No. 17-1717

IN THE
Supreme Court of the United States

THE AMERICAN LEGION, *ET AL.*,

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE AMERICAN LEGION PETITIONERS

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QUESTIONS PRESENTED

In the decision below, the Fourth Circuit held that a 93-year-old memorial to the fallen of World War I is an unconstitutional establishment of religion, merely because it is shaped like a cross. The Fourth Circuit reached this conclusion even though the memorial was designed to be a war memorial, has only ever been a war memorial, has only ever been regarded by the community as a war memorial, and is on public land only because of traffic safety concerns that arose 40 years after the memorial was built. The questions presented are:

1. Whether a 93-year-old memorial to the fallen of World War I is unconstitutional merely because it is shaped like a cross.

2. Whether the constitutionality of a passive display incorporating religious symbolism should be assessed under the tests articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Van Orden v. Perry*, 545 U.S. 677 (2005), *Town of Greece v. Galloway*, 572 U.S. 565 (2014), or some other test.

3. Whether, if the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), applies, the expenditure of funds for routine upkeep and maintenance of a cross-shaped war memorial, without more, amounts to an excessive entanglement with religion in violation of the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners in No. 17-1717 are The American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131, who were defendants-appellees below.

The Maryland-National Capital Park and Planning Commission, respondent on review in No. 17-1717 and petitioner on review in No. 18-18 consolidated herewith, was a defendant-appellee below.

The American Humanist Association, Steven Lowe, Fred Edwords, and Bishop McNeill, respondents on review in both No. 17-1717 and No. 18-18, were plaintiffs-appellants below.

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OPINIONS BELOW

The Fourth Circuit's decision appears at 874 F.3d 195 and is reproduced at Pet. App. 1a. The Fourth Circuit's unreported order denying rehearing *en banc* is reproduced at Pet. App. 82a. The District Court's decision appears at 147 F. Supp. 3d 373 and is reproduced at Pet. App. 50a.

JURISDICTION

The Fourth Circuit's order granting summary judgment to Respondents was entered on October 18, 2017. Pet. App. 1a. Petitioners filed a timely petition for rehearing *en banc*, which was denied on March 1, 2018. Pet. App. 82a-84a. The Chief Justice extended the time for filing the petition to June 29, 2018. The petition for certiorari was granted on November 2, 2018. *See* No. 17A1201. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

"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." U.S. Const., amend. I.

STATEMENT OF THE CASE

I. THE PEACE CROSS

The Bladensburg World War I Veterans Memorial, known locally as the "Peace Cross," is a Celtic-styled Latin cross standing on a large pedestal. The American Legion's symbol is displayed at the intersection of the cross's horizontal and vertical arms, and the words "VALOR", "ENDURANCE", "COURAGE", and "DEVOTION" are inscribed at its base. JA888-89; JA969. On the pedestal is a nine-foot by two-and-a-half-foot bronze plaque, which declares the monument "DEDICATED TO THE HEROES / OF PRINCE GEORGE'S COUNTY, MARYLAND WHO LOST THEIR LIVES IN / THE GREAT WAR FOR THE LIBERTY OF THE WORLD." JA915. The plaque lists the names of the 49 local men who died in World War I ("WWI"), identifies the dates of American involvement, and quotes President Woodrow Wilson's request for a declaration of war: "The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives." JA915. Each of these adaptations is proportionate to the size of the 32-foot-tall Peace Cross, and is readily visible to passersby traveling by foot, vehicle, or other means. JA1528, JA887-90; JA971 (noting Peace Cross is "[a]ccessible" and "unrestricted" to pedestrians); JA1085-86 (same).[1]

The Peace Cross stands in "Veterans Memorial Park," surrounded by several other privately built

[1] A map of Veterans Memorial Park is at JA903. For photographs of the Peace Cross and its neighboring memorials, see JA887-903.

monuments to the Nation's conflicts. JA986-87; JA996. These memorials include (1) a World War II ("WWII") Honor Scroll dedicated by the American Legion in 1944; (2) a Pearl Harbor memorial; (3) a Korea-Vietnam Veterans memorial; (4) a September 11 memorial garden; (5) a Battle of Bladensburg memorial; and (6) two 38-foot-tall soldier statues, one British and one American, on opposite sides of the bridge just to the west. JA1528-30; JA986-95; JA887-904. The park's many memorials—and its location on the site of the infamous Battle of Bladensburg from the War of 1812—have made Bladensburg "the focus of the County's remembrance of its veterans and war dead." JA1961.

II. THE ORIGINS OF THE PEACE CROSS

The Peace Cross traces its origins to the immediate aftermath of WWI, when returning servicemembers and the families of the fallen sought to create a monument to honor their sons and comrades. The builders' decision to create a cross-shaped memorial reflects the fact that, during WWI, crosses became a well-recognized symbol of the losses of the war.

A. Crosses Became A Well Recognized Symbol Of The Losses Of WWI

World War I was a brutal, industrialized war unlike any before, with millions of casualties. JA934-35. Approximately 87,900 American soldiers were killed in just five months of fighting—more than in both Korea and Vietnam. JA935. Around half were buried in overseas battlefield cemeteries, *id.*, most under temporary wooden crosses, JA1146. For servicemembers on the Western Front, the "countless

groups of wooden crosses gathered together to mark the site where soldiers died" were a constant presence. JA940.

Indeed, as Respondents' expert Dr. Kurt Piehler observed in prior publications, "the Cross became the principal grave marker" during WWI, JA1094, and "developed into a central symbol of the American overseas cemetery." JA1143. After the war, Dr. Piehler wrote in 2010, "cross gravestones replaced the widely used wooden crosses that served as temporary grave markers and quickly emerged as a cultural image of the battlefield." JA1127; *see also* JA922 (report of Dr. Jay Winter). Crosses came to symbolize "vast armies of the dead, forever resting on foreign soil," JA938, and, as Dr. Piehler has noted, "signified the dreadful nature of war on the Western Front," JA1127. In fact, the original cover for one of Dr. Piehler's books used an image of crosses and stars in a cemetery to reflect "remembering war the American way." *See* JA1548.

The cross's resonance as a powerful symbol of the fallen was confirmed in the national debate over how to replace the temporary wooden crosses and Stars of David with permanent gravemarkers. Although Congress initially proposed installing marble slabs, many desired to retain the crosses and stars because they had become such a powerful image of the fallen. JA1146. Congress ultimately agreed, recognizing that the markers had become "wooden symbols," "emblematic of the great sacrifices which [the] war entailed." JA1163 (H.R. Res. 15, 68th Cong. at 1 (1924)). A resolution noted the crosses had become "peculiarly and inseparably associated" with the fallen due to widespread imagery in art and poetry.

Id. "The crosses on the graves," one witness testified, "symbolize the American sacrifices in France during [WWI], and our war literature has impressed this fact very forcibly on the minds of the people." JA1199.

Reflecting these sentiments, communities throughout America erected cross-shaped memorials to commemorate those lost in WWI. The Peace Cross is itself within 40 miles of four other cross-shaped WWI memorials: the Wayside Cross in Towson, the Victory Cross in Baltimore, and the Argonne Cross and Canadian Cross of Sacrifice in Arlington National Cemetery. Pet. App. 98a; JA951; JA1453-58. In fact, because "[f]or a substantial number of bereaved families at the end of both world wars, there was no grave or gravesite to visit, or it was beyond their means to travel long distances to go there," many community memorials took on the character of "surrogate grave sites." JA936-37, JA957.

B. The Peace Cross Was Designed To Mirror The WWI Gravemarkers

In Prince George's County, Maryland, in 1919, a Memorial Committee, including the mothers of ten fallen servicemembers, resolved to erect a memorial to the county's fallen heroes. JA989. Consistent with the national sentiment, *see* JA912, the Committee chose to design the memorial in the shape of a cross. Committee treasurer Mrs. Martin Redman explained the reason in a 1920 letter to U.S. Senator John Walter Smith: "[T]he chief reason I feel so deeply in this matter, my son, Wm. F. Redman, lost his life in France and because of that I feel that our memorial cross is, in a way, his grave stone." JA1244.

The Committee partnered with the county Good Roads League, whose fundraising letter stressed the project's commemorative focus:

> *To honor your comrades lost in the War*, we are going to dedicate the National Defense Highway, . . . and build a massive sacrifice cross at [its] beginning . . . *You are to get the names of every person in your community regardless of wealth, nationality, religion, or politics.* These names will be wrapped in an American Flag, placed in a bronze chest, and buried in the foundation of the monument[.]

JA1082-83 (emphases added); *see also* JA1246 (1919 flyer announcing drive to build memorial in "commemoration of their sons who thus died for the cause of democracy" "that future generations may look upon it and remember").

This was a "strictly voluntary undertaking[] of private citizens," JA986, "with a call for everyone to participate, regardless of how small or large the donation," JA1014. Recalling the traditional patriotic rhetoric of the day, the Committee sought donations through pledge sheets which read:

> WE, THE CITIZENS OF MARYLAND, TRUSTING IN GOD, THE SUPREME RULER OF THE UNIVERSE, PLEDGE FAITH IN OUR BROTHERS WHO GAVE THEIR ALL IN THE WORLD WAR TO MAKE THE WORLD SAFE FOR DEMOCRACY. THEIR MORTAL BODIES HAVE TURNED TO DUST, BUT THEIR SPIRIT LIVES TO GUIDE US

> THROUGH LIFE IN THE WAY OF GODLINESS, JUSTICE, AND LIBERTY. WITH OUR MOTTO, "ONE GOD, ONE COUNTRY, AND ONE FLAG," WE CONTRIBUTE TO THIS MEMORIAL CROSS COMMEMORATING THE MEMORY OF THOSE WHO HAVE NOT DIED IN VAIN.

