NOS. 17-1717, 18-18

In the Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al*.,
Respondents.

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

BRIEF OF *AMICI CURIAE* AMERICAN CENTER FOR LAW & JUSTICE AND LT. GEN. ROBERT R. BLACKMAN, USMC (RET.) IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amicus, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for *amici*, *e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

In addition, the ACLJ has represented numerous local governments in challenges involving passive displays, both in this Court, *Pleasant Grove City v. Summum*, and in the lower courts, *e.g.*, *ACLU of Kentucky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc); *Soc'y of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000). The ACLJ also filed an *amicus* brief in support of the State of Texas in *Van Orden v. Perry,* 545 U.S. 677 (2005), and in support of the certiorari petitions in this case.

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[1] The parties in this case have consented to the filing of this brief. The blanket consent letters of the parties are on file with the Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from *amici* or counsel for *amici* made a monetary contribution intended to fund the preparation or submission of this brief.

The ACLJ therefore has considerable legal expertise in the subject matter at issue.[2]

Amicus, Lieutenant General Robert R. Blackman, USMC (Ret.), was commissioned into the Marine Corps from Cornell University in 1970. Among other key assignments over 37 years of active service, Lt. Gen. Blackman served as Chief of Staff of the Coalition Forces Land Component Command during Operation Iraqi Freedom; Commanding General, III Marine Expeditionary Force; and Commander, Marine Corps Forces Command. After leaving active service, Lt. Gen. Blackman served with the Marine Corps' Marine Air-Ground Task Force Training Program and Joint Warfighting Center advising and mentoring operational commanders and staffs. Lt. Gen. Blackman has served as President and CEO of the Marine Corps Heritage Foundation since March 2011 and will retire at the end of this year.

Lt. Gen. Blackman believes that the Peace Cross is an important and laudable commemoration of the forty-nine men of Prince George's County who perished while serving their country with bravery and distinction during World War I. He believes that a decision by this Court affirming the judgment below could have a widespread and damaging impact on other monuments throughout the nation that honor those who have made the ultimate sacrifice in defense of their country.

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[2] This brief is also submitted on behalf of more than 230,000 supporters of the ACLJ as an expression of their support for the Bladensburg World War I Veterans Memorial, known also as the Peace Cross.

SUMMARY OF ARGUMENT AND INTRODUCTION

Relying on this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and the imputed perceptions of a "reasonable observer," the Fourth Circuit ordered the removal of a near century-old monument dedicated to the memory of local soldiers who perished in the Great War. What's in need of dismantling in this case, however, is not the memorial at issue, but the confounding jurisprudence used by the court below in reaching its erroneous conclusion. Indeed, if there is any inconsistency between *Lemon* and the monument of civic piety at issue in this case, that inconsistency calls into question the continuing validity of *Lemon*, not the constitutionality of the Peace Cross.

This case presents the Court with an opportunity to resolve an important and ongoing legal conflict over diametrically opposed applications of the Establishment Clause. That principal conflict, however, is not so much between decisions of the lower courts, or even between lower courts and decisions of this Court. Rather, now is the time to resolve a conflict between decisions *of this very Court*, regarding, no less, the very same subject matter: passive displays with both historical and religious import. While in *Van Orden v. Perry,* 545 U.S. 677 (2005), this Court eschewed *Lemon* in upholding a display of the Ten Commandments in Texas, in *McCreary County v. ACLU*, 545 U.S. 844 (2005), it struck down, based squarely on *Lemon*, displays of the Decalogue in Kentucky.

Since *Van Orden* and *McCreary* were decided, however, this Court provided a framework for resolving

the conflict between these two decisions (in addition to settling much of the disarray of Establishment Clause jurisprudence in general) in *Town of Greece v. Galloway*, 572 U.S. 565 (2014). As the rationale of that decision suggests, there is no need for this Court, not to mention the lower courts, to continue to use *Lemon* and the perceptions of a "reasonable observer" in adjudicating Establishment Clause challenges, at least with respect to passive displays.

The more appropriate criteria for evaluating Establishment Clause challenges, as articulated in *Town of Greece*, is to look to (1) historical practices and understandings, and (2) whether the state action at issue imposes unwarranted governmental coercion on others. This jurisprudential measure will not only give lower courts a more objective standard to decide cases, it will provide state and local governments firmer guidance when deciding whether to undertake or defend state action in this much litigated area of law.

Finally, even before reaching the merits of the case, this Court should reject the notion of "offended observer" standing as inconsistent with the requirements of Article III of the Constitution. Feelings of offense or exclusion upon viewing a passive display, such as the one contested here, do not amount to an "injury in fact" for purposes of legal standing. The public forum and political process are more appropriate avenues to address grievances of this nature than the federal courts, whose power to address cases and controversies is closely circumscribed.

The Court should reverse.

