Nos. 17-1717 and 18-18

In the Supreme Court of the United States

THE AMERICAN LEGION, ET AL., PETITIONERS

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, PETITIONER

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
FREDERICK LIU
Assistant to the Solicitor General
ANDREW C. MERGEN
LOWELL V. STURGILL JR.
JOAN M. PEPIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a 93-year-old memorial to American service-members who lost their lives in World War I violates the Establishment Clause because the memorial bears the shape of a cross.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

In the Supreme Court of the United States

No. 17-1717

THE AMERICAN LEGION, ET AL., PETITIONERS

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.

No. 18-18

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, PETITIONER

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the constitutionality of a memorial to 49 servicemembers who fought on behalf of the United States in World War I. The memorial bears the shape of a Latin cross and stands on state grounds. In 2015, the National Park Service placed the memorial on the National Register of Historic Places. Numerous other memorial crosses stand on federal property, including two World War I memorial crosses in Arlington

National Cemetery: the Argonne Cross and the Canadian Cross of Sacrifice. The United States has participated as a party or as amicus curiae in prior cases involving the Establishment Clause and passive displays of religious symbols. See, *e.g.*, *Salazar* v. *Buono*, 559 U.S. 700 (2010); *McCreary Cnty.* v. *American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005); *Van Orden* v. *Perry*, 545 U.S. 677 (2005).

STATEMENT

A. Factual Background

1. This case concerns the "Memorial Cross"—a memorial to 49 men from Prince George's County, Maryland, who died in service to this country in World War I. 17-1717 Pet. App. (Pet. App.) 51a-52a; see *id.* at 30a-31a (photographs). The memorial, which is made of concrete, bears the shape of a Latin cross and stands approximately 40 feet tall on a traffic median at the intersection of Maryland Route 450 and U.S. Route 1 in Bladensburg, Maryland. *Id.* at 51a. The symbol of the American Legion—a veterans service organization—appears on both sides of the cross where the bars meet. *Id.* at 52a; see D. Ct. Doc. 15, at 2 (May 1, 2014); J.A. 931. Four words are inscribed near the bottom of the cross, one on each side: "valor," "endurance," "courage," and "devotion." Pet. App. 52a.

The Memorial Cross sits on a rectangular pedestal. Pet. App. 52a. The pedestal features a nine-foot-wide plaque, *id.* at 105a, stating: "This Memorial Cross 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 52a; see *id.* at 32a (photograph). The plaque then lists the names of the 49 local men who died, *id.* at 52a, and concludes with a quotation from President Wilson, taken from his speech to Congress in

1917 asking 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." J.A. 932. An American Legion symbol appears in each corner of the plaque. J.A. 931. Next to the Memorial Cross stands a flagpole flying an American flag. Pet. App. 52a.

2. The idea for the Memorial Cross originated with a group of private citizens, including ten mothers of the fallen, organized as the Prince George's County Memorial Committee (Memorial Committee). Pet. App. 52a; J.A. 989. The Memorial Committee began raising funds for the construction of the memorial in late 1918. Pet. App. 52a. In 1919, the Memorial Committee held a groundbreaking ceremony, attended by the Secretary of the Navy and families of veterans, where the memorial now stands. *Id.* at 53a-54a. "At the time of the groundbreaking, the land was owned by the Town of Bladensburg." *Ibid.* The Memorial Committee chose that site because of its "strategic position" at one end of the National Defense Highway (now Maryland Route 450), itself a memorial to those who died in the war. *Id.* at 52a-53a; see J.A. 928, 1082, 1246.

In 1922, the American Legion assumed responsibility for completing the Memorial Cross. Pet. App. 54a. That same year, the Town passed a resolution assigning the "parcel of ground upon which the cross now stands" to a local post of the American Legion. *Id.* at 55a (citation omitted). The American Legion unveiled the completed memorial at a dedication ceremony in 1925. *Ibid.*

In the decades that followed, traffic around the Memorial Cross increased, and safety concerns arose about private ownership of the median. Pet. App. 56a.

In 1961, the Maryland-National Capital Park and Planning Commission (Commission), a state entity, acquired both the memorial and the median. *Id.* at 5a, 57a. The Commission thus assumed responsibility for maintaining the memorial, and it has owned the memorial and the median ever since. *Ibid.*; see *id.* at 59a-60a.