JA1251.

The builders broke ground on the Peace Cross and another WWI memorial—the National Defense Highway (modern-day MD-450) connecting Washington with the U.S. Naval Academy—together at the same ceremony on September 28, 1919. JA1001; JA1024-25. By 1922, however, little progress had been made for lack of funds. JA910-11, JA1345. As a result, the local American Legion post ("Post 3") volunteered to complete the memorial. JA1058. Post 3 assumed the Committee's contracts and the Town of Bladensburg conveyed the land to Post 3, *id.*, that the Peace Cross "might be a finished and fitting tribute to those of our boys who gave their lives in the World War." JA64 (Town of Bladensburg Commissioners' 1922 conveyance to Legion).[2]

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[2] The American Legion is a federally chartered veterans organization founded in 1919 by veterans returning home from WWI. JA1269; JA1265 (federal charter). From its beginning, the Legion has been an inclusive organization, and it has no religious requirements for membership, leadership, or service as a chaplain. *See* JA1048-49; JA1315-17. In fact, Respondents' expert Dr. Piehler remarked that the American Legion was a "remarkably diverse and ecumenical organization" that successfully recruited large numbers of Catholics and Jews after WWI during "an era of substantial nativism." JA1333.

The Legion dedicated the Peace Cross in a patriotic ceremony on July 12, 1925. JA1371-73 (describing ceremony). Representative Stephen Gambrill delivered the keynote. *Id.* Clergy from local Hyattsville churches gave an invocation and benediction. *Id.* The Army Music School band provided music, and representatives from the War Mothers and the Legion also spoke. *Id.*

III. THE COMMISSION'S OWNERSHIP OF THE MEMORIAL

Although the Peace Cross was originally built at the terminus of the National Defense Highway, over time the roads grew busier and expanded around the memorial such that the Peace Cross ended up in the median of a traffic roundabout. Recognizing potential traffic safety hazards from private ownership of the median, in 1935 the state legislature authorized the Maryland Roads Commission to acquire property rights around the Peace Cross. JA420-21 (1935 Maryland Laws 937, Ch. 432); JA1374-75. Eventually, after a series of land transfers in the vicinity of the Peace Cross, the Legion conveyed the land and Peace Cross to the Maryland-National Capital Park and Planning Commission (the "Commission") in 1961, but reserved an easement to conduct veterans' commemorative events on the property, and a reversionary right to intervene and care for the memorial should the Commission ever be unable to do so. *See* JA1384-87 (1961 conveyance from Post 3 to the Commission); JA1377-79; JA1380-83 (Md. Rd. Comm'n Mins., Oct. 25, 1960); JA1480-89 (Md. Rd. Comm'n Deed).

Today, the Commission owns and controls the property, subject to the Legion's reserved interests.

JA920-21; JA1384-87. The Commission provides routine groundskeeping, power for the lighting, and occasional repairs every few decades. JA292-94. In total, the Commission has spent $117,000 on upkeep over the six decades it has owned the Memorial, and has budgeted an additional $100,000 for needed repairs. Pet. App. 28a.

IV. PUBLIC USE AND RECEPTION OF THE MEMORIAL

From its beginning, the community has regarded the Peace Cross only as a commemorative monument. Indeed, accounts from every decade of its existence uniformly refer to it as a memorial to the county's WWI dead. *See, e.g.*, JA1405-08 (1927 & 1929 *Washington Post* articles); JA1409 (1940 *Washington Post* article); JA1005 (describing 1953 commemorative ceremony); JA1014 (1957/58 report describing Peace Cross as a "monument honoring the county's war dead"); JA525 (similar 1965 article), JA1410-11 (similar 1975 article), JA1420-22 (similar 1984 article); JA974 (similar 1996 report); JA1429-30 (similar 2010 report); JA1599-1601 (2015 addition to National Register of Historic Places).

Similarly, the Peace Cross has only ever been used by the community as a commemorative monument. *See* JA911-12; JA1004; JA1390-92; JA1049. Each year, the Legion holds a commemorative event at the Peace Cross on Veterans Day, and a Memorial Day event across the street between the WWII Honor Scroll and the Korea-Vietnam Veterans' Memorial. JA1039; JA1393-94. Those events typically include a presentation of the colors; the national anthem; an invocation by a Legion representative; a welcome message from public officials; remarks by a regional

Legion official; laying of floral wreaths; taps; a benediction by a local Legion representative; and retirement of the colors. JA1473-75 (2014 program).[3]

In stark contrast, Respondents' expert could not identify any religious event at the Peace Cross in its nine-decade history, other than a 1931 event noted in the *Washington Post*. JA1442. That article mentions an out-of-town preacher planned to hold a series of three Sunday services at the Peace Cross in August 1931. JA1432. Nothing in the record, however, confirms whether the services occurred. And there is no evidence that any member of the Bladensburg community has used the Peace Cross for a religious event.

V. THE PROCEEDINGS BELOW

In 2012, the American Humanist Association lodged the first and only known complaint against the Peace Cross, alleging that its presence on public land violates the Establishment Clause. JA1443-51; Pet. App. 98a-99a. Respondents commenced this lawsuit against the Commission in 2014, and the Legion petitioners intervened as defendants to protect their reserved interests in the memorial. Pet. App. 60a. The District Court ruled the memorial constitutional on cross-motions for summary judgment. Pet. App. 81a.

In a 2-1 decision, the Fourth Circuit reversed. The majority acknowledged the government had articulated "legitimate secular purposes for

[3] The Legion post typically uses invocations and benedictions whose themes express respect for the fallen and remembrance of POWs and MIAs. For examples, see JA1397-1404.

displaying and maintaining the [Peace Cross]," which contained "secular elements." Pet. App. 16a, 21a. However, because "[t]he Latin cross is the 'preeminent symbol of Christianity,'" and "for thousands of years . . . has represented Christianity," the majority held crosses possess an "inherent religious meaning" that "easily overwhelm[ed]" the government's secular purposes and the Peace Cross's history and thus had the effect of "endorsing" Christianity. Pet. App. 17a-22a. The majority also held the government had excessively entangled itself with religion by spending funds to maintain the memorial. Pet. App. 27a-28a.

Chief Judge Gregory dissented, arguing the majority had adopted a "*per se* finding[] that all large crosses are unconstitutional despite any amount of secular history and context[.]" Pet. App. 43a. According to Chief Judge Gregory, the panel had "subordinate[d] the Memorial's secular history and elements while focusing on the obviously religious nature of Latin crosses themselves" and "construct[ed] a reasonable observer who ignores certain elements of the Memorial" because they are not immediately obvious to a passing motorist. Pet. App. 40a. He also observed that excessive entanglement requires some engagement with religious institutions or promotion of doctrine, not "merely maintaining a monument within a state park and a median in between intersecting highways that must be well lit for public safety reasons." Pet. App. 48a-49a.

The Fourth Circuit denied *en banc* review by an 8-6 vote, over dissents by Chief Judge Gregory, Judge Wilkinson, and Judge Niemeyer. Pet. App. 83a-84a. Judge Niemeyer noted the panel's decision "puts at

risk hundreds, and perhaps thousands, of similar monuments," including "similarly sized monuments incorporating crosses in the Arlington National Cemetery." Pet. App. 99a-101a. Judge Wynn, a member of the panel, wrote separately to defend the panel's opinion because "[n]othing in the First Amendment empowers the judiciary to conclude that the freestanding Latin cross has been divested of [its] predominantly sectarian meaning" in global history. Pet. App. 85a-86a.

This Court granted certiorari on November 2, 2018.

SUMMARY OF ARGUMENT

The Commission's display and maintenance of the Peace Cross does not violate the Establishment Clause because it does not coerce belief in, observance of, or financial support for religion, and would survive any other test applied by this Court.

I. The Court should clarify that coercion, not endorsement, is the proper standard for Establishment Clause claims.

I.A. First, no clear standard governs this case. Although the Court of Appeals applied the so-called "endorsement test" derived from this Court's decisions in *Lemon v. Kurtzman*, 403 U.S. 602 (1970), and *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), the continuing viability of that test is uncertain. In particular, while upholding sectarian legislative prayer in *Town of Greece v. Galloway*, this Court made clear it would reject any "test" that does not "accord[] with history and faithfully reflect[] the understanding of the Founding Fathers." 572 U.S. 565, 577 (2014)

(quotation marks omitted). And there is no principled basis for concluding that one form of government speech—prayer—is constitutional unless it is coercive while subjecting another form of government speech—passive displays—to a different standard. When considered in light of this Court's inconsistent application of the endorsement test and the substantial criticism of the test from the Justices, other courts, and commentators, it is no surprise this Court must decide whether, as *Town of Greece* indicates, the presence of coercion is a necessary element for an Establishment Clause claim, or whether, as *Allegheny* indicated, government "endorsement" of religion is sufficient.

I.B. Second, the text and history of the First Amendment show the Establishment Clause prohibits religious coercion, not endorsement. The First Amendment is designed to protect religious liberty against government interference—both the positive right to believe and practice according to one's convictions (through the Free Exercise Clause), and the negative right against being compelled to believe or practice contrary to one's convictions (through the Establishment Clause). The history of the First Amendment—which is uniquely relevant when interpreting the Religion Clauses—confirms this interpretation. From the characteristics of the existing establishments in England and several Colonies, and the disestablishment efforts in the States, we know that the use of government power to compel religious belief, practice, or financial support was the essence of "establishment." And, conversely, we know from the actions of the Framers after adoption of the First Amendment that government

actions merely endorsing religion posed no Establishment Clause concern. Thus, each element of history points in the same direction: Coercion, not endorsement, is the standard for an Establishment Clause claim.

