spread over a few poles, and gather leaves and put them in that shelter for a bed....

April 4 [1863] - Firing at intervals all day. The reserve was sent to the river to support our artillery. The colors went with them. It is raining hard. We laid in line two and a half hours in an old field. It is very cold. The Yankees are firing all the time. Then the 43rd Regiment came and relieved us. Katz came in to-day and reported Henry Wortheim dead - he died Monday, March 30.

April 5 - Everything is quiet on our line to-day.

April 6 - A little firing to-day. Went to the river to throw up breastworks. Worked all night. We put up one piece of cannon right on the river bank, but had to work all night in the swamp to do so. We carried sandbags for breastworks to protect the artillerymen....

May 21 - Left this morning, marched twenty-one miles, halted at 5:30. It is a very hilly country, warm and dusty.

May 22 - Marched twenty miles to-day, and halted at 6 P.M.

May 23 - Marched fifteen miles and halted. On our to-days' march we saw any amount of dead horses, which did not smell altogether like cologne.

May 24 - Laid here all day, it being Sunday.<sup>19</sup>

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<sup>19</sup> Id. at 3-4, 10-11, 14, 21-22, 28

(Emphasis Added.)

This small portion of what Private Leon recorded as having sacrificed for North Carolina represents what tens of thousands of soldiers sacrificed. Yet, Leon lived to tell his story. It is entirely fitting for Lakeland, or any town, to recognize the sacrifice of its people—black, white, blue or gray—by preserving the constitutionally protected monument in their honor.<sup>20</sup> The private and constitutionally protected speech of the Appellants should prevail over the government speech erroneously elevated by the district court.

### **III. HISTORICAL MONUMENTS EXPRESS FIRST AMENDMENT RIGHTS**

This Court's recent decision regarding the Bay View Cross Memorial in Pensacola, Florida is obviously at the forefront of the Court's mind here. Amanda Kondrat'yev v. City of Pensacola, Florida, 949 F.3d 1319 (11th Cir. 2020). In Pensacola, this Court made application of the Supreme Court's decision in American Legion. American Legion did not differentiate between solely war monuments, quasi-religious monuments and more iconic religious monuments, but instead focused on the structure's history when analyzing constitutionality. Even though the

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<sup>20</sup> The Southern soldier was recognized as a veteran for pension purposes in 1958. See 38 U.S.C § 1532. See also Griffin v. Department of Veterans' Affairs 274 F. 3d. at 818, 821-23 (4<sup>th</sup> Cir. 2001) (recognizing the propriety of honoring the Confederate dead as American citizens).

cross is “undoubtedly” a Christian symbol, “that fact should not blind us to everything else that the Bladensburg cross has come to represent.” See American Legion at 2090. The Munn Park Monument is inscribed to “Confederate Dead.” It states:

*(Left Face)* In memory of that noble band,  
who have crossed the mystic stream,  
and are resting now in that happy land,  
where peace and pleasure reign supreme.

The heroic deeds will never fade,  
from memory's brightest page,  
and their brave defense of country and home,  
is left as a glorious heritage.

*(Right Face)* This monument was erected  
by the Lakeland Chapter  
United Daughters of the Confederacy  
In memory of the noble  
Sons of the South.  
A.D. 1910.

Although the Munn Park Cenotaph has admittedly religious tones, its religious speech is only one aspect of the monument. It too is a “symbolic resting place for ancestors who never returned home,” a community gathering place “to honor all veterans and their sacrifices” and “a historical landmark.” American Legion at 2090

The Pensacola opinion analyzed the various Supreme Court Justices’ views on whether and under what circumstances the passage of time gives rise to a strong presumption of constitutionality. Justice Alito, author of the plurality opinion in American Legion noted a “presumption of constitutionality for longstanding

monuments, symbols, and practices.” See Pensacola at 1326 quoting American Legion 139 S. Ct. at 2080-82, 2081 n. 16, 2087. The plurality emphasized the mandate of interpreting the Establishment Clause with reference to “historical practices and understandings.” Pensacola at 1327 quoting American Legion. Here the Munn Park Monument was dedicated in June 1910, standing much longer than the Pensacola Cross (1941 – wooden, 1969 – concrete) or the Bladensburg Cross (1925) upon which American Legion was based.