3. Over the years, the American Legion, the Town, and the Commission have held numerous "patriotic" events by the Memorial Cross, Pet. App. 59a, "the vast majority in commemoration of Memorial Day or Veterans Day," *id.* at 58a. "The events generally follow the same format and include a presentation of colors, the national anthem, an invocation, a keynote speaker (typically a veteran[] [or] military, local government, or American Legion official), songs or readings, the laying of a wreath or flowers, a benediction, and a reception." *Id.* at 59a.

Today, the Memorial Cross is part of an area known as Veterans Memorial Park. Pet. App. 57a; see *id.* at 109a (map). The Park is home to six other memorials, erected over the years, commemorating lives lost in the War of 1812, World War II (and, specifically, at Pearl Harbor), the Korean and Vietnam Wars, and the September 11 attacks. *Id.* at 57a-58a, 105a-107a; 17-1717 Br. in Opp. 11 & n.48. A sign installed by the National Park Service marks the "Bladensburg Monuments" on the "Star-Spangled Banner National Historic Trail" and explains that "[t]his crossroads has become a place for communities to commemorate their residents in service and in death." J.A. 1517. The National Park Service added the Memorial Cross to its National Register of Historic Places in 2015. J.A. 1601; see Pet. App. 60a n.6.

B. Procedural History

1. For nearly 90 years, the Memorial Cross stood unchallenged. In 2014, respondents—the American Humanist Association and three individuals alleging "unwelcome contact" with the memorial, J.A. 29-30—sued the Commission under 42 U.S.C. 1983, claiming that the memorial violates the Establishment Clause, J.A. 36. The American Legion and its state and local chapters intervened to defend the memorial. Pet. App. 8a, 60a.

The district court granted summary judgment to the Commission and the American Legion. Pet. App. 50a-81a. The court concluded that the Memorial Cross is constitutional under either the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), or the "legal judgment" test of Justice Breyer's concurrence in *Van Orden* v. *Perry*, 545 U.S. 677 (2005). Pet. App. 64a-66a. Applying *Lemon*'s three-part test, the court determined, first, that the Commission's display of the memorial served the "legitimate secular purpose" of "honor[ing] fallen soldiers," *id.* at 69a; second, that "a reasonable observer would not view the [memorial] as having the effect of impermissibly endorsing religion," *id.* at 75a; and third, that the Commission's maintenance of the memorial does not create excessive entanglement between government and religion, *id.* at 75a-77a. The court then determined that, "for many of the same reasons," the memorial "does not violate the Establishment Clause under *Van Orden*'s legal judgment test." *Id.* at 77a-78a.

2. A divided panel of the court of appeals reversed and remanded for further proceedings. Pet. App. 1a-29a.

a. The panel majority first determined that respondents have standing to bring an Establishment

Clause claim, based on the individual respondents' allegations of "unwelcome direct contact with the Cross," Pet. App. 10a, and the American Humanist Association's allegations that its members have experienced the same, *id.* at 11a. Turning to the merits, the panel majority determined that "[t]he display and maintenance of the Cross violates the Establishment Clause." *Id.* at 29a. Based on its view that *Van Orden* "did not overrule *Lemon*," *id.* at 14a, the majority applied "the three-prong test in *Lemon*," while giving what it characterized as "due consideration" to "the factors outlined in *Van Orden*," *id.* at 15a.

The panel majority found *Lemon*'s first prong satisfied because the Commission's display and maintenance of the Memorial Cross serve the "legitimate secular purposes" of maintaining "safety near a busy highway intersection" and preserving a "memorial to honor World War I soldiers." Pet. App. 16a. The majority determined, however, that the "Commission's display of the Cross fails the second and third prongs of *Lemon*." *Id.* at 29a. With respect to the second prong, the majority reasoned that "the Latin cross is 'exclusively a Christian symbol,'" *id.* at 17a (citation omitted), and that while "the Cross contains a few secular elements," "the sectarian elements easily overwhelm the secular ones," *id.* at 21a-22a. The majority therefore concluded that "a reasonable observer would fairly understand the Cross to have the primary effect of endorsing religion." *Id.* at 25a. With respect to *Lemon*'s third prong, the majority found "excessive religious entanglement" because the "Commission has spent at least $117,000 to maintain the Cross and has set aside an additional $100,000 for restoration"; and because "the Commission is displaying the hallmark symbol of Christianity in a

manner that dominates its surroundings and * * * excludes all other religious tenets." *Id.* at 27a-28a.