I.C. In addition, unlike the coercion standard, the endorsement test does not provide a workable rule of decision. First, the endorsement test is incapable of consistent application and leads to results out of step with history and common sense. Indeed, the endorsement test would (if applied consistently) not only invalidate many practices of the Framers, it would also prohibit many practices approved by this Court or consistent with national traditions. Second, by making a constitutional claim out of feelings of offense and exclusion, the endorsement test grants a heckler's veto over speech supportive of religion that does not apply to any other form of government speech. Restricting only religious speech singles out religious speech for discriminatory treatment and burdens that speech based on its content and viewpoint—thus creating severe tension with both the Free Speech and Free Exercise Clauses. Third, evaluating government action from the perspective of a hyper-knowledgeable "reasonable observer" defeats the test's own goal of protecting plaintiffs from feelings of offense and exclusion, leads to confusion about what information a reasonable observer knows, and often turns on the *mis*perceptions of the hypothetical observer.

Similarly, the fact-bound, multi-factor approach of the concurrence in *Van Orden v. Perry*, 545 U.S. 677 (2005), does not solve, and in many ways exacerbates, the problems inherent in the endorsement test. The

concurrence itself disclaimed it was setting out a new test. And while the factors that proved important to the concurrence adequately resolved *Van Orden*, it is unclear these factors will be equally important in other factual contexts, or that these are the only factors a court should consider.

II. The Peace Cross does not violate the Establishment Clause because it does not coerce religious belief, practice, or financial support—whether through compelled profession or observance, excessive proselytization, or other historically grounded means. As an initial matter, passive displays like the Peace Cross will almost never be coercive because, even more obviously than with legislative prayer and other government speech, a government's use of religious imagery in a passive display does not compel "citizens to support or participate in any religion or its exercise," *Town of Greece*, 572 U.S. at 586 (quotation marks omitted). Thus, consistent with the original meaning of the Establishment Clause, this Court should clarify that passive displays with religious imagery—like the Peace Cross—will not constitute an establishment of religion except in extraordinary circumstances. Here, far from extraordinary circumstances, a memorial honoring war dead is precisely where one would expect to encounter religious imagery in a government display.

III. Finally, if the Court applies the endorsement or other tests, the Peace Cross passes scrutiny. The Peace Cross is not materially distinguishable from the Ten Commandments display upheld in *Van Orden*, which also was privately built, sat among other memorials, and stood unchallenged for decades.

Similarly, because the Peace Cross was built to be a war memorial, has only ever been a war memorial, has only ever been regarded by the community as a war memorial, and is only on government land because of traffic safety concerns arising decades after it was built, a properly informed reasonable observer should conclude the message of the Peace Cross is one of commemoration, not endorsement. Lastly, if the *Lemon*/endorsement test applies, there is no plausible argument that merely providing routine maintenance and groundskeeping for a war memorial that happens to include religious imagery unconstitutionally "entangles" government with religion.

ARGUMENT

I. COERCION, NOT ENDORSEMENT, IS THE PROPER STANDARD FOR ESTABLISHMENT CLAUSE CLAIMS

A. No Clear Standard Governs This Case

The central question in this case is whether the Commission's display and maintenance of the Peace Cross amounts to a "law respecting an establishment of religion" prohibited by the First Amendment. U.S. Const., amend I. To answer that question, the Court of Appeals applied a test derived from this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as subsequently modified in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), *abrogated in part by Town of Greece v. Galloway*, 572 U.S. 565 (2014). [4] That test—the

[4] As originally formulated, the *Lemon* test asked whether government action had a secular purpose, had the primary effect of advancing or inhibiting religion, or created an excessive

"endorsement test"—asks whether a "reasonable observer" would perceive the challenged government action to have the purpose or effect of "endorsing" religion—that is, whether the government action "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Allegheny*, 492 U.S. at 595 (quoting *Lynch*, 456 U.S. at 688).

In stark contrast, however, this Court recently held in *Town of Greece* that opening legislative sessions with prayer does not violate the Establishment Clause unless the practice has been exploited to coerce nonadherents. Rather than the endorsement test, the Court applied the principle that "the Establishment Clause must be interpreted by reference to historical practices and understandings." 572 U.S. at 576 (quotation marks omitted). According to the Court, "[t]hat the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society." *Id.* Particularly because challenged actions "must be evaluated against the backdrop of historical

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entanglement with religion. *Lemon*, 403 U.S. at 612-13. Recognizing that *Lemon* had been substantially criticized, Justice O'Connor suggested in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), that the *Lemon* test should be "clarifie[d]" to prohibit government "endorsement" of religion, *see id.* at 688-89, 691-92. A 5-4 majority of this Court accepted this reformulation of the *Lemon* test in *Allegheny*. *See Allegheny*, 492 U.S. at 592-94.

practice," *id.* at 587 (plurality), the speech in *Town of Greece* satisfied the Establishment Clause because, as with legislative prayer at the Founding, the government did not "compel[] its citizens to engage in a religious observance," "coerce participation by nonadherents," or otherwise "proselytize or force truant constituents into the pews." *Id.* (plurality); *id.* at 592 (majority). Specifically, the practice was non-coercive because "[n]othing in the record indicate[d] that town leaders allocated benefits and burdens based on participation in the prayer, or that citizens were received differently depending on whether they joined the invocation or quietly declined." *Id.* at 589 (plurality).

Town of Greece calls into question the viability of the *Lemon* test and its endorsement standard in at least two respects.

First, in declining to apply the *Lemon*/endorsement test, *Town of Greece* made clear that the Court will reject any Establishment Clause "test" that does not "'accord[] with history and faithfully reflect[] the understanding of the Founding Fathers.'" *Town of Greece*, 572 U.S. at 577 (quoting *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)). This is because the Establishment Clause, even more than other constitutional provisions, "must be interpreted by reference to historical practices and understandings," and "[a]ny test the Court adopts must acknowledge . . . practice[s] that w[ere] accepted by the Framers and ha[ve] withstood the critical scrutiny of time and political change." *Id.* at 576-77 (quotation marks omitted). This does not mean that the practices of the Framers merely "carv[e] out an

exception" to the meaning of the Establishment Clause. 572 U.S. at 575 (citation omitted). To the contrary, *Marsh*—the case upholding legislative prayer—"must *not* be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id.* at 576 (emphasis added). The inquiry is broader than merely asking whether the specific practice challenged was (like legislative prayer) accepted by the Framers. *Id.*; *see also Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring and dissenting) ("Whatever test [the Court] choose[s] to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion."). Rather, discerning the original meaning of the Establishment Clause—its "ultimate constitutional objective"—involves interpreting the text, "illuminated by history," to develop a rule consistent with that history and the practices accepted by the Framers. *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970).

Second, and more specifically, *Town of Greece*'s holding that one form of government speech—public prayer—is unconstitutional only if coercive, should necessarily dictate that another form of government speech—a symbolic display—is subject to the same test. There is no principled distinction between government speech pertaining to religion in the form of a prayer and government speech pertaining to religion in the form of a symbolic display. *Cf. Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("The [Free Speech Clause] literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written

word."). If anything, the Establishment Clause concerns arising from government-sponsored public prayer would far exceed those arising from a static, passive display. Unlike communal public prayer, a passive display that passers-by are free to ignore poses no risk a person must choose either to participate in religious exercise or express disrespect by leaving or declining to stand. *Cf. Lee v. Weisman*, 505 U.S. 577, 593 (1992). Additionally, unlike governmental prayer, a passive display requires no regular monitoring of government speech to enforce the constitutional line. *Cf. Town of Greece*, 572 U.S. at 581. In short, if coercion is a necessary element of a claim that public prayer violates the Establishment Clause, *a fortiori* it must be an element of Establishment Clause claims regarding other forms of government speech pertaining to religion, like passive displays.

This case thus raises the question whether, as *Town of Greece* indicates, the presence of coercion is a necessary element for an Establishment Clause claim, or whether, as *Allegheny* indicated, government "endorsement" of religion suffices. That the Court must decide this question is not surprising. Observations abound that Establishment Clause jurisprudence is in disarray. *See, e.g.*, *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 994-95 (2011) (Thomas, J., dissenting from denial of certiorari). Indeed, perhaps no principle in this Court's jurisprudence is more criticized than the *Lemon*/endorsement test, which has proved unworkable. *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in judgment) (noting "the long list of

constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced"); *id.* at 398 ("Like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence[.]"); Steven Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987) (criticizing endorsement test). Indeed, many current and recent Justices of this Court have expressed their dissatisfaction with this standard. *See* Pet. 20-21 & n.2 (collecting citations).

Moreover, the Court has applied the *Lemon*/endorsement test only intermittently over the past 25 years,[5] and has meanwhile also focused on coercion as a key aspect of an Establishment Clause

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[5] The Court did not apply *Lemon* and the endorsement test in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Van Orden*, 545 U.S. 677; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Town of Greece*, 572 U.S. 565; and *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). The Court applied some form of *Lemon* or the endorsement test in *Agostini v. Felton*, 521 U.S. 203 (1997); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); and *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005).

claim. *See, e.g., Santa Fe*, 530 U.S. at 310-12 (concluding "delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship"); *Lee*, 505 U.S. at 587 ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" (citation omitted)).[6] Indeed, when the Court last considered passive displays with religious imagery, five Justices held that the *Lemon*/endorsement test was "not useful" in resolving the case. *See Van Orden* 545 U.S. at 686 (plurality); *id.* at 699-700 (Breyer, J., concurring in judgment) (finding "no test-related substitute for the exercise of legal judgment"). More recently, Justices Scalia and Thomas stated that "*Town of Greece* [already] abandoned the antiquated 'endorsement test,'" noting

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[6] Although dicta in *Engel v. Vitale*, 370 U.S. 421, 430 (1962), stated that the Establishment Clause "does not depend upon any showing of *direct* governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate *directly* to coerce nonobserving individuals or not," *id.* (emphasis added), this dicta does not mean that a plaintiff need not demonstrate some form of coercion—some identifiable interference with religious liberty—to state a claim under the Establishment Clause. *See* Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 936 (1986). To the extent subsequent cases relied on this dicta for isolated statements that "proof of coercion" is "not a necessary element of any claim under the Establishment Clause," *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 786 (1973); *see also Schempp*, 374 U.S. at 222-23, such language should be understood as similarly limited to "direct" coercion or, if necessary, reconsidered.

that claiming "the endorsement test remains part of the 'prevailing analytical tool' for assessing Establishment Clause challenges misstates the law." *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from denial of certiorari) (citation omitted).