ARGUMENT

I. The much-maligned test of *Lemon v. Kurtzman* continues to cause confusion and conflict.

Few tests used by this Court in adjudicating constitutional matters have been subject to more criticism than the *ad hoc*, tripartite analysis adopted in *Lemon v. Kurtzman* and its subsequent refinement to include a "reasonable observer's" perceptions of religious endorsement.[3]

The jurisprudence arising out of *Lemon* has been criticized by members of the Court for decades.[4] It has

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[3] *Lemon* requires (1) a secular purpose; (2) that the principal or primary effect be one that neither advances nor inhibits religion; and (3) that the governmental practice not create an excessive entanglement with religion. 403 U.S. at 612-13. *Lemon*'s endorsement refinement was first articulated by Justice O'Connor in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring), and was adopted by a majority of the Court in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

[4] *See*, *e.g.*, *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from denial of certiorari) (lamenting the "infinitely malleable standard [that] asks whether governmental action has the purpose or effect of 'endorsing' religion"); *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 997 (2011) (Thomas, J., dissenting from denial of certiorari) ("Our jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases."); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763-68 (1995) (plurality opinion) (criticizing reliance on "perceived endorsement"); *Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in judgment in part and dissenting in part) ("[T]he endorsement

also long befuddled the courts of appeal, where judges "struggl[e] mightily to articulate when government action has crossed the constitutional line" in light of "the Supreme Court's failure to 'prescribe a general analytic framework within which to evaluate Establishment Clause claims.'" *American Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1156 (10th Cir. 2010) (citation omitted). The First Amendment doctrine in this area has been described as a "judicial morass," *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1235 n.1 (10th Cir. 2009) (Kelly, J., dissenting from the denial of rehearing en banc), "rife with confusion," *Croft v. Perry*, 624 F.3d 157, 165 (5th Cir. 2010), and, more starkly put, "purgatory." *Mercer Cnty.*, 432 F.3d at 636.[5]

District court judges have also bemoaned the state of Establishment Clause jurisprudence following *Lemon*. As the district court in this very case succinctly put it: "Establishment Clause jurisprudence is a law

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test is flawed in its fundamentals and unworkable in practice."); *Wallace v. Jaffree,* 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) ("The three-part test [of *Lemon*] has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize.").

[5] *See also Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 9 n.16 (1st Cir. 2010) (noting that "the *Lemon* analysis has been often criticized, including by members of the Supreme Court"); *Skoros v. City of N.Y.*, 437 F.3d 1, 24 (2d Cir. 2006) ("[W]e recognize that the reasonable objective observer standard, like other aspects of the *Lemon* test, is subject to criticism."); *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003) (beginning Establishment Clause inquiry with the "obligatory observation that the *Lemon* test is often maligned"); *ACLU v. Schundler*, 104 F.3d 1435, 1440 (3d Cir. 1997) (recognizing "the much-maligned test arising out of *Lemon v. Kurtzman*").

professor's dream, and a trial judge's nightmare." *Am. Humanist Ass'n v. Md.-National Capital Park & Planning Comm'n*, 147 F. Supp. 3d 373, 381 (D. Md. 2015). And in another cross-display case, in which a petition for a writ of certiorari is currently pending, the district court summarized current jurisprudence as "historically unmoored, confusing, inconsistent, and almost universally criticized by both scholars and judges alike." *Kondrat'yev v. City of Pensacola*, No. 3:16-cv-195, 2017 U.S. Dist. LEXIS 203588, at *4 (N.D. Fla. June 19, 2017), *aff'd* 903 F.3d 1169 (11th Cir. 2018), *petition for cert. filed*, Sep. 17, 2018 (No. 18-351); *see also Felix v. City of Bloomfield*, 36 F. Supp. 3d 1233, 1247 (D.N.M. 2014) ("[I]n performing the role of [the reasonable] observer, the Court is thrust into a realm of pretend and make-believe, guided only by confusing jurisprudence and its own imagination.").

The lower courts cannot be blamed for their exasperation over current Establishment Clause doctrine. As observed by two members of the Court last term, "[t]his Court's Establishment Clause jurisprudence is in disarray. Sometimes our precedents focus on whether a 'reasonable observer' would think that a government practice endorses religion; other times our precedents focus on whether a government practice is supported by this country's history and tradition." *Rowan Cnty. v. Lund*, 138 S. Ct. 2564, 2564 (2018) (Thomas, J., dissenting from denial of certiorari, joined by Gorsuch, J.).

A. *Van Orden* and the missing reasonable observer

The inconsistent nature of this Court's Establishment Clause teaching that has caused confusion at every level of the federal judiciary is seen most concretely in two cases decided on the very same day: *Van Orden* and *McCreary*.

In *Van Orden*, this Court upheld a passive display of the Ten Commandments on the grounds of the Texas State Capitol. While the Fifth Circuit used *Lemon* to decide that case, holding that that the monolith was created with a valid secular purpose and did not impermissibly endorse religion, *Van Orden v. Perry*, 351 F.3d 173, 180, 182 (5th Cir. 2003), this Court did not. In a plurality opinion, Chief Justice Rehnquist noted that the "test" derived from *Lemon* was simply "not useful in dealing with the sort of passive monument" like the one at issue in that case. The plurality noted that *Lemon* and its "prongs" were described as providing "no more than helpful signposts" only two years after that decision was handed down, and the test had only been selectively used by this Court in deciding challenges under the Establishment Clause. *Van Orden*, 545 U.S. at 686 (plurality opinion).

Instead of applying any part of *Lemon*'s test to the Texas monument, and doubting "the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence," the plurality undertook an "analysis . . . driven both by the nature of the monument and by our Nation's history." 545 U.S. at 686. Surveying the country's legal and cultural heritage, it held that even though the Ten Commandments are unquestionably

religious, they also have "an undeniable historical meaning." *Id*. at 690.