So if the Munn Park Cenotaph is only quasi-religious, what application is there of Pensacola and American Legion here? Well, if First Amendment analysis requires a study of historical events, practices, and understandings, how can “history” be integral if it has been selectively extinguished? If the historic speech is silenced or marginalized, where is history to be kept? In private? If as the trial court concluded, putting up the Munn Park monument was protected government speech and taking it down was as well<sup>21</sup>, that turns the “speech” analysis on its head. As the Alabama Supreme Court recently noted, “[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.” City of Birmingham WL 6337424 at \*7 quoting Pleasant Grove City v. Summum 555 U.S. 460, 467, 129 S. Ct. 1125, 1131, 172 L. Ed. 2d 853 (2009).

The “four considerations” to evaluate a particular monument under American

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<sup>21</sup> Gardner v. Mutz, 360 F. Sup. 3d. 1269, 1275-76 (M.D. Fla. 2019).

Legion are: (1) that identifying the original purpose or purposes of a longstanding monument may be especially difficult; (2) that ‘as time goes by, the purposes associated with an established monument, symbol, or practice often multiply; (3) that ‘the message conveyed’ by the monument may change over time; and (4) that ‘when time’s passage imbues’ a monument with “familiarity and historical significance, removing it may appear hostile rather than neutral toward religion.”<sup>22</sup>

Though Munn Park is not squarely an Establishment case, the American Legion proofs as applied in Pensacola are surely applicable to weigh the First Amendment claims of the Appellants against those of the City. Munn Park passes the “four considerations” analysis. The Southern Cross featured on the Cenotaph is a derivative of St. Andrew’s Cross, symbolizing the martyrdom of St. Andrew (brother of St. Peter) an Apostle of Jesus Christ (see Considerations 1 and 2). Some believe the monument is a symbolic resting place for ancestors who never returned home. The inscription on it supra surely communicates that sentiment. For others, it is a historical landmark, having been listed on the National Register of Historic Sites, etc. Other meanings have also been attached even as simple as a focal point for the town center or a work of art (see Considerations 2 and 3). For many, removing the Cenotaph that has stood undisturbed for over a century was not a

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<sup>22</sup> Kondrat'yev v. City of Pensacola, No. 17-13025, (11th Cir. Feb. 19, 2020) at 1322-23

neutral act, but a hostile one, flaunting its “historical acceptance,” degrading a cenotaph’s intended purpose and violating common ideas of respect and tolerance embodied in the Constitution (see Consideration 4).

When the City originally granted permission for erection of the Cenotaph, and in fact, participated financially in its erection, Munn Park was well known as “the public square,” a classical free speech zone and the site of political events, rallies, public displays, art shows, *et cetera*. It continued to be so until the City—despite public opinion, and despite the inability to fund the removal from private donations—acted unilaterally to charge the monument’s speech with one derogatory meaning, symbolically silence the long standing free-speech venue, and to stamp out speech with which it, for a time, disagrees. It narrow-mindedly created one message for the Munn Park Monument and silenced it and all of the varied expressions and alternative interpretations that went with it. In so doing, the City violated the principles of American Legion, Pensacola, and the rights of the Appellants.

#### **IV. THE CITY OF LAKE LAND IS A CONSTRUCT OF THE STATE AND ITS POWERS MAY NOT EXCEED THOSE DELEGATED BY THE STATE**

The Constitution of the State of Florida (see Fla. Const. Art. VIII, § 2) provides that “[m]unicipalities may be established or abolished and their charters amended pursuant to general or special law.” A municipality’s powers come from the State and are to be used to “enable them to conduct municipal government,

perform municipal functions and render municipal services, and [they] may exercise any power for municipal purposes except as otherwise provided by law.”<sup>23</sup> The City of Lakeland, therefore, cannot perform functions that are contrary to and in disharmony with State of Florida policy. See e.g., Lakeworth Utilities Auth. v. City of Lakeworth 468 So. 2d 215, 217 (Fla. 1985).