As a result, no clear standard governs this case. For the reasons discussed below, however, the Court should clarify that the Establishment Clause is not violated absent government actions that pose a realistic threat to religious liberty—those that coerce belief in, observance of, or financial support for religion. Mere "endorsement" is not enough. This "liberty-focused" approach is consistent with history, which shows that the essence of an establishment of religion—and the evil the Establishment Clause was designed to address—was government coercion that, by its nature, negated religious liberty. Br. of United States, *Lee v. Weisman*, No. 90-1014, at 6-7, 18 (1991). It also harmonizes the guarantees of the Establishment Clause with those of the Free Exercise and Free Speech Clauses, which require a tangible threat to liberty before constitutional rights are implicated. And it provides a workable standard under which courts can evaluate practices for their likelihood of restraining liberty—an inquiry with which courts are very familiar. *Id.* at 22. The Court should thus clarify that coercion, not endorsement, is the standard for Establishment Clause claims.[7]

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[7] Given *Town of Greece*, a coercion standard must at least apply to government speech. But a coercion standard also works in other Establishment Clause contexts, for example, by prohibiting preferential funding of religious organizations while

B. The Text and History Of The First Amendment Show The Establishment Clause Was Designed To Prohibit Coercion

The First Amendment provides in part that "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof." U.S. Const. amend. I. While the Court has sometimes described an "internal tension" between the clauses, *Hosanna-Tabor*, 565 U.S. at 181 (quotation marks omitted), "the common purpose of the Religion Clauses 'is to secure religious liberty.'" *Santa Fe*, 530 U.S. at 313 (quoting *Engel*, 370 U.S. at 430). The Free Exercise Clause protects liberty by preventing the government from "enact[ing] laws that suppress religious belief or practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). And the Establishment Clause does so by prohibiting "compulsion by law of the acceptance of any creed or the practice of any form of worship." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Together, these "complementary clauses" work in tandem to ensure individuals and religious bodies can decide matters of religious faith and practice themselves. *Everson v. Bd. of Ed.*, 330 U.S. 1, 15 (1947).

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recognizing that non-coercive government efforts to accommodate religion, *cf. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), or to allow religious organizations to participate in neutral government programs, *cf. Mitchell*, 530 U.S. at 816 (plurality), pose no Establishment Clause concerns.

Thus, the Religion Clauses together function analogously to the Free Speech Clause. That clause encompasses "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Similarly, the Free Exercise Clause preserves the positive right to practice freely while the Establishment Clause preserves the negative right not to be compelled or coerced into financially supporting, practicing, or professing what one does not believe.

Founding era dictionaries generally defined "establish" as "[t]o settle firmly; to fix unalterably," "[t]o form or model," "[t]o found; to build firmly; to fix immovably," and an "establishment" as a "[s]ettlement; fixed state," "confirmation of something already done; ratification," "[s]ettled regulation; form; model." Samuel Johnson, *A Dictionary of the English Language* (1768). With respect to religion, moreover, the word "establishment" acquired a particular meaning through its use in laws such as the 1604 Canons of the Church of England, which state that "the Church of England *by law established*, under the King's Majesty, is . . . a True and an Apostolical Church." 1604 Canons of the Church of England, https://www.anglican.net/doctrines/1604-canon-law/ (emphasis added); *see* Douglas Laycock, *Church and State in the United States: Competing Conceptions*, 13 Ind. J. Global Legal Stud. 503, 506 (2006). From this statutory phrase, an "establishment of religion" came to mean the official religion of the realm, designated

by law, enforced by the power of the government, and subject to its authority. [8]

While neither contemporaneous definitions nor general English usage would suggest that an "establishment" of religion could be achieved merely by words of endorsement, "establishment" even more clearly cannot encompass mere endorsement when the term is construed in a way that "accords with history and faithfully reflects the understanding of the Founding Fathers." *Town of Greece*, 572 U.S. at 577 (quoting *Schempp*, 374 U.S. at 294 (Brennan, J., concurring)). Among constitutional provisions, history provides uniquely revealing insight into the meaning of the Establishment Clause. *See Nyquist*, 413 U.S. at 777 (1973). ("Establishment Clause precedents have recognized the special relevance in this area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic.'" (citation omitted)). Based on that history, we know directly what "establishment" means from the characteristics of the existing established religions in England and the Colonies, and the disestablishment efforts in the States. Equally important, we know what

[8] For this reason, while coercion is the standard because coercive laws were the historical hallmark of an establishment, it would also be possible to violate the Establishment Clause by enacting laws or policies that actually purport to establish a religion, even if arguably non-coercive. For example, if a state designated a particular sect the official state religion, this would, by definition, constitute an "establishment" of religion within the original meaning of that term. Coercion becomes relevant when evaluating laws that do not on their face establish a religion, but are nonetheless alleged to interfere with the negative religious liberty protected by the Establishment Clause.

"establishment" did *not* mean from what the Framers said and did after proposing the First Amendment. Thus, this Court has often looked to the Framers' experience to discern the meaning of the Establishment Clause, for "[i]t was against this background that the First Amendment was adopted." *Hosanna-Tabor*, 565 U.S. at 183.

1. At The Founding, The Essential Element Of Religious "Establishment" Was Coercion

Simply put, "establishments," whether in the Colonies or in England, compelled or coerced nonadherents to profess belief in, participate in, or financially support a particular religion. The term would have been unrecognizable to the Framers if used to describe actions that merely endorsed religion with no threat of coercion.

The Church of England has been England's established church since 1534, when the Act of Supremacy made the king head of the church and gave him "authority to reform and extirp[ate] all errors, heresies, and other enormities and abuses." Supremacy Act, 1534, 26 Hen. 8, c. 1 (Engl.), *in* 1 *Statutes Relating to the Ecclesiastical and Eleemosynary Institutions* 178 (Archibald John Stephens ed. 1845). Thereafter, "[v]arious Acts of Uniformity," "tightened further the government's grip on the exercise of religion." *Hosanna-Tabor*, 565 U.S. at 182. "The Uniformity Act of 1662, for instance, limited service as a minister to those who formally assented to prescribed tenets," and a dissenter was "'deprived of all his Spiritual Promotions.'" *Id.* (quoting the Act of Uniformity, 1662, 14 Car. 2, c. 4.). Other laws restrained individual religious freedom by,

for example, limiting public offices to state church members and prohibiting "unlicensed" or dissenting worship services. Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2113-14 (2003).

"Established religion came to these shores with the earliest colonists." *Id.* at 2115. As in England, the colonial establishments were essentially "coercive." *See* René Reyes, *The Mixed Blessings of (Non)Establishment*, 80 Alb. L. Rev. 405, 411 (2017). For example, in 1661 the Virginia House of Delegates enacted the Diocesan Canons, which "warrant particular attention [because] [t]hey constitute a catalog of the essential legislative ingredients for an established church as perceived at the time." McConnell, *Establishment*, at 2118 (describing Canons). "In short, the laws compelled religious observance, provided financial support for the ministry, controlled the selection of religious personnel, dictated the content of religious teaching and worship, . . . and imposed sanctions for the public exercise of religion outside of the established church." *Id.* at 2119. And although the New England colonies "substituted a localized establishment based on the religious convictions of majorities in the various towns," these "establishment[s] had the same essential elements found in the Virginia diocesan canons." *Id.* at 2121.

Gradually, the State establishments evolved into what then-prominent minister William Tennant called a "general establishment," which, although more tolerant of religious differences, still attempted to utilize government power to coerce religious belief

or observance. Leonard W. Levy, *The Establishment Clause* 9-10 (2d ed. rev., 1994) (citation omitted). These general or multiple establishments created "a system in which all residents [we]re required to support, and perhaps to attend, religious worship, but within certain limits may choose which one." McConnell, *Establishment*, at 2124; *accord* Levy, *Establishment Clause*, at 10.

In short, in Colonies with established churches, as in England, the government "sought to compel adherence to one religion or, in some colonies, one of several religions, and . . . sought to restrain adherence to the others." Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 939 (1987). An establishment was thus understood to be "the promotion and inculcation of a common set of beliefs through governmental authority," and "can be summarized in six categories: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the church." McConnell, *Establishment*, at 2131; *see also* Joseph Brady, *Confusion Twice Confounded: The First Amendment and the Supreme Court* 6-7 (1954) (similar). "The establishment and free exercise clauses arose out of these very problems." McConnell, *Coercion*, at 939; *see also* Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 851-53 (1986) (similar).

2. Disestablishment In The States Involved Removing Coercive Laws And Allowing Freedom Of Conscience

In the years before enactment of the Federal Constitution, several States (particularly in the South) began the process of disestablishment. This Court frequently has found Virginia's disestablishment to be particularly instructive as to the Establishment Clause's meaning, both because it was contemporaneous with the creation of the Federal Constitution, and because several of the Founders—most notably James Madison and Thomas Jefferson—played leading roles. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 788 n.5 (1983) (Virginia's history of disestablishment is particularly "instructive, . . . because that colony took the lead in defining religious rights"); *McGowan v. State of Md.*, 366 U.S. 420, 437 (1961) (history surrounding Virginia disestablishment is "particularly relevant in the search for the First Amendment's meaning").