Based on that dual significance of the Decalogue, "partaking of both religion and government," the plurality ruled that Texas's display of the monument, standing among other monuments "representing the several strands in the State's political and legal history," was consistent with the demands of the Establishment Clause. *Id*. at 690-91.

Justice Breyer concurred in the judgment only. Like the plurality, Justice Breyer did not use *Lemon* to evaluate the monolith's legality. While he opined that the display might survive the Court's more formal Establishment Clause tests, *id*. at 703 (Breyer, J., concurring in the judgment), Justice Breyer preferred instead to apply "the exercise of legal judgment," an analysis that would "reflect and remain faithful to the underlying purposes of the Clauses, and . . . take account of context and consequences measured in light of those purposes." *Id*. at 700. Evaluating the underlying case-specific facts of the case in tandem with these purposes, Justice Breyer believed that the Texas display "falls on the permissible side of the constitutional line." *Id*. at 703.

In neither the plurality decision nor Justice Breyer's concurrence did *Lemon* and the "reasonable observer" play any role. It was not necessary to decide whether this hypothetical observer thought that the State of Texas was advocating the Ten Commandments as a religious code, a moral code, both, or neither. This observer's feelings of exclusion (or not), his religious sensibilities, or his thoughts of religious endorsement at viewing the monument were simply not relevant.

B. *McCreary County* and the omnipresent reasonable observer

In *McCreary*, by contrast, *Lemon*'s "ghoul" arose from his slumber in Texas to "stalk[]" county courthouses in Kentucky. *See Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in judgment). In fact, not only did *McCreary* explicitly reject the invitation to abandon *Lemon*, 545 U.S. at 861, the *McCreary* Court gave *Lemon* the determinative and decisive role in deciding the case. Moreover, the *McCreary* Court not only employed *Lemon*'s secular purpose prong, it refashioned that criterion from meaning that the government must have "a secular . . . purpose" to the "heightened requirement that the secular purpose 'predominate' over any purpose to advance religion." *Id*. at 901 (Scalia, J., dissenting).

While notably absent in *Van Orden*, the "reasonable observer"—a "most unwelcome[] addition" to Establishment Clause jurisprudence, *Allegheny*, 492 U.S. at 668 (Kennedy, J.)—was fully present in *McCreary*, shrewdly watching the history of Ten Commandments displays as they were placed on county courthouse walls.

When the counties first displayed the Ten Commandments, standing alone in a gold frame, the observer "could only think that the Counties meant to emphasize and celebrate the Commandments' religious message." 545 U.S. at 869. When the counties first altered the contents of their displays, by adding other documents in smaller gold frames, the observer "could not forget" the original display. *Id*. at 870. The Court opined that "reasonable observers have reasonable memories." *Id*. at 866.

With respect to the third and final displays (incorporating copies of historical documents like Magna Carta and the Mayflower Compact), the disbelieving observer could not "swallow the claim that the Counties had cast off the [religious] objective so unmistakable in the earlier displays." *Id*. at 872. The observer was, moreover, "perplex[ed]" and "puzzled" by the choices made by the counties in what to display alongside the Decalogue. *Id*. Even though the Counties in the third display tried to emphasize the dual religious-historical-significance of the Decalogue by including other historical texts, the doubting observer would nonetheless "probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality." *Id*. at 873. In other words, the "reasonable observer," once convinced that a government agency had failed to comply with the Establishment Clause on its first attempt, would harbor a lingering prejudice in which that first try would "taint" all future efforts with irremediable unconstitutionality.

It was these thoughts, perceptions, confusions, and suspicions of the make-believe (and omnipresent!) reasonable observer that led the Court to conclude that the displays at issue had an impermissible "predominantly religious purpose," and therefore violated the Establishment Clause.[6] *Id*. at 881. While

[6] Because the breadth of the reasonable observer's knowledge is uncertain—somewhere between omniscient and a "casual passerby," *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment)—it is little wonder, as noted by the Court itself in *McCreary*, that the lower court judges in that case couldn't agree on what the "reasonable observer" would

McCreary acknowledged "that the Commandments have had influence on civil or secular law," *id*. at 869, *Lemon* and its reasonable observer trumped that history.

The conflict between *Van Orden* and *McCreary*/*Lemon* is clear, and the ensuing confusion cannot be denied. Undoubtedly, "appellate judges seeking to identify the rule of law that governs Establishment Clause challenges to public monuments . . . have their hands full after *McCreary* and *Van Orden*." *Green*, 574 F.3d at 1245 (Gorsuch, J., dissenting from the denial of rehearing en banc).