The State of Florida’s public policy is clearly an ambitious one to protect historical resources. The Munn Park Historic District is recognized by the National Register of Historic Places as historically significant.<sup>24</sup> The City of Lakeland promotes the entire Munn Park Historic District as having been named after the city’s founder and placed on the National Register in 1997. The Park itself, deeded in 1890, has “served as the City’s Town Square and was renovated in 1990.”<sup>25</sup> Undoubtedly the City’s removal of the only Historic Monument in the State’s most

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<sup>23</sup> Fla. Const. Art. VIII, § 2(a) and 2(b).

<sup>24</sup> In its September 19, 1997 application for National Register status with the National Register of Historic Places, the State remarked: “Between 1903 and 1913, Lakeland had grown from 1,200 residents to 8,000. The commercial growth had established a downtown center with the park at its heart, further recognized with the erection in 1910 of the Confederate Memorial statute.” See Munn Park Historic District, National Register of Historic Places Registration Form, Received 09/19/1997 Last Accessed: April 13, 2020: [https://s3.amazonaws.com/NARAprdstorage/lz/electronic-records/rg-079/NPS\\_FL/97001228.pdf](https://s3.amazonaws.com/NARAprdstorage/lz/electronic-records/rg-079/NPS_FL/97001228.pdf) The statue is identified as the lone “contributing object” in the application.

<sup>25</sup> Historic District Summaries, Munn Park Historic District 1 (March 30, 2006) <https://www.lakelandgov.net/media/2404/historic-district-summaries.pdf>.

intact Historic District can only be construed as overreaching its delegated powers at the expense of State policy. The City defendants, by removing the Cenotaph honoring dead soldiers whose remains are scattered elsewhere, have acted unconstitutionally and beyond their authorized charter. The Foundation urges this Court to reinstate Appellants' case and instruct the City to be rightly confined to the proper channels of its power.

#### **IV. MUNICIPALITIES MAY BE EMPOWERED TO ENGAGE IN “GOVERNMENT SPEECH” BUT DO NOT HAVE FIRST AMENDMENT FREE SPEECH RIGHTS**

In the recent Alabama Supreme Court case of State of Alabama v. City of Birmingham 2019 WL 6337424, --So. 3d--, (Ala. Nov. 27, 2019), that Court reversed a trial court's determination that the government had First Amendment rights. Similar to here, the trial court had cited Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995), Rust v. Sullivan, 500 U.S. 173 (1991), and Nat'l Endowment for Arts v. Finley, 524 U.S. 569 (1998) (Scalia, J., concurring) for the proposition that a city has a right to speak for itself, to say what it wishes, and to select the views that it wants to express. But there is a constitutional differentiation that must be made between the proposition that municipalities can speak for themselves versus the claim that they have free speech rights under the First Amendment. See e.g., City of Birmingham. Rosenberger held that the University of Virginia could not engage in viewpoint discrimination by denying a subsidy to a

religious organization that was granted to other organizations. Rust held that Congress could deny federal funds for family-planning services to programs in which abortion is a method of family planning. Finley held that the National Foundation on the Arts and Humanities Act does not impermissibly discriminate on the basis of viewpoint by giving grants to some but not others; Justice Scalia's concurrence addresses the free speech issue in terms of whether Congress can deny funding without violating the First Amendment rights of artists, not whether Congress has First Amendment rights.

The Alabama Supreme Court rejected the proposition that municipalities act as amplified voices of their constituents and that the marketplace of ideas would be unduly restricted if municipalities could not voice their concerns. City of Birmingham at \*11 The fact that the marketplace of ideas can be enhanced by a city engaging in government speech is not the same as the First Amendment guaranteeing a city's right to do so. The Foundation urges this Court to acknowledge that the municipal power to engage in "government speech" is not conveyed to states or municipalities by the First Amendment.