Having found an Establishment Clause violation, the panel majority remanded the case for the parties to explore a remedy, such as "removing the arms or razing the Cross entirely." Pet App. 29a n.19.

b. Chief Judge Gregory dissented from the majority's Establishment Clause holding. Pet. App. 34a-49a. Emphasizing the memorial's "overwhelmingly secular history and context," *id.* at 46a, he concluded that a "reasonable observer" would "perceive the Memorial" not "as an endorsement of Christianity," but rather as "a war memorial built to celebrate the forty-nine Prince George's County residents who gave their lives in battle," *id.* at 46a-47a. Chief Judge Gregory also criticized the majority for "confus[ing] maintenance of a highway median and monument in a state park with excessive religious entanglement." *Id.* at 40a.

3. The court of appeals denied rehearing en banc by an 8-6 vote. Pet. App. 82a-84a. Judge Wynn explained that he voted to deny rehearing because, in his view, "[n]othing in the First Amendment empowers the judiciary to conclude that the freestanding Latin Cross has been divested of [its] predominately sectarian meaning." *Id.* at 85a-86a. Chief Judge Gregory, joined by Judges Wilkinson and Agee, dissented from the denial for the reasons expressed in his dissent from the panel decision. *Id.* at 94a. Judge Wilkinson separately dissented, joined by Chief Judge Gregory and Judge Agee, stating that he "would let the cross remain and let those honored rest in peace." *Id.* at 96a. And Judge Niemeyer also dissented, expressing concern that the panel decision "puts at risk hundreds of monuments with similar symbols standing on public grounds across the

country, such as those in nearby Arlington National Cemetery, where crosses of comparable size stand in commemoration of fallen soldiers." *Id.* at 97a.

SUMMARY OF ARGUMENT

A. This Court's previous decisions do not provide a clear standard for Establishment Clause challenges to passive displays such as the Memorial Cross, which has led lower courts to apply different tests in cases like this one. And because those tests involve fact-intensive inquiries that are heavily dependent on context, lower courts have not always reached consistent outcomes across cases. That indeterminacy encourages challenges to longstanding displays like the Memorial Cross, which in turn fosters the very religion-based divisiveness that the Establishment Clause seeks to avoid. This case presents an opportunity for the Court to adopt a standard for Establishment Clause challenges to passive displays that will provide clarity to lower courts, promote consistency across cases, and reduce factious litigation.

B. In *Town of Greece* v. *Galloway*, 572 U.S. 565 (2014), this Court reaffirmed in considering the constitutionality of legislative prayer that the Establishment Clause should be interpreted "by reference to historical practices and understandings." *Id.* at 576 (citation omitted). Given the similarities between legislative prayer and passive displays like the Memorial Cross—which both represent forms of symbolic expression by the government—the Court should adopt the same historical approach here. History shows that the Framers understood the Establishment Clause as prohibiting the coercion of religious belief or adherence, but not the acknowledgement of religion in public life. Passive displays generally fall on the permissible side of that line,

because they typically do not compel religious belief; coerce support for, or participation in, any particular religion or its exercise; or represent an effort to proselytize or denigrate any particular faith. That is certainly true of the Memorial Cross. Respondents take offense at seeing the cross, but that offense does not amount to coercion—and thus to an establishment of religion.

C. Even if this Court looks to more modern understandings of the Establishment Clause, the Memorial Cross is constitutional. It is indistinguishable in every material respect from the Ten Commandments display this Court upheld in *Van Orden* v. *Perry*, 545 U.S. 677 (2005). As in that case, the context, history, and physical setting of the display underscore its secular message: commemoration and respect for the fallen. The fact that the memorial stood unchallenged for decades reinforces that it has been understood by the community as a secular war memorial. The Memorial Cross also satisfies the three-part test outlined in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). A reasonable observer with knowledge of the relevant facts and circumstances would not perceive the memorial to be a governmental endorsement of Christian beliefs. And the Commission's expenditure of funds for maintenance of the memorial does not excessively entangle the Commission with religion.

ARGUMENT

THE MEMORIAL CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

For almost a century, a memorial cross has stood in commemoration of the 49 residents of Prince George's County, Maryland, who died in service to this Nation in World War I. In holding that the cross may not remain,

the decision below unavoidably fosters the very divisiveness that the Establishment Clause seeks to avoid. Facing similar concerns in the context of legislative prayer, this Court recently reaffirmed that the Establishment Clause should be interpreted "by reference to historical practices and understandings." *Town of Greece* v. *Galloway*, 572 U.S. 565, 576 (2014) (citation omitted). To bring clarity and consistency to this area, and to reduce these types of rancorous conflicts among litigants, the Court should take the same historical approach to passive displays of religiously associated symbols that acknowledge the role of religion in the formation and history of the Nation and the lives of its people. On that approach, the Memorial Cross here is constitutional because it does not coerce religious belief or adherence in any meaningful sense. Under any standard, however, the Memorial Cross passes muster because, viewed in proper context, it conveys a secular message. Whatever the relevant test, the Constitution permits the State to join its citizens in honoring fallen servicemembers by displaying the Memorial Cross.