II. *Town of Greece* resolves the conflict between *Van Orden* and *McCreary/Lemon.*

The confusion created by *Lemon*, as concretely seen in the conflict between *Van Orden* and *McCreary*, cannot be allowed to continue and should be resolved here and now. Not only are the lower courts plagued by the lack of clarity, so too are state and local governments. Governments deciding whether to create or defend a prior existing display with religious connotations must undertake the all but impossible task of navigating the imperceptible line between *Van Orden* and *McCreary*. And failure to succeed at that guesswork can come at a very real cost. So long as attorney's fees are permitted under 42 U.S.C. § 1988 for prevailing Establishment Clause plaintiffs, local

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conclude. 545 U.S. at 858 n.8. Indeed, it's "unrealistic to expect different judges . . . to reach consistent answers as to what any beholder, the average beholder, or the ultrareasonable beholder (as the case may be) would think." *Pinette*, 515 U.S. at 769 n.3 (plurality opinion).

governments will not just have to look to this Court's conflicting precedents, but limited financial resources, in determining whether to proceed with such a display or to defend one in court. For many of these localities, the safer course will be to "purge from the public sphere all that in any way partakes of the religious," rather than gamble on what a court would opine a reasonable observer would think. *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in judgment).[7]

In resolving the conflict between *Van Orden* and *McCreary / Lemon*, however, this Court need not write on a blank slate. Nine years after those decisions, and fully consistent with *Van Orden*, the Court in *Town of Greece* provided an objective jurisprudential framework for resolving future Establishment Clause challenges, such as the one at issue here. That framework does not involve the application of one or more prongs of the maligned *Lemon* test or the subjective task of discerning a reasonable observer's perceptions.

Instead, *Town of Greece* requires that a reviewing court look to two related measures: (1) historical practices and understandings, and (2) coercion. As the Eighth Circuit recently observed: "This two-fold analysis is complementary: historical practices often

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[7] The defendant counties in *McCreary*, for example, were ordered to pay in excess of $400,000 in attorney's fees and costs on account of what the reasonable observer concluded in that case. *ACLU of KY v. McCreary Cnty., KY*, Case No. 6:99-cv-00507-JBC (E.D. Ky. March 13, 2009) (ECF Doc. 195). McCreary County, a relatively poor area, was unsure whether paying its share of the attorney's fees would "require layoffs or cutbacks in other services." *Pulaski pays $230,000 in fees in 10 Commandments case*, Lexington Herald Leader (Sept. 10, 2011), https://tinyurl.com/y95ltv5n (last visited Dec. 6, 2018).

reveal what the Establishment Clause was originally understood to permit, while attention to coercion highlights what it has long been understood to prohibit." *Doe v. United States*, 901 F.3d 1015, 1020 (8th Cir. 2018).

A. Historical practices and understandings

In *Town of Greece*, this Court decided whether sectarian invocations at the beginning of town council meetings were consistent with the Establishment Clause. The Second Circuit reasoned that because "an objective, reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity," the prayers were unconstitutional. *Galloway v. Town of Greece*, 681 F.3d 20, 33 (2d Cir. 2012).

In reversing that decision, however, this Court—as in *Van Orden*—did not suggest that the Second Circuit misapplied *Lemon*, or any of its prongs, or that the "reasonable observer" would conclude differently. In fact, except for being cited once in dissent, *Lemon* is nowhere invoked, or even mentioned, in *Town of Greece*. 572 U.S. at 615 (Breyer, J., dissenting).[8] The Court thus dispensed with divining the mind of a hypothetical "reasonable observer" to determine endorsement and adopted a different analysis entirely.

Stating emphatically that "the Establishment Clause *must* be interpreted 'by reference to historical practices and understandings,'" 572 U.S. at 576

[8] The term "reasonable observer" appears once, but only in passing and not as an invocation of the "endorsement test." *Id*. at 587.

(quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J.) (emphasis added)), the Court looked to objective and historical facts. It held that the line that must be drawn "between the permissible and the impermissible" under the Establishment Clause has nothing to do with the reasonable observer and his perceptions of endorsement, but instead must be "one which accords with history and faithfully reflects the understanding of the Founding Fathers." *Id.* at 577 (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

Importantly, *Town of Greece* nowhere suggests that this history-based approached is limited to the context of legislative prayer. In fact, the Court in *Town of Greece* made it clear that though its decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), has sometimes been called an "exception" to Establishment Clause jurisprudence, 572 U.S. at 576, *Marsh* "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id*. In other words, historical practices and understandings are not a basis for holding that an otherwise unconstitutional practice or display should be permitted, but a standard for determining their constitutionality in the first place. *See Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. at 2284 (Scalia, J., dissenting from denial of certiorari) ("*Town of Greece* left no doubt that the Establishment Clause must be interpreted by

reference to historical practices and understandings.") (internal quotations omitted).[9]

Moreover, "the relevance of history is not confined to the inquiry [of] whether the challenged practice itself is a part of our accepted traditions dating back to the Founding." *Allegheny*, 492 U.S. at 669 (Kennedy, J.). Rather, "[w]hatever test we choose 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." *Id*. Thus, nowhere does *Town of Greece* (or any other decision, for that matter) suggest that *only* practices engaged in by the founding generation could withstand an Establishment Clause challenge. While, for example, the tradition of this Court's invocation, "God save the United States and this Honorable Court," may not stretch back all the way back to the founding of the Court, it is nonetheless a tradition in keeping with the Founders' understanding of what the Establishment Clause allows. The same rationale applies to the Pledge of Allegiance, the National Motto, Presidential proclamations and speeches that invoke the Divine, etc. *Town of Greece*, 572 U.S. at 587; *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 25-30 (2004) (Rehnquist, C.J., concurring in the judgment).[10]

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[9] *See also* Eric Rassbach, Town of Greece v. Galloway*: The Establishment Clause and the Rediscovery of History*, 2013-14 Cato Sup. Ct. Rev. 71, 84 (noting that, in *Town of Greece*, the Court has "introduce[d] a 'historical override' to all Establishment Clause claims," and "*Marsh*'s historical analysis trumps the *Lemon* test, not the other way around").