Virginia began its move toward disestablishment with the enactment of its Declaration of Rights in 1776. That Declaration reflected the principle of John Locke that "religion . . . and the manner of discharging it, can be directed only by reason and conviction, not by force or violence[.]" Virginia Declaration of Rights § 16 (1776), *available at* https://perma.cc/N9EF-89WM. In 1779, Jefferson sought to implement this principle with his "Act for Establishing Religious Freedom." According to the Act's preamble, established religion departed "from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate

it by *coercions* on either." Act for Establishing Religious Freedom (1785), *available at* https://perma.cc/JJX3-4RLW (emphasis added). The Act sought to eliminate state coercion in the form of (1) compelled attendance or financial support of religious services; and (2) burdens due to religious beliefs, including religious tests for public office. The Act's substantive provision read as follows:

> [N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or beliefs; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

Act for Establishing Religious Freedom art. II, quoted in *McGowan*, 366 U.S. at 493 (Frankfurter, J., concurring).

While Jefferson's Act would not pass until 1786, its passage was preceded by the proposal of another measure bearing on religious establishment—Patrick Henry's proposed "Assessment Bill," "designed to revive the payment of tithes suspended since 1777." *Everson*, 330 U.S. at 36 (Rutledge, J., dissenting). Debate over the Bill led to James Madison's now-famed Memorial and Remonstrance Against Religious Assessments, called "the most concise and the most accurate statement of the views of the First

Amendment's author concerning what is 'an establishment of religion.'" *Id.* at 37.

Madison's Memorial and Remonstrance repeatedly condemns the Assessment Bill for its use of *force*, making clear that the chief evil of an establishment is coercion. *See id.* at 64-72 (Memorial at Preface (Assessment Bill "will be a dangerous abuse of power" if "armed with the sanctions of a law"), para. 1 (quoting Declaration of Rights that "the duty which we owe to our Creator" may not be directed "by force or violence"), para. 3 (arguing "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment"). Madison did not address, much less repudiate, government use of religious symbolism or language in a general sense; to the contrary, he concluded his argument by "earnestly praying" to "the Supreme Lawgiver of the Universe" that his intervention would turn the Assembly "from every act which would affront his holy prerogative." *Id.* at 71-72.

Madison's efforts not only assured the Assessment Bill "was at once abandoned," but also sped Jefferson's Religious Freedom Act to final passage. Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* 497 (1902). That Act, quoted above, officially achieved disestablishment in Virginia by ensuring no one would be "compelled to frequent or support" a church or "bur[d]ened" on account of his religion. Religious Freedom Act, art. II.

Many other states prohibited establishments with similar language.[9]

3. The Debates In Congress Over The First Amendment Show The Establishment Clause Was Designed To Prevent Coercion

While the original Constitution "had no provisions safeguarding individual liberties, such as freedom of speech or religion," many state representatives pressed for a formal Bill of Rights. *City of Boerne v. Flores*, 521 U.S. 507, 549-50 (1997) (O'Connor, J., dissenting). At the convening of the First Congress, "Rhode Island and North Carolina flatly refused to ratify the Constitution" without such amendments, while "New Hampshire, New York, and Virginia" proposed "in one form or another a declaration of religious freedom." *Wallace v. Jaffree*, 472 U.S. 38, 93 (1985) (Rehnquist, J., dissenting). Notably, the amendments proposed by Virginia, North Carolina, and Rhode Island all mirrored Virginia's Declaration of Rights, affirming that religion "can be directed only by reason and conviction, not by force or violence." 2 J. Elliot, *Debates on the Federal Constitution* 485 (1828) (Virginia); 3 *id.* at 212 (1830) (North Carolina); 4 *id.* at 223 (Rhode Island).

Madison fashioned this guidance into a proposed amendment: "The civil rights of none shall be abridged on account of religious belief or worship, nor

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[9] *See, e.g.*, Pa. Const. art. II (1776); N.J. Const. art. XVIII (1776); Del. Const. art. I, § 1 (1792); Ky. Const. art. XII, § 3 (1792); Vt. Const. ch. I, art. 3 (1793); Tenn. Const. art. XI, § 3 (1796); Ohio Const. art. VIII, § 3 (1802); Conn. Const. art. VII, § 1 (1818).

shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 *Annals of Cong.* 433 (J. Gales ed. 1834). The Select Committee adjusted the amendment to read: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 729.

Though debate on this proposal was limited, Madison made clear the proposed amendment was intended to prevent government coercion, stating he "apprehended the meaning of the words to be, that Congress should not establish a religion, and *enforce* the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience." *Id.* (emphasis added). Representative Benjamin Huntington of Connecticut, immediately following Madison's comments, stated he also "understood the amendment to mean what had been expressed by" Madison. *Id.* Madison further explained that the goal was to prevent a circumstance where "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would *compel* others to conform." *Id.* (emphasis added).

While Representative Samuel Livermore of New Hampshire moved for modified language to be reported out of committee—"Congress shall make no laws touching religion, or infringing the rights of conscience"—unrecorded debates in the House and Senate resulted in a return to the "establishment" language before the First Amendment was accepted. *Jaffree*, 472 U.S. at 97 (Rehnquist, J., dissenting). But throughout these alterations, all parties focused on *coercive* state activity: "Madison did not suggest that

the Establishment Clause put government out of the business of [per]suasion; neither did anyone else in 1789." *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 136 (7th Cir. 1987) (Easterbrook, J., dissenting).

4. The Conduct Of The Framers Confirms That Non-Coercive Actions Did Not Raise Establishment Clause Concerns

As described above, the Framers' experience under an established church in England and several States led to laws prohibiting religious coercion and promoting freedom of conscience. But their contemporaneous actions just as strongly confirm they did not regard expression merely endorsing religion, where no coercion was present, to raise any Establishment Clause concerns.

Rather, as this Court has observed, there "is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. And "references to the Almighty [have] run through our laws, our public rituals, [and] our ceremonies" since the Founding. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); *see also Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in judgment).

"[H]istory is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncement of the Founding Fathers and contemporary leaders." *Lynch*, 465 U.S. at 675. Indeed, this Nation's founding document—the Declaration of Independence—appeals "to the Supreme Judge of the world" and "the protection of Divine Providence," and grounds its claim to

independence in "the laws of nature and of nature's God" and the truth that all men "are endowed by their Creator with certain unalienable Rights." The Constitution dates itself from "the Year of our Lord," and it exempts Sunday from the count of days for the President to sign a bill of Congress, *see* U.S. Const., art. I, § 7. It also permits the Nation's leaders to take an "Oath" of office—an inherently religious action.[10]

The early Presidents all included invocations of God in their inaugural addresses and Presidents Washington, Adams, and Madison issued proclamations recommending prayers of thanksgiving. *Lynch*, 465 U.S. at 675 & n.2; *see also* 1 *Messages and Papers of the Presidents*, 1789-1897, at 43-46, 56, 218-22, 274-76, 309-12, 451-53, 517-18 (J. Richardson ed. 1897); 3 Anson Stokes, *Church and State in the United States*, 180-93 (1950). For example, in what he called his "first official act," President George Washington's 1789 inaugural address began with "fervent supplications to that Almighty Being who rules the Universe[.]" 1 *Messages and Papers* at 44. He added, "No people can be bound to acknowledge and adore the Invisible Hand . . . more than those of the United States." *Id.*

Likewise, the day after proposing the Establishment Clause, Congress urged President

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[10] *See* Samuel Johnson, "Oath," *A Dictionary of the English Language* (1755) ("[a]n affirmation, negation, or promise, corroborated by the attestation of the Divine Being"); T. Blount, *Nomo-Lexicon: A Law-Dictionary*, "Oath" (1691) ("a calling of Almighty God to witness that the Testimony is True"); Br. of United States, *Lee v. Weisman*, No. 90-1014, at 13-15 (1991) (discussing Oath Clause).

Washington "to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God.'" *Lynch*, 465 U.S. at 675 n.2 (citation omitted). Washington's subsequent proclamation offered "our prayers and supplications to the Great Lord and Ruler of Nations," beginning a pattern by which "his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration." *Id.*; *see, e.g.*, Proclamation of John Adams Recommending a National Day of Humiliation, Fasting, and Prayer (Mar. 23, 1798), 1 *Messages and Papers* 258-60 (Thanksgiving proclamation asking God "through the Redeemer of the World, freely to remit all our offenses, and to incline us by His Holy Spirit to . . . sincere repentance and reformation").

Congress also made clear that it saw the promotion of religion—as distinct from any coercion in its practice—as proper. After adapting it to the new Constitution, Congress reauthorized the Northwest Ordinance—which provided that education "shall forever be encouraged" because "[r]eligion, morality, and knowledge" are "necessary to good government and the happiness of mankind." Northwest Ordinance, ch. 8, 1 Stat. 50 (1789); *see also McCreary*, 545 U.S. at 886-900 (Scalia, J., dissenting). Moreover, the first Congress adopted the Great Seal, which still appears on the back of all dollar bills. The reverse side of the Great Seal contains the Eye of Providence and the motto *Annuit Coeptis*, meaning "He [God] has favored our undertakings," which "allude[s] to the many signal interpositions of providence." U.S. Dep't of State Bureau of Public Aff., *The Great Seal of the*

United States 4-5 (2003), https://perma.cc/94WY-5MMT.

Given that legislation "passed by the first [C]ongress assembled under the [C]onstitution" is "contemporaneous and weighty evidence of its true meaning," these initial enactments suggest the Framers saw no Establishment Clause concern with acts endorsing religion or using its symbols. *State of Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888), *overruled in part by Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268 (1935); *see also Marsh*, 463 U.S. at 790 (Framers' "actions reveal their intent").