A. A Clear Standard Is Needed To Govern Establishment Clause Challenges To Passive Displays Acknowledging The Role Of Religion In American Life

This Court has applied different tests in considering the constitutionality of passive displays challenged under the Establishment Clause. In some cases, the Court has applied the three-pronged test outlined in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). See, *e.g.*, *McCreary Cnty.* v. *American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005); *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). "Under the *Lemon* analysis, a statute or

practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." *County of Allegheny*, 492 U.S. at 592. In assessing *Lemon*'s second prong, the Court has asked whether a "reasonable observer" would view the challenged action as an "endorsement" of religion. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 655 (2002).

In *Van Orden* v. *Perry*, 545 U.S. 677 (2005), however, a majority of the Court expressly declined to apply the *Lemon* framework, including the endorsement test, in reviewing the constitutionality of a Ten Commandments display on public grounds. See *id.* at 686 (plurality opinion) ("[W]e think [*Lemon*] not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."); *id.* at 699-700 (Breyer, J., concurring in judgment). Instead, the plurality focused on "the nature of the monument" and "our Nation's history," *id.* at 686 (plurality opinion), while Justice Breyer—in a concurrence that lower courts have treated as the controlling opinion in the case, see Pet. App. 14a—considered a broad range of factors, each bearing on "the message that the [display] conveys," *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in judgment).

Rather than apply either of those frameworks in this case, the court of appeals adopted a hybrid approach, combining "the three-prong test in *Lemon*" with "due consideration" for "the factors outlined in *Van Orden*." Pet. App. 15a. Other courts, by contrast, have adhered exclusively to the *Lemon* test in deciding challenges to

passive displays. See, *e.g.*, *Kondrat'yev* v. *City of Pensacola*, 903 F.3d 1169, 1173-1174 (11th Cir. 2018) (per curiam), petition for cert. pending, No. 18-351 (filed Sept. 17, 2018); *Felix* v. *City of Bloomfield*, 841 F.3d 848, 856 (10th Cir. 2016), cert. denied, 138 S. Ct. 357 (2017); *American Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 238 (2d Cir. 2014); *American Civil Liberties Union of Ky.* v. *Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005). And still others have understood *Van Orden* as creating an exception to *Lemon* in some cases. See, *e.g.*, *Red River Freethinkers* v. *City of Fargo*, 764 F.3d 948, 949 (8th Cir. 2014); *Card* v. *City of Everett*, 520 F.3d 1009, 1018 (9th Cir. 2008).

The resulting uncertainty in the lower courts has been compounded by the indeterminacy of the *Lemon* and *Van Orden* tests themselves. Both tests require a fact-intensive inquiry into a variety of circumstances, including the history of a particular religious symbol, the way the symbol appears as part of the display, the display's proximity to other displays, and the context surrounding the display's placement on public grounds. See *Van Orden*, 545 U.S. at 700-704 (Breyer, J., concurring in judgment); *County of Allegheny*, 492 U.S. at 674-675 (Kennedy, J., concurring in judgment in part and dissenting in part). Because each test's application is so context-dependent, adjudication must proceed display by display; disputes often cannot be resolved at an early stage; and even seemingly minor differences between displays can produce divergent outcomes. See *Utah Highway Patrol* v. *American Atheists, Inc.*, 565 U.S. 994, 1001-1004 (2011) (Thomas, J., dissenting from the denial of certiorari).

Such indeterminacy encourages disputes over the constitutionality of longstanding displays like the one at

issue here. See *Van Orden*, 545 U.S. at 698, 704 (Breyer, J., concurring in judgment). And those disputes, in turn, undermine one of the "basic purposes" of the Establishment Clause: to avoid "divisiveness based upon religion." *Id.* at 698. This case is an excellent example: The removal or destruction of a 93-year-old war memorial would be viewed by many as the action of a government "that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage." *Salazar* v. *Buono*, 559 U.S. 700, 726 (2010) (Alito, J., concurring in part and concurring in judgment). Cases like these cannot help but divide those with sincerely held beliefs on both sides. This case presents an opportunity for the Court to adopt a standard for Establishment Clause challenges to passive displays that will reduce factious litigation, provide clarity to lower courts, and promote consistency across cases.