[10] As Michael McConnell has observed: "The early practice in the Republic was replete with governmental proclamations and other actions that endorsed religion in noncoercive ways, without

Finally, *Town of Greece*'s historical approach is fully consistent with this Court's observations that there is an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life," *Van Orden*, 545 U.S. at 686, and that a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution," *Lee v. Weisman*, 505 U.S. 577, 598 (1992). In fact, this Court has previously noted that "religion has been closely identified with our history and government," *Schempp*, 374 U.S. at 212; that "[o]ur history is replete with official references to the value and invocation of Divine guidance," *Lynch*, 465 U.S. at 675; that "[w]e are a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); and that "[t]he history of man is inseparable from the history of religion," *Engel v. Vitale*, 370 U.S. 421, 434 (1962). Undoubtedly, "this Nation's history has not been one of entirely sanitized separation between Church and State," nor has it ever "been thought either possible or desirable to enforce a regime of total separation." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).

The historical approach adopted by this Court in *Town of Greece* comports with these prior statements of the Court far more than the *ad hoc*, ahistorical test of *Lemon*, where religious symbolism must be sanitized, or contextualized out of all meaning, in order

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favoring one sect over another. . . . The Religion Clauses were not directed against the evil of perceived messages, but of government power." *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 155 (1992).

to pass constitutional muster. *See*, *e.g.*, *Allegheny*, 492 U.S. at 674 (Kennedy, J.) (criticizing a "jurisprudence of minutiae," where a "reviewing court must consider whether the city has included Santas, talking wishing wells, reindeer, or other secular symbols as 'a center of attention separate from the creche'"); *Van Orden*, 545 U.S. at 690 ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.").

B. Display of the Peace Cross is consistent with the historical purposes and understandings of the Establishment Clause.

Looking at the "nature of the monument" at issue in this case, *Van Orden*, 545 U.S. at 686, and the "historical practices and understandings" of the undeniable role religion has played in the character and culture of this country, *Town of Greece*, 572 U.S. at 576, it is clear that public display of the monument here does not violate the Establishment Clause.

The cross was not erected with the intent to proclaim Christianity as the government-sanctioned religion of Prince George's County. It was not created to be a center of religious worship or to honor and praise the Christian faith. The cross, quite simply, but profoundly, was erected to honor forty-nine men who made the ultimate sacrifice in defense of their country. *Am. Humanist Ass'n ("AHA") v. Md.-National Capital Park & Planning Comm'n*, 874 F.3d 195, 200 (4th Cir. 2017). As the monument itself reads, in capitalized letters: "[T]his memorial cross [is] dedicated to the heroes of Prince George's County, Maryland who lost

their lives in the great war for the liberty of the world." *Id*. at 216.

Indeed, what a plurality of this Court observed in *Salazar v. Buono*, 559 U.S. 700 (2010), regarding a similar memorial, with a similar history, applies with equal force here:

> Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message. . . . Placement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers.

559 U.S. at 715 (Kennedy, J., plurality).

The fact that a cross was chosen as the object to memorialize the soldiers, instead of a poppy or some other symbol from World War I, *see AHA*, 874 F.3d at 207 n.10, does not doom the monument from the start, as the panel below all but suggests. Instead, as was noted in *Salazar*,

> a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. . . . It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose

> tragedies are compounded if the fallen are forgotten.

559 U.S. at 721 (Kennedy, J., plurality).

In fact, it has been a long historical practice in this country, consistent with the historical understanding of the Establishment Clause, to use the symbol of the cross in the context of giving honor to members of the armed forces. As has been correctly observed, as a straightforward factual and historical matter:

> 114 Civil War monuments include a cross; the fallen in World Wars I and II are memorialized by thousands of crosses in foreign cemeteries; Arlington Cemetery is home to three war memorial crosses, and Gettysburg is home to two more; and military awards often use the image of a cross to recognize service, such as the Army's Distinguished Service Cross, the Navy Cross, the Air Force Cross, the Distinguished Flying Cross, and the most famous cross meant to symbolize sacrifice—the French "Croix de Guerre."

Trunk v. City of San Diego, 660 F.3d 1091, 1100 (9th Cir. 2011) (Bea, J., dissenting from the denial of rehearing en banc).

As in *Salazar* and *Van Orden*, the Peace Cross permissibly partakes of both the religious and the secular. By no means is it a "treacherous step towards establishment of a state church." *Town of Greece*, 572 U.S. at 575; *see also Lynch*, 465 U.S. at 678 ("'The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the

national government.'") (quoting 3 J. Story, Commentaries on the Constitution of the United States 728 (1833)). And just as courts should not act as "supervisors and censors of religious speech" in the context of religious invocations, *Town of Greece*, 572 U.S. at 581, neither should they act, as did the lower court here, as supervisors and censors of public monuments that commemorate heroes, historical events, our common heritage, etc. Long before the adoption of the Establishment Clause, governments have erected monuments as works of civic piety. *Pleasant Grove City*, 555 U.S. at 470 ("Governments have long used monuments to speak to the public . . . . Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance.").