And, of course, the judiciary joined its coordinate branches in incorporating non-coercive religious expression into its governmental activities: "Since the days of John Marshall," this Court has begun each session requesting that "God save the United States and this Honorable Court." *Engel*, 370 U.S. at 446 (Stewart, J., dissenting).

States that banned establishment also nonetheless employed religious expression or imagery. For example, Rhode Island, which never had an established religion, adopted in 1664 a seal depicting an anchor with the word "Hope" above it, alluding to the Book of Hebrews' statement that "hope we have as an anchor of the soul." Origins of the Seal of the State of Rhode Island, RI.gov, https://perma.cc/HJQ8-LCXN. Similarly, although New York had no established church, the New York legislature declared shortly before the Establishment Clause's adoption that "it is the duty of all wise, free, and virtuous governments, to countenance and encourage virtue and religion." Act of April 6, 1784, ch. 18, 1784 N.Y. Laws 613. And Delaware's

constitution urged "all persons frequently to assemble for the public worship of Almighty God," while simultaneously foreclosing "compelled" worship. Del. Const., art. I, §1 (1792).

The understanding that government could endorse or acknowledge religion without running afoul of the Establishment Clause continued through the Civil War and the 1868 ratification of the Fourteenth Amendment, through which the Establishment Clause came to apply to state government entities like the Commission. For example, the now-national motto—"In God We Trust"—was originally placed on gold and silver coins in 1865. *See* Act of March 3, 1865, ch. 100, § 5, 13 Stat. 518. To support his Emancipation Proclamation, President Lincoln invoked "the gracious favor of Almighty God." Emancipation Proclamation, ¶ 8, https://perma.cc/J6AS-6Q99. Lincoln's Second Inaugural Address comments extensively on "the judgments of the Lord" for the Nation's history of slavery. Second Inaugural Address, ¶ 3, https://perma.cc/9E4X-RN2L. And many Civil War memorials included crosses and other religious imagery. *See Trunk v. City of San Diego*, 660 F.3d 1091, 1100 (9th Cir. 2011) (Bea, J., dissenting from denial of reh'g *en banc*) (noting at least 114 Civil War memorials incorporating crosses, including two at Gettysburg).

Religious symbolism remains no stranger to our public life today, including at the modern Court, which has long featured in its frieze "a notable and permanent . . . symbol of religion: Moses with Ten Commandments" alongside other lawgivers. *Lynch*, 465 U.S. at 677.

This list is by no means exhaustive. But the foregoing suffices to confirm that historically, as long as the coercive power of the government was not employed, the Establishment Clause did not preclude government actions that merely endorsed religion.

C. Only A Coercion Standard Provides A Workable Approach That Does Not Create Tension Within The First Amendment

While this history alone is sufficient to show that coercion is a necessary element of an Establishment Clause claim, the various problems inherent in the endorsement test make clear that only a coercion standard provides a workable approach, faithful to history, that does not create tension within the First Amendment.

1. The Endorsement Test Is Inconsistent With Practices Accepted By The Framers, This Court's Precedent, And National Traditions

First, the endorsement test (if applied consistently) would produce results fundamentally incompatible with the actions of the Framers, this Court's precedents, and the Nation's traditions.

For one, many actions taken by the Framers, described above, unquestionably endorse religion. The endorsement test therefore is not merely ahistorical; it is antihistorical. "Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past . . . . Neither result is

acceptable." *Allegheny*, 492 U.S. at 674 (Kennedy, J., concurring and dissenting). For this reason alone, the endorsement test must be abandoned. "If there is any inconsistency between any of those tests and [a] historic practice . . . , the inconsistency calls into question the validity of the test, not the historic practice." *Town of Greece*, 572 U.S. at 603 (Alito, J., concurring).

However, not only would the endorsement test, if applied by its terms, sweep away practices of the Framers, it would also sweep away practices this Court has upheld. Certainly, legislative prayer would not have survived a test that turns on whether religion is endorsed, *see id.* at 569, but neither would religious accommodations such as RLUIPA and RFRA, *see Cutter*, 544 U.S. at 714; Ten Commandments monuments, *Van Orden*, 545 U.S. at 681 (plurality); nor programs providing benefits to special needs children attending religious schools, *see Zobrest*, 509 U.S. at 3. In each of these cases, the Court declined to apply the endorsement test, basing its decision instead on different precedent or a fact-specific analysis. Indeed, over the past 25 years, applying the endorsement test has been the exception rather than the rule for this Court. *See supra* note 5.

Nor would the endorsement test permit longstanding national traditions, such as the reference to "under God" in the pledge of allegiance, the national motto "In God We Trust," the Eye of Providence on the Great Seal, and the call to begin sessions of this Court. Indeed, the federal government's decision to make Christmas a national holiday would, under *Allegheny's* reasoning, send a message to those who do not celebrate Christmas that

they are "outsiders." Nonadherents who live in Corpus Christi, Texas, or Las Cruces, New Mexico, are likely confronted with their "outsider" status every day. If any of these matters came to the Court, the Court must either strike them down as an impermissible endorsement of religion, or not apply the endorsement test at all. A standard that cannot be applied consistently is no standard.

2. The Endorsement Test Creates Tension Within The First Amendment

Second, the endorsement test creates tension with the liberties guaranteed by both the Free Exercise and Free Speech Clauses.

Consider how the endorsement test functions: it directs courts to condemn government speech, verbal or non-verbal, simply because it reflects or honors the religious beliefs of some, but not all, members of the community. And any member of the community may request such condemnation on the grounds that mere exposure to that speech made the plaintiff feel like an outsider.

"Our tradition assumes that adult citizens . . . can tolerate" religious speech "delivered by a person of a different faith." *Town of Greece*, 572 U.S. at 584. But the endorsement test reverses that vital tradition of tolerating different views, instead excluding religious speech from the public sphere solely because of its viewpoint and content. This creates two interrelated problems that would be unequivocally rejected in other First Amendment contexts.

At the threshold, the notion that mere exposure to government speech that offends or makes one feel excluded gives rise to a constitutional claim is unthinkable for any other First Amendment claim. Both the Free Speech Clause and the Free Exercise Clause require some tangible deprivation of liberty—not mere offense or feelings of exclusion—before constitutional protections are implicated. Consequently, the endorsement test has wrought an "endless stream of litigation," Stephen Carter, *Reflections on the Separation of Church and State*, 44 Ariz. L. Rev. 293, 309 (2002), regularly "elevat[ing] the trivial to the proverbial 'federal case,' by making benign signs and postings subject to challenge." *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring). [11]

More important, by treating exposure to speech endorsing religion as a constitutional injury, the endorsement test authorizes a heckler's veto mandating censorship of the offense-giving speech.

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[11] To be sure, this Court has held that "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is framed in constitutional terms." *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982). But such limitations on standing are impossible to enforce when the endorsement test makes feelings of offense and exclusion a constitutionally significant injury, which is why the lower courts routinely grant standing on this basis. *See, e.g.*, *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086-87 (4th Cir. 1997) (collecting cases). Conversely, requiring a plaintiff to plead some government action that coerces religious belief or practice ensures Article III standing is predicated on a sufficiently *concrete* injury, because "[o]ffense . . . does not equate to coercion." *Town of Greece*, 572 U.S. at 589 (plurality).

Critically, no such veto is available to silence any *secular* message by the government—including many that are legitimately offensive to a great number of citizens. "A government entity has the right to speak for itself. It is entitled to say what it wishes, and to select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009) (quotation marks and citations omitted). "'To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.'" *Id.* at 468 (quoting *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting)). "Were the Free Speech Clause interpreted otherwise, government would not work." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015).

These principles mean that, while "a government entity is ultimately accountable to the electorate and the political process for its advocacy," *Summum*, 555 U.S. at 468 (quotation marks omitted), it ordinarily is free under the Constitution to give offense until checked at the ballot box. These offenses can range from the minor annoyance felt by Democrats having to travel through *Ronald Reagan* National Airport (to say nothing of former members of the air traffic controller union), to the sincere and understandable anger many people feel at state preservation of Confederate monuments, which many see as inseparable from the horrors of slavery. These feelings of offense and exclusion are just as sincerely felt as those of Respondents, but do not give rise to a constitutional claim without some tangible impact on

a person's liberty. *See Elmbrook*, 134 S. Ct. at 2283 (Scalia, J., dissenting from denial of certiorari).

Because a "heckler's veto" is allowed *only* against religious speech, this converts the Establishment Clause into a rule that singles out religious speech for censorship and discriminatory, adverse treatment based on its content. And the ratchet is only one-way; neither the Free Speech nor Free Exercise Clause restricts government from *disparaging* the beliefs of religious adherents absent a tangible burden on speech or exercise. Plainly, a constitutional rule through which government is free under those Clauses both to endorse secular beliefs and disparage religion, but may not say anything positive about religion, would have been inconceivable to the Framers.

This rule's stark tension with this Court's Free Speech and Free Exercise decisions is vividly illustrated here. A decision by the Commission in 1961 to upkeep all memorials in Veterans Memorial Park, *except* those with religious symbols, would have raised serious questions about religious discrimination. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (state cannot "expressly den[y] a qualified religious entity a public benefit solely because of its religious character"). Had it instead opened Veterans Memorial Park to all privately sponsored monuments honoring veterans *except* those with religious symbols, it may well have violated the Free Speech Clause. *See, e.g.*, *Pinette*, 515 U.S. at 761 (plurality opinion) ("State's interest in avoiding official endorsement of Christianity" insufficient to bar Klan cross from traditional public forum).

It is illogical and anomalous to conclude that the Establishment Clause *requires* federal courts in 2018 to *mandate* the religious discrimination *prohibited* in 1961. Yet the endorsement test does precisely that. It holds that, among all means of memorializing our fallen servicemen—including those like Confederate memorials that may give secular offense—only religious symbolism must be singled out for discriminatory exclusion.