B. The Memorial Cross Is Constitutional By Reference To Historical Practices And Understandings

The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I. In construing the Establishment Clause, this Court has long been guided by "what history reveals was the contemporaneous understanding of its guarantees." *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984); see *Town of Greece*, 572 U.S. at 602 (Alito, J., concurring) ("This Court has always purported to base its Establishment Clause decisions on the original meaning of that provision."). The Court has thus looked to "historical evidence" in discerning both "what" the Establishment Clause "mean[s]" and "how"

it "applie[s]" to a particular practice. *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983); see *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.").

The Court most recently applied that historical approach in *Town of Greece*. In addressing the constitutionality of a town's practice of "opening its monthly board meetings with a prayer," 572 U.S. at 570, a majority of this Court considered that question "against the backdrop of historical practice." *Id.* at 587 (plurality opinion); see *id.* at 608-610 (Thomas, J., concurring in part and concurring in judgment). In so doing, the Court reaffirmed that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* at 576 (opinion of the Court) (citation omitted). Applying that test in light of "the unambiguous and unbroken history" of legislative prayer throughout the Nation, *ibid.* (citation omitted), the Court upheld the town's practice because it "comport[ed] with our tradition and d[id] not coerce participation by nonadherents," *id.* at 591-592.

Like legislative prayer, displays such as the Memorial Cross represent a form of "symbolic expression" by the government. *Town of Greece*, 572 U.S. at 575. In both cases, the issue is whether the government's acknowledgement of religion is "benign," *id.* at 576, "rather than a first, treacherous step towards establishment of a state church," *id.* at 575. Given those similarities, the Court should adopt the same approach for passive displays as for legislative prayer, and again look to our Nation's history as a guide. That history shows that

the founding generation understood the Establishment Clause as prohibiting governmental coercion of religious belief or adherence, but as permitting governmental acknowledgement of religion in public life. The Memorial Cross stands on the permissible side of that constitutional line.

1. The history of the Establishment Clause distinguishes the coercion of religious belief or adherence from the acknowledgement of religion in public life

a. As originally understood, the Establishment Clause protects religious liberty by "forestall[ing] 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); see *Town of Greece*, 572 U.S. at 586 (plurality opinion) ("It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'") (citation omitted). That is the threat at which the Establishment Clause is aimed, because it is the threat with which the Framers were well familiar. The Church of England had been England's established church since the Act of Supremacy in 1534, and "[e]stablished religion came to these shores with the earliest colonists." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2112-2115 (2003) (*Establishment*).

The hallmark of those early state establishments of religion was compelling or coercing people to profess belief in, participate in, or otherwise support a particular religion. "In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue." *Town of Greece*, 572 U.S. at 608 (Thomas, J., concurring in part and concurring in

judgment); see *Establishment* 2144-2146, 2152-2159. "[O]nly clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities." *Lee* v. *Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting). An establishment of religion at the time of the Founding was thus marked by some element of compelled religious belief or adherence, whether by requiring religious observance or support, sanctioning nonadherence, or controlling the inner workings of the church. *Establishment* 2131. And the movement toward disestablishment was, in turn, marked by greater guarantees of freedom from such coercion. See *ibid.*

Virginia's experience with disestablishment illustrates the point. "In 1785, the General Assembly of the Commonwealth of Virginia considered a 'tax levy to support teachers of the Christian religion.'" *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 140 (2011) (citation omitted). The proposed assessment was an example of "coercive taxation to support an established religion." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 54 (2004) (Thomas, J., concurring in judgment). And it was in response to that proposal that James Madison penned his famous Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* 8 *The Papers of James Madison* 298-306 (Robert A. Rutland et al. eds., 1973) (Memorial and Remonstrance), "at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion,'" *Everson* v. *Board of Educ.*, 330 U.S. 1, 37 (1947) (Rutledge, J., dissenting); see *Borough of Duryea* v.

Guarnieri, 564 U.S. 379, 396 (2011) (describing the Memorial and Remonstrance as "an important document in the history of the Establishment Clause").

"In the Memorial and Remonstrance, Madison objected to the proposed assessment on the ground that it would coerce a form of religious devotion in violation of conscience." *Arizona Christian*, 563 U.S. at 141. The proposed assessment, Madison declared, would be "a dangerous abuse of power" if "armed with the sanctions of a law." Memorial and Remonstrance 299 (pmbl.). It would violate, in Madison's view, the "fundamental" truth that religion "'can be directed only by reason and conviction, not by force or violence.'" *Ibid.* (¶ 1) (citation omitted). And if the proposal were enacted, Madison warned, there would be no principled basis to object to further coercion: "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 in all cases whatsoever." *Id.* at 300 (¶ 3).