Deciding upon the form and content of such public monuments should be the work of the community through the democratic process, not the work of federal courts, examining minutiae with a tape-measure or using the fiction of a reasonable observer. *Allegheny*, 492 U.S. at 675 (Kennedy, J.); *see also Mather v. Mundelein*, 864 F.2d 1291, 1293 (7th Cir. 1989) ("Details that would be important to interior decorators do not spell the difference between constitutionality and unconstitutionality.").

While *Amici* maintain that the Peace Cross passes constitutional muster under *Lemon*, if that decision can be so readily applied to order the removal a longstanding, historical monument, as here, it is *Lemon* that must be discarded, not the monument. *Cf. Town of Greece*, 572 U.S. at 577 ("A test that would sweep away what has so long been settled would create

new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.").

C. Establishment Clause challenges must consider coercion as a determining factor.

Town of Greece did not look solely to history to determine the constitutionality of the challenged prayer practice, but to an additional factor: *coercion* (a criterion notably absent under *Lemon*). "It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" 572 U.S. at 586 (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J.)); *see also id*. (citing *Van Orden*, 545 U.S. at 683 (recognizing that our "institutions must not press religious observances upon their citizens")).

Requiring an Establishment Clause violation to involve governmental coercion is not made up out of whole cloth. It follows from the text and history of the Establishment Clause itself:

> Standards such as those found in *Lemon* . . . and the "no endorsement" rule, not only are hopelessly open-ended but also lack support in the text of the first amendment and do not have any historical provenance. They have been made up by the Justices during recent decades. The actual Establishment Clause bans laws respecting the *establishment* of religion—which is to say, taxation for the support of a church, the employment of clergy on the public payroll, and mandatory attendance or worship.

Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, J.) (dissenting from the denial of rehearing en banc) (emphasis in original);[11] *see also Lee*, 505 U.S. at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty."); *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) ("[E]stablishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers.").

Though a majority in *Town of Greece* did not agree on what type or level of coercion would have to be present in order to find an Establishment Clause violation, there would be no need to resolve that issue in this case. Respondents here have not been coerced into doing *anything*, much less "compelled . . . to engage in a religious observance." 572 U.S. at 587.

Like the plaintiffs in *Town of Greece*, who "stated that the prayers gave them offense and made them feel excluded and disrespected," *id.* at 589, Respondents claim that they have come into "unwelcome direct contact with the Cross" and "are offended by the prominent government display of the Cross." *AHA*, 874 F.3d at 203. While one of the individual plaintiffs alleged that he "is personally offended and feels excluded" by the monument, the other two individual plaintiffs did not even allege offense—only that they

[11] As Judge Easterbrook wrote elsewhere: "'Establishment' entails coercion: either mandatory religious observance or mandatory support (via taxes) for clergy on the public payroll." *Books v. Elkhart Cty.*, 401 F.3d 857, 869 (7th Cir. 2005) (dissenting).

have come into "unwelcome contact" with the monument and "object" to it. J.A. 29-30, Complaint, ¶¶ 6-10.[12]

"Offense, however, does not equate to coercion." *Town of Greece*, 572 U.S. at 589. Just as "[a]dults often encounter speech they find disagreeable," *id*., so too might they encounter disagreeable monuments or displays, as Respondents claim here. "[A]n Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression" of views which are contrary to his own. *Id*. Indeed, it is difficult to see how "passive and symbolic" displays can ever create a "risk of infringement of religious liberty." *Allegheny*, 492 U.S. at 662 (Kennedy, J.).[13]

Respondents are not forced to participate in any religious exercise by a passive monument that they only observe while traveling in the vicinity. *AHA*, 874 F.3d at 202; *see Allegheny*, 492 U.S. at 664 (Kennedy, J.) ("Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do

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[12] For these reasons, as discussed *infra*, Sec. IV, Respondents have not suffered an injury in fact and therefore do not have Article III standing to press their Establishment Clause claim.

[13] Cases involving public school children are inapplicable here. *See, e.g., Lee,* 545 U.S. at 691 (plurality opinion); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. at 203.

when they disagree with any other form of government speech.").[14]

To be consistent with the history and text of the Establishment Clause itself, some level of coercion must be exercised by the government for there to be a constitutional violation, as this Court reaffirmed in *Town of Greece*. As a practical matter, why should the plaintiffs in that case, who witnessed sectarian prayers at town council meetings, and who felt offended thereby, fail in their Establishment Clause challenge, while Respondents here, who come into unwelcome contact with the cross while running errands or riding a bike, prevail? *See* J.A. 29, Complaint, ¶ 6. If *Town of Greece* means what it says, then the monument in this case can no more violate the Establishment Clause than the sectarian legislative prayers in *Town of Greece*. It strains credulity to suggest otherwise.