In recent decisions, the U.S. Supreme Court has discussed "government speech" and suggests that government speech is not subject to the same forum analysis and content/viewpoint analysis that is applied to individual speakers. See Sumnum. The right to free speech is part of the "liberty" recognized in the

Declaration of Independence as having been endowed on "all men" by the Creator. The First Amendment guarantees that liberty to individuals and sometimes to associations of individuals, but governments do not have liberties granted to them by God. Rather, governments have powers that are granted by God (Romans 13:1-7) and established by constitutions. The power of a city to engage in government speech is part of the city's plenary power to act for the safety and welfare of its constituents.

In City of Birmingham, the State had codified policy through legislation regarding historic monuments. The City of Birmingham acted in contravention of the law and when challenged by the State's Attorney General, cited Free Speech rights under Sumnum. As in Florida, municipalities in Alabama are established by the State. Birmingham claimed "Government Speech," when deciding to build a structure around a historic monument erected to Confederate soldiers to obstruct it from view. The city argued its newly-minted rights were superior to those of the constitutionally protected free speech rights of individuals expressed through the monument. The trial court held for the City. On appeal, the Alabama Supreme Court confronted the new-sprung "Government Speech" doctrine: "Nothing in Sumnum, Walker, or any authority cited by the City defendants supports the [trial] court's conclusion that a government entity's ability to 'speak' or to engage in expression confers on that government entity the rights and protections included in

the Free Speech Clause of the First Amendment.” City of Birmingham, 2019 WL 6337424, --So. 3d--, (Ala. Nov. 27, 2019)

The City of Birmingham, had also suggested that a city has “inherent rights” of free speech. Again, the Supreme Court refuted that concept: “To the extent the City defendants suggest that the City has an “inherent right” to free speech, we disagree.” Id. As here, in asserting that a city has “inherent rights,” the City of Lakeland defendants incorrectly equate a city with an individual citizen rather than a subdivision of the State.

Florida’s Constitution, as does Alabama’s, echoes the free speech rights of persons versus the State: “Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.” See Fla. Const. Art. 1 §

4. City actors do not enjoy the same protection.

#### **V. STANDING CAN NOT BE SO NARROW AS TO PROHIBIT ACCESS TO CIVIL RIGHTS INFRINGEMENT PLEAS**

The Pensacola decision addressed standing affirming that “at least one” of the Pensacola plaintiffs had standing. Pensacola at 1324 Here, Appellants have stronger standing than in Pensacola, having both specialized economic and non-economic interests, including the ability to visit the Cenotaph at its National Register Historic District site. It is no longer there. Although day old bread is still bread, the Munn Park Appellants have been injured by being told they must eat it. As true successors

to the original donors and the stewards of the history called essential to the analysis in American Legion, these Appellants have better standing than those in Pensacola. Thus, their case should be reinstated.

## CONCLUSION

The Natural Right of free speech is a fundamental underpinning of our Nation guaranteed the individual, not the government. Recognition of these God-given natural rights is what is so exceptional in world history. Speech is one of the natural rights codified in our founding documents and must be protected. Non-controversial speech needs less protection. Speech is the method by which we honor ancestors especially war dead with monuments. A society cannot long endure that teaches its children to hate their ancestors and be ashamed of their heritage. Markers to that heritage deserve First Amendment protection.

The State of Florida, the United States of America and the world community have established policy to protect and preserve culture, history and heritage for many reasons including to foster understanding of different cultures and view.

Monuments stand as voices of the past, what Edmund Burke called the "democracy of the dead" by which their voices live on in remembered tradition. As such, monuments are an intergenerational history lesion, a voice from the past, perhaps even one of dissent, possibly a nagging reminder to the politically-correct orthodoxy and those who blindly adhere to it, that there was a time when people

thought maybe the same as today, or maybe differently. May this voice not be silenced.

Private erectors of public monuments and memorials toil and expend treasure with the expectation of permanence speak once and keep on speaking. Once permission is granted for such erection, the right to continue the monuments' speech is expected to continue after the erectors have departed this life. Accordingly, Appellants deserve their case to be reinstated and their constitutional liberties restored.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17<sup>th</sup> day of April, 2020, I served the foregoing motion upon all counsel of record through the CM/ECF system.

/s/Jack B. Hinton, Jr.

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