The proposed assessment "ultimately died in committee," *Arizona Christian*, 563 U.S. at 141, and "in its place Madison succeeded in securing the enactment of 'A Bill for Establishing Religious Freedom,' first introduced in the Virginia General Assembly seven years earlier by Thomas Jefferson," *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 502 (1982) (Brennan, J., dissenting). In condemning religious establishments, Jefferson's bill shared Madison's focus on coercion. As enacted, the bill guaranteed "[t]hat no 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 belief." 12 Va. Stat. 86 (W. Hening ed., 1823). Many other States prohibited the establishment of religion using similar language. See 17-1717 Pet. Br. 33 n.9.

Madison went on to become "the leading architect of the religion clauses of the First Amendment." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 184 (2012) (citation omitted). In 1789, he proposed in the House of Representatives the following language for those Clauses: "The civil rights of none shall be abridged on account of religious belief or worship, nor 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. 434 (1789). A committee consisting of Madison and others subsequently revised the language to read: "no religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 729; see *Wallace* v. *Jaffree*, 472 U.S. 38, 95 (1985) (Rehnquist, J., dissenting).

When the House debated the revised language, Madison explained that "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." 1 Annals of Cong. 730. Madison thus made clear that the text of the proposed amendment covered "enforc[ing]" religious observance "by law" or "compel[ling]" worship. He also addressed the concerns underlying the amendment: that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 731. Although Congress ultimately

changed the text to "Congress shall make no law respecting an establishment of religion," there is no indication that the change fundamentally altered the meaning of the provision.

In sum, as both the experience in the States and Madison's remarks in Congress show, "compulsion" was regarded as "the essence of an establishment" when the First Amendment was ratified. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 937 (1986) (*Lost Element*); see U.S. Br. at 7, *Lee*, *supra* (No. 90-1014) (stating, with respect to ceremonial acknowledgements of religion, that "[t]he proper approach recognizes that in this setting coercion is the touchstone of an Establishment Clause violation"). To the founding generation, the Establishment and Free Exercise Clauses stood in harmony, serving the fundamental purpose of "secur[ing] religious liberty," *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 313 (2000) (citation omitted), by both protecting against coercive governmental activity and ensuring the freedom to worship according to the dictates of conscience, see *Wallace*, 472 U.S. at 50.

b. History makes clear not only that the Establishment Clause forbids coercion, but what types of actions are (or are not) coercive. See *Marsh*, 463 U.S. at 790 (explaining that "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied" to contemporaneous practices). The founding generation generally saw no Establishment Clause problem with "official acknowledgement * * * of the role of religion in American life." *Lynch*, 465 U.S. at 674. As this Court has observed, there is "an unbroken history" of such recognition of religion "by all three

branches of government" dating back to the early Republic. *Ibid.*; see *Elk Grove*, 542 U.S. at 26 (Rehnquist, C.J., concurring in judgment) ("Examples of patriotic invocations of God and official acknowledgements of religion's role in our Nation's history abound.").

For example, Presidents beginning with Washington have invoked God in their inaugural addresses, *Lee*, 505 U.S. at 633-634 (Scalia, J., dissenting), and "issued Thanksgiving Proclamations establishing a national day of celebration and prayer," *County of Allegheny*, 492 U.S. at 671 (Kennedy, J., concurring in judgment in part and dissenting in part). Washington "added to the form of Presidential oath prescribed by Art. II, § 1, cl. 8, of the Constitution, the concluding words 'so help me God.'" *McCreary Cnty.*, 545 U.S. at 886 (Scalia, J., dissenting). The very First Congress "enacted legislation providing for paid Chaplains" to "offer daily prayers" in the House and the Senate. *Lynch*, 465 U.S. at 674. The same Congress also reenacted the Northwest Ordinance, which recognized "[r]eligion, morality, and knowledge" as "necessary to good government." *McCreary Cnty.*, 545 U.S. at 887 (Scalia, J., dissenting) (citation omitted). "And this Court's own sessions have opened with the invocation 'God save the United States and this Honorable Court' since the days of Chief Justice Marshall." *Lee*, 505 U.S. at 635 (Scalia, J., dissenting).

That those practices were embraced by the founding generation means that