III. The Court should formally abandon *Lemon* in light of *Town of Greece.*

In *Town of Greece*, this Court did not explicitly announce the demise of *Lemon*, including its endorsement and reasonable observer refinements. The rationale of that decision, however, which notably avoided those rubrics entirely, has paved the road for the Court to do so here and now. Two Justices have already noted the direct consequences of *Town of Greece*. *See Elmbrook Sch. Dist.*, 134 S. Ct. at 2284

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[14] Respondent Fred Edwords's ideological objection was not so strong that he couldn't be interviewed on camera about his lawsuit in plain view of the cross. *See Bladensburg 'Peace Cross' Memorial Lawsuit*, Youtube, https://tinyurl.com/yahpk2sl (last visited Dec. 6, 2018).

(Scalia, J., dissenting from denial of certiorari, joined by Thomas, J.) ("*Town of Greece* abandoned the antiquated 'endorsement test,' which formed the basis for the decision below.").

Indeed, the lower courts await such an announcement. While the Eighth Circuit recently declined to apply *Lemon*, per "the guidance of new Supreme Court precedent" in *Town of Greece*, *Doe,* 901 F.3d at 1019 (upholding national motto on currency), other courts have understandably been reluctant to do so. *See Freedom from Religion Found., Inc. v. Concord Cmty. Schs.*, 885 F.3d 1038, 1045 n.1 (7th Cir. 2018)(noting that it did not "feel free to jettison" the endorsement test in light of *Town of Greece* because the Court in that case did not make it "explicit"); *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 601 (6th Cir. 2015) (Batchelder, J., concurring in part) ("[N]otwithstanding *Town of Greece*'s broad language regarding the test that properly governs the Establishment Clause . . . unless and until the Supreme Court explicitly holds that it has abandoned the *Lemon*/endorsement test, the lower courts are bound to continue applying that test in contexts where the Court has previously employed it."); *see also Felix v. City of Bloomfield*, 847 F.3d 1214, 1221 (10th Cir. 2017) (Kelly, J., dissenting from the denial of rehearing en banc) (noting that "returning to a more historically-congruent understanding of the Establishment Clause is the ultimate province of the Supreme Court").

A decision by this Court upholding the Peace Cross without simultaneously and unequivocally abandoning *Lemon* will only kick the can down the road. Meanwhile, lower courts will continue to apply *Lemon*

despite this Court's notable eschewal of that decision in cases such as *Van Orden* and *Town of Greece*. As this Court has only selectively used *Lemon* in Religion Clause cases, and not at all since *McCreary*, overturning *Lemon* in this case would hardly be a revolutionary step forward.[15]

IV. The Court should instruct the lower courts to abandon "offended observer" standing.

Lurking beneath the merits of this case is an issue of constitutional import that cannot be brushed aside or merely assumed: *standing*. Though this Court did not evaluate the Article III standing of plaintiffs in *Town of Greece*, *Van Orden*, and *McCreary*, it should do so here, even before it considers the merits of the Establishment Clause claim. While standing is not one of the questions presented in this case, it was discussed and decided in favor of plaintiffs by the court below. *See AHA*, 874 F.3d at 203-4. More importantly, as this Court has emphasized, "we bear an independent obligation to assure ourselves that jurisdiction is proper before proceeding to the merits." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008).

Where there is no "injury in fact," there can be no federal jurisdiction. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Indeed, "[n]o principle is more

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[15] Notable cases involving the Religion Clauses and avoiding use of *Lemon* include *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Cutter*, 544 U.S. 709; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id*. (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)).

As discussed, *supra*, Respondents in this case have not been coerced, forced, compelled, or otherwise required to do anything. Their only alleged "injuries" are hurt feelings and objection upon viewing the cross. Such "offended observer" standing is wholly inconsistent with Article III's requirement that there be an "injury in fact" that is "concrete" and "actual or imminent." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000).

A. Personal objection or feeling offense, without more, is not an injury in fact.

A claim of personal offense or dismay, without more, fails the first requirement of standing, namely, a showing of injury in fact. As this Court has stated in no uncertain terms, "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). Plaintiffs in such cases

> fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 485-86 (1982) (emphasis omitted).

Recognition of "offended observer" standing not only runs directly contrary to this Court's teaching set forth above, it is also profoundly inconsistent with Article III decisional law.

For example, allowing "personal offense" to suffice would render irrelevant the entire body of taxpayer standing precedents. In that area of case law, the usual rule, set forth in *Frothingham v. Mellon*, 262 U.S. 447 (1923), is that federal and state taxpayers cannot sue to challenge the use of tax money. This Court recognized a narrow exception to that rule in *Flast v. Cohen*, 392 U.S. 83 (1968), which allows taxpayers to sue only to challenge specific, legislatively authorized expenditures of funds in alleged violation of the Establishment Clause. *See Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007); *ACSTO v. Winn*, 131 S. Ct. 1436 (2011). However, this Court has carefully and repeatedly insisted upon maintaining firm limits to that exception. Suits alleging violations of other clauses are not permitted. *E.g.*, *United States v. Richardson*, 418 U.S. 166 (1974) (no taxpayer standing to sue under Statement and Account Clause); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (no taxpayer standing to sue under Incompatibility Clause); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006) (no taxpayer standing to sue under Commerce Clause).