By contrast, recognizing that the Establishment Clause is not implicated until government action coerces religious belief or practice reconciles the complementary guarantees of the First Amendment. This interpretation is directed at the evil of the Framers' concern, preserving the negative liberty of nonadherents whose positive liberty is protected by the Free Exercise Clause. *See supra* at I.A. It avoids the unnecessary "conflict[]" between the Religion Clauses caused when the endorsement test questions even efforts to accommodate religion to satisfy the Free Exercise Clause. *See, e.g.*, *Cutter*, 544 U.S. at 719. And it restricts only the same sort of speech that may be restricted under the Free Speech Clause—that which causes real harms having a tangible impact beyond mere offense. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (city could punish Klan cross-burning on equal terms with other inciting or intimidating speech); *cf. Pinette*, 515 U.S. at 770-71 (Thomas, J., concurring) ("In Klan ceremony, the cross is . . . a tool for the intimidation and harassment of racial minorities" and others.).

In short, there is no reason to preserve an endorsement test that gratuitously keeps the Establishment Clause and the Free Exercise Clause

"frequently in tension," *Locke v. Davey*, 540 U.S. 712, 718 (2004), just to condemn government actions that do not coerce, whether through direct compulsion, excessive proselytization, or other historically grounded means.

3. The Endorsement Test's "Reasonable Observer" Needlessly Complicates The Analysis

Third, the problems inherent in the endorsement test are compounded by the use of a "reasonable observer" to evaluate the constitutional claim. This "reasonable observer" is (at least sometimes) a "hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement." *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (plurality).

As an initial matter, asking whether a hypothetical, incredibly well-informed reasonable observer feels excluded, rather than whether the particular plaintiff feels excluded, will necessarily not accomplish the endorsement test's goal—preventing plaintiffs and like-minded individuals from feeling like outsiders. There may be circumstances where the hypothetical observer, knowing more than the plaintiff about the background of the government action, does not feel excluded even though the plaintiff actually does. That is because the plaintiff is often, in fact, simply a casual passer-by.[12]

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[12] Thus, contrary to Justice O'Connor's opinion in *Pinette*, the reasonable observer standard is not "similar to the 'reasonable person' in tort law," 515 U.S. at 779 (O'Connor, J., concurring); that inquiry asks what a reasonable person in the

Moreover, even after decades of case law attempting to describe the reasonable observer, it still is unclear what the reasonable observer knows in any given case. *Pinette* illustrates the problem. There, the Court had to decide whether a cross on public land next to city hall erected by the Ku Klux Klan violated the Establishment Clause. The Court ultimately held that the endorsement test does not apply to private speech on government property, but several of the Justices nonetheless discussed how the reasonable observer would view the display. Justice Stevens believed the reasonable observer should be the average observer. *See* 515 U.S. at 807 (Stevens, J., dissenting). Justice Souter believed the reasonable observer should be an "intelligent observer"—one who is not "obtuse," but who does not necessarily know everything about a display's history. *Id* at 785-86 (Souter, J., concurring) (citation omitted). Justice O'Connor, however, worried that judging a display from the perspective of average or intelligent observers would turn the endorsement standard into an absolute prohibition on religious symbolism "so long as some passersby would perceive a governmental endorsement." *Id.* at 779 (O'Connor, J., concurring). She therefore believed the reasonable observer should be a person in possession of all the knowledge available. *Id.*

Particularly given this confusion, under the reasonable observer test, all we know is "that a crèche displayed on government property violates the

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same circumstances and with the *same level of knowledge and judgment* expected under those circumstances would do. *See, e.g.*, Restatement (Second) of Torts § 289 (1965).

Establishment Clause, except when it does not"; "a menorah displayed on government property violates the Establishment Clause, except when it does not"; "[a] display of the Ten Commandments on government property also violates the Establishment Clause, except when it does not"; and "a cross displayed on government property violates the Establishment Clause, as the [Fourth] Circuit held here, except when it does not." *Utah Highway Patrol, Inc.*, 565 U.S. at 1001-04 (Thomas, J., dissenting from denial of certiorari) (collecting cases). Decisions under the endorsement test thus lack "the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *See McCreary*, 545 U.S. at 890-91 (Scalia, J., dissenting).

This kind of confusion has been replicated in the lower courts: In one case, the reasonable observer knew detailed municipal history and was even familiar with Spanish idioms. *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1024, 1033-34 (10th Cir. 2008). In another case—in the same court—the observer was simply a "passing motorist" who drove by a memorial at 55 miles per hour without bothering to find out what was written on the memorial or why it was there. *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1121 (10th Cir. 2010); *see also id.* at 1108 (Gorsuch, J., dissenting from denial of reh'g *en banc*) ("[O]ur observer continues to be biased, replete with foibles, and prone to mistake."). At best, the endorsement test defies consistent application. At worst, "[t]he unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause

challenges turns on judicial predilections." *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring).

Relatedly, the endorsement test's focus on the "effect" on the reasonable observer leads to internally inconsistent results. If, as this Court has suggested, the reasonable observer "must be deemed aware of the history and context of the community and forum in which the religious display appears," *McCreary*, 545 U.S. at 866 (citation and punctuation omitted), then, logically, no display maintained with a secular motivation could be regarded by the reasonable observer as endorsing religion. Yet many courts regularly find such displays unconstitutional. Here, in fact, even after the court concluded the government's purpose was to honor veterans and safely preserve a historically significant war memorial, the reasonable observer somehow misunderstood the government's message as one of religious endorsement. The reasonable observer knew a great deal about how crosses have been perceived throughout global history, but he failed to understand the basic history of this memorial and the government's admittedly secular purposes in displaying it. In fact, the reasonable observer did not even get out of his car to read the plaque on the front of the Peace Cross, which would have removed any question that it was intended to send a commemorative message. Thus, "the legitimacy of a government action . . . turn[ed] on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion." *McCreary*, 545 U.S. at 901 (Scalia, J., dissenting).

Unfortunately, these problems appear to be irremediable: As Justice Kennedy observed in

Allegheny, the "test could provide workable guidance to the lower courts, if ever, only after this Court has decided a long series of . . . display cases, using little more than intuition and a tape measure." 492 U.S. at 675 (Kennedy, J., concurring and dissenting). And, as Justice Scalia observed: "[E]ven when one achieves agreement upon [the reasonable observer], it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any beholder, the average beholder, or the ultra-reasonable beholder (as the case may be) would think. It is irresponsible to make the Nation's legislators walk this minefield." *Pinette*, 515 U.S. at 768 n.3 (plurality).

4. The Fact-Specific Approach Of The *Van Orden* Concurrence Does Not Solve The Problem

In *Van Orden v. Perry*, this Court considered whether a Ten Commandments monument on the Texas State Capitol grounds violated the Establishment Clause. 545 U.S. 677. After declaring the *Lemon* test "not useful in dealing with the sort of passive monument" at issue, a plurality of this Court looked instead to "the nature of the monument and . . . our Nation's history." *Id.* at 686 (plurality). It found the Decalogue's "undeniable historical meaning" for the Nation placed it in "the rich American tradition of religious acknowledgments" that do not violate the Establishment Clause. *Id.* at 690.

Justice Breyer issued an opinion concurring in the judgment, which lower courts have concluded is the "controlling opinion." *See, e.g.*, *Card v. City of Everett*, 520 F.3d 1009, 1017 n.10 (9th Cir. 2008) (applying

Marks v. United States, 430 U.S. 188 (1977)). The concurrence found "no test-related substitute for the exercise of legal judgment" in evaluating the monument. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in judgment). It observed that although the "Commandments' text undeniably has a religious message," "encourag[ing] disputes concerning the removal of longstanding depictions . . . from public buildings" could create the "religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.* at 700, 704. After examining the particular facts of the monument, the concurrence concluded it was constitutional. *Id.* at 703-05.

The concurrence's approach does not solve, and in many ways exacerbates, the problems inherent in the endorsement test. Indeed, the concurrence itself disclaimed its usefulness as a new test, suggesting instead that the constitutional question must be resolved on a case-by-case basis, considering the totality of the circumstances, by using "legal judgment." 545 U.S. at 700.

In any event, the concurrence's approach suffers from the same basic flaws as the endorsement test itself. For one, although the concurrence declined to apply the three-part test of *Lemon*, it still fundamentally sought to determine whether the government's action endorsed religion. *See id.* at 703. But this modified endorsement test is no more grounded in history than the endorsement test itself.

Moreover, by requiring the exercise of "legal judgment" after case-by-case analysis of the totality of the circumstances, the concurrence's approach is even more malleable than the reasonable observer approach. And while the factors that proved

important to the concurrence adequately resolved the case in *Van Orden*, it is not clear whether these factors will be equally important in other factual contexts, whether these are the only factors that should be considered, or whether different circumstances might call for an analysis of different factors. In short, the *Van Orden* concurrence fails to provide the workable, consistently applicable standard of decision that should govern claims of a constitutional violation.

II. THE PEACE CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE IT IS NOT COERCIVE

The Peace Cross does not violate the Establishment Clause because it does not coerce belief in, observance of, or financial support for religion. There is simply no argument that the Peace Cross compels anyone to make a religious profession, has been exploited to excessively proselytize, mandates any form of religious exercise, or involves any other historically grounded form of coercion.

As an initial matter, passive displays like the Peace Cross will almost never be coercive precisely because they are "passive." *See Allegheny*, 492 U.S. at 662 (Kennedy, J., concurring and dissenting). ("Where the government's act of recognition or accommodation is passive and symbolic, . . . any intangible benefit to religion is unlikely to present a realistic risk of establishment.").