Suits under the Establishment Clause, meanwhile, are carefully bounded. Thus, challenging the exercise of authority outside of the taxing and spending

authority is not allowed. *See Valley Forge*, 454 U.S. 464 (no taxpayer standing to bring Establishment Clause challenge to exercise of federal power under Property Clause, as opposed to Taxing and Spending Clause). Suits challenging the use of funds, as opposed to specifically authorized legislative spending, are not allowed. *Hein*, 551 U.S. 587. Suits challenging tax credits instead of expenditures are not allowed. *ACSTO*, 131 S. Ct. 1436. In short, the *Flast* exception has repeatedly been confined to its facts.

"Offended observer" standing, however, as in the case here, largely casts those limits to the wind. As here, plaintiffs would not need to claim taxpayer status. The taxpayers in *Valley Forge* could have had standing after all, just by visiting the location in question and alleging, as in this case, "object[ion]," "offen[se]," and "feel[ing] excluded" and "unwelcome." J.A. 29-30, Complaint, ¶¶ 7-10. The same holds true for the taxpayers in *Hein* and *ACSTO*. In short, the carefully bounded *Flast* exception would be a pointless irrelevancy if offended observer standing is recognized as being sufficient.

This Court has never adopted offended observer standing as sufficient under Article III. That this Court has adjudicated on the merits cases that rested upon that theory of standing in the lower courts is beside the point. "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006) (citation omitted).

Although lower courts have commonly recognized offended observer standing as a special rule for Establishment Clause cases, *see City of Edmond v. Robinson*, 517 U.S. 1201 (1996) (Rehnquist, C.J., dissenting from denial of certiorari), this Court is obviously not bound by those precedents. Moreover, this Court has not hesitated to reverse a majority of circuit courts on a point of law when circumstances so dictated. *See*, *e.g.*, *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 n.3 (2001) (rejecting "catalyst theory" for obtaining attorney's fees despite every circuit, but two, accepting it); *id*. at 621 (Scalia, J., concurring) ("[O]ur disagreeing with a 'clear majority' of the Circuits is not at all a rare phenomenon. Indeed, our opinions sometimes contradict the *unanimous* and long-standing interpretation of lower federal courts.") (emphasis in original, citation omitted).

B. There is no need to create a special Establishment Clause exception to the rule against "hurt feelings" standing.

Nor should there be special privileges for Establishment Clause plaintiffs: "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992). As *Valley Forge* held, litigants' "claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." 454 U.S. at 487 (footnote omitted). *Accord Lujan*, 504 U.S. at 573-74 ("generally available grievance about government" is insufficient for

standing); *Valley Forge*, 454 U.S. at 483 ("[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.").

Respondents may protest that absent standing here, no one could sue even for egregiously unconstitutional government acts. But this argument proves far too much. The hypothetical downside of a lack of offended observer standing is by no means unique to Establishment Clause claims. Flagrant violation of the Nobility Clause, U.S. Const. art. I, § 9, cl. 8, for example—say, by the President or Congress conferring knighthood on Bob Dylan—would not give standing to offended observers either. Importantly, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger*, 418 U.S. at 227. *Accord Valley Forge*, 454 U.S. at 489 (quoting same language in denying standing to bring Establishment Clause claim). "Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *Richardson*, 418 U.S. at 179.

Moreover, (hypothetical) worst case scenarios have a way of generating political consequences. As this Court observed in *Richardson*, as "[s]low, cumbersome, and unresponsive" as that system "may be thought at times," "the political forum" and "the polls" remain available for the pursuit of redress. *Id*. Additionally,

some would-be plaintiffs who lack Article III standing could have standing to bring cases in state court under state constitutional provisions. If worst case hypotheticals sufficed to overturn limits on standing, however, then *Valley Forge*, *Hein*, and *ACSTO* should have come out the other way, as little imagination is needed to conjure up unconstitutional government land transfers, workshops on religion, or expressly religiously preferential tax credits.

C. This is not a case of coerced exposure to objectionable matter.

A different rule may well apply under Article III where the offended observer is coerced, in the legal sense, to view or hear the objectionable matter. Thus, a program of mandatory "reeducation"—brainwashing—or the issuance of fines to individuals for voicing their opposition to the maintenance of a monument, could give rise to an injury in fact, not so much because of the objection to the exposure as because of the coercion involved.

Here, however, the government does not mandate that anyone do anything vis-à-vis the monument. Nor does the government engage in indirect coercion, for example by requiring citizens to pay homage to the monument as a condition upon access to generally available public benefits like use of a park or highway, receipt of municipal services, or admission to local public schools or their programs. Nor is this a case of mandatory indoctrination of minor children compelled to attend a government-run school. *Compare Lee,* 505 U.S. at 597 (contrasting effectively mandatory school event with government session "where adults are free to enter and leave with little comment and for any

number of reasons"). Nor does this case involve prisoners or others genuinely unable to avoid exposure to objectionable speech. Such cases raise concerns that go well beyond the all-too-common disagreement, however visceral or sincere, that a citizen feels upon viewing government action that is personally objectionable. "People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." *Id*. Respondents and others who perceive a religious message from a commemorative cross are free to disbelieve, argue against, or even mock that message. Such disagreement, however, whether couched as an objection, an offense, or a feeling, does not give rise to an Article III injury.

Simply put, federal courts do not have jurisdiction to entertain challenges by individuals merely offended by government actions or displays that they do not like as an ideological or religious matter. There should be no different rule for challenges brought under the Establishment Clause. This Court should make that clear in this case.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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