More basically, *Town of Greece* explained that "in the general course[,] legislative bodies do not engage in impermissible coercion merely by exposing their constituents to prayer they would rather not hear and in which they need not participate." *Town of Greece*,

572 U.S. at 590 (plurality). This was because "[o]ffense . . . does not equate to coercion," for "[a]dults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum." *Id.* at 589. The plurality acknowledged "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissenters for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity." *Id.* at 588. But where "nonbelievers [could] choose to exit the room during a prayer they find distasteful," no Establishment Clause claim was appropriate. *Id.* at 590.

Even more obviously than legislative prayer, a government's use of religious imagery in a passive display does not compel "citizens to support or participate in any religion or its exercise." *Id.* at 586 (citation and punctuation omitted). "Passersby who disagree with the message conveyed by these displays are free to ignore them just as they are free to do when they disagree with any other form of government speech." *Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring and dissenting). Indeed, passive displays pose a far lower risk of coercion than legislative prayer. There is virtually no chance that a passer-by will be "single[d] out" for disagreeing with the display and, unlike communal speech such as public prayer, a passive display cannot possibly exert even subtle pressure to "participate." *See supra* at I.A. In short, if the sectarian legislative prayers upheld in *Town of Greece* were not coercive, surely a static war memorial

must survive. *Allegheny*, 492 U.S. at 665 (Kennedy, J., concurring and dissenting); *cf. Lynch*, 465 U.S. at 681.

Thus, consistent with the original meaning of the Establishment Clause, this Court should make clear that passive displays with religious imagery—like the Peace Cross—are presumptively non-coercive and thus cannot constitute an establishment of religion except in extraordinary cases. There may be the rare case where a passive display is sufficiently coercive to violate the Establishment Clause, but courts can address these cases "in the regular course." *See Town of Greece*, 572 U.S. at 589 (plurality). Absent such a case, a government's symbolic use of religious imagery will not constitute the kind of traditionally coercive practice the Establishment Clause forbids.[13]

Here, far from extraordinary circumstances, a memorial honoring war dead is precisely where one would expect to encounter religious imagery in a government display. In addition to the crosses at Arlington National Cemetery, Pet. App. 98a, the Nation has a long history of honoring those who have fallen in war with symbols that have religious significance. *See Buono*, 559 U.S. at 721 (plurality) (discussing cross that "evokes thousands of small crosses in foreign fields marking the graves of

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[13] In analyzing coercion generally, historical silence cuts in favor of upholding the practice, not against it. That is because the plaintiff bears the burden of showing the government action is akin to practices that would have been considered an "establishment of religion" when the First Amendment was enacted. *See Lynch*, 465 U.S. at 673 (Establishment Clause interpretation should "comport[] with what history reveals was the contemporaneous understanding of its guarantees").

Americans who fell in battles"); *Trunk*, 660 F.3d at 1100 (Bea, J., dissenting from denial of reh'g *en banc*) (noting at least 114 Civil War memorials incorporating crosses); *Kondrat'yev v. City of Pensacola*, 903 F.3d 1169, 1180 (11th Cir. 2018) (Newsom, J., concurring) ("[T]he erection of crosses as memorials is a practice that dates back centuries, and . . . for a long time now, we . . . have been commemorating the role that religion has played in our history through the placement and maintenance of cross monuments." (citing examples)). And wholly apart from history, it is natural to expect religious imagery in connection with our honored dead. After all, the contemplation of death and the possibility of the afterlife is perhaps the most basic element of any religion. It should come as no surprise that the Peace Cross's original builders decided to use religious imagery to honor their deceased loved ones, particularly given that the cross-shaped gravemakers in battlefield cemeteries had become such a powerful symbol of the losses of the war. *See supra* Statement of the Case II.A; *Buono*, 559 U.S. at 721. The record here is unequivocal that the Commission did not exploit the Peace Cross to proselytize or otherwise compel religious observance. *See Town of Greece*, 572 U.S. at 583.

To be sure, the Peace Cross uses a sectarian symbol to honor the fallen servicemembers, but that poses no real threat of establishment here. For one, the history of the First Amendment and the practices of the Framers demonstrate no general prohibition against sectarian government speech. *See id.* at 578; *id.* at 595 (Alito, J., concurring). In addition, a rule prohibiting government use of sectarian symbols in

passive displays makes no sense. All passive displays using religious symbols are likely to be sectarian, as it is difficult to conceive of a non-sectarian religious symbol. A prohibition on sectarian religious symbols would thus devolve into a flat prohibition on religious symbolism, which is neither neutral toward religion nor called for even by current law. On the other hand, mandating inclusion of multiple symbols would be unworkable, as it will never be possible to include a wide enough range of symbols to satisfy all onlookers. *See id.* at 581-82; *id.* at 595 (Alito, J., concurring).

Finally, although not necessary to resolve the coercion question, all of the facts discussed below further confirm the obvious—the Commission's display and maintenance of the Peace Cross is not coercive.

III. THE PEACE CROSS SURVIVES ANY OTHER TEST APPLIED BY THIS COURT

Even if the Court decides to apply the endorsement or other tests, the Peace Cross should survive scrutiny.

A. The Fourth Circuit's Decision Cannot Be Reconciled With *Van Orden*

The Peace Cross would survive the fact-specific inquiry of the *Van Orden* concurrence.

First, as in *Van Orden*, the "circumstances surrounding" the Commission's ownership of the Peace Cross "suggest[s] that the State itself intended the . . . nonreligious aspects of the [Peace Cross's] message to predominate." 545 U.S. at 701 (Breyer, J., concurring in judgment). Here, the Commission owns the Peace Cross only because of roadway expansion and traffic safety concerns. Pet. App. 56a-57a, 77a.

And even the court below found the State's decision to retain the memorial served secular purposes. Pet. App. 16a.

Second, the "context suggests that the State intended the display's [commemorative] message . . . to predominate." *See Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment). As in *Van Orden*, the seal of the original private builder—the American Legion—is prominently displayed on the Peace Cross, joined by a plaque that explains its commemorative purpose. Moreover, as in *Van Orden*, the Peace Cross is located near other monuments that "provide a context of history," *id.*—remembering those who died in the Nation's conflicts. And, as in *Van Orden*, the Peace Cross's location in a traffic roundabout "suggests little or nothing of the sacred," and "does not readily lend itself to meditation or any other religious activity." *Id.*

Third, while 40 years passed before the *Van Orden* monument was challenged—a factor the concurrence found "determinative," *id.*—almost *90* years passed before the first complaint against the Peace Cross. "[T]hose [90] years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the [Peace Cross] as . . . a government effort" to endorse religion. *Id.* "[T]o reach a contrary conclusion here, based primarily on the religious nature of [crosses] would . . . lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions," and "create . . . religiously based divisiveness." *Id.* at 704.

B. The Peace Cross Satisfies The *Lemon*/ Endorsement Test

1. The Peace Cross Does Not Have The Purpose Or Effect Of Endorsing Religion

The Court of Appeals correctly determined that the Commission's purpose in maintaining the Peace Cross was to commemorate, not endorse religion. Pet. App. 16a. Properly understood, that is also its effect.

Under *Lemon* and *Allegheny*, a display "endorses" religion if it sends "a message to nonadherents that they are outsiders, not full members of the political community." *Allegheny*, 492 U.S at 625, 627 (O'Connor, J., concurring) (quotation marks omitted). Despite the confusion it has engendered, properly understood, "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." *Pinette*, 515 U.S. at 779 (O'Connor, J., concurring). Nor does the "endorsement" test require courts to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens." *Allegheny*, 492 U.S at 623 (O'Connor, J., concurring). At bottom, the *Lemon*/endorsement test asks whether, in light of history and context, a fully informed objective member of the community would conclude the government intended to endorse religion. Here, no "reasonable observer" would so conclude.

First, the reasonable observer should know the Peace Cross's history: that the Commission came to own it only because of traffic safety concerns, that the Commission has never expressed religious motivation

for its ownership or maintenance of the Peace Cross, and that the Peace Cross's private builders used a cross to mirror the gravemarkers under which their loved ones were buried abroad.

Second, the reasonable observer should know how the community has responded to the Peace Cross. In the near-century it has stood, the community has used the Peace Cross as a site for hundreds of events honoring veterans. By contrast, the record mentions only a single religious event that (may have) occurred at the Peace Cross, and that was in 1931 by an out-of-town preacher. Moreover, the community has responded to the Peace Cross by adding other secular commemorative monuments—and no religious monuments—around the memorial. In short, for almost 100 years, the community has treated the Peace Cross as it would any other secular war memorial. If the reasonable observer's goal is to determine what message the community would take from the display, this history should be dispositive.

Third, the reasonable observer should be aware of the various secular elements on the Peace Cross that explain its message—namely, the large plaque that identifies it as a memorial honoring 49 men who died in WWI, the military-themed words on the base, and the American Legion's symbol in the center.

2. Spending Money For Groundskeeping And Routine Maintenance Of A War Memorial Does Not "Entangle" Government With Religion

Nor is there any entanglement problem with the Commission's expenditure, over the course of *six*

decades, of $117,000 to maintain the Peace Cross and grounds. As this Court has made clear, "'comprehensive, discriminating, and continuing state surveillance' [is] necessary to fall afoul of this [entanglement] standard." *Mueller v. Allen*, 463 U.S. 388, 403 (1983) (quoting *Lemon*, 403 U.S. at 619); *see also Agostini*, 521 U.S. at 233-34.

Here, the Commission engaged only in routine upkeep of the Peace Cross, such as groundskeeping, lighting, and occasional repairs every few decades. *See* Pet. App. 59a-60a. And there is no evidence of religious events at the Peace Cross since the Commission took ownership in 1961. As the District Court correctly held, this was not entanglement.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Fourth Circuit.

Respectfully submitted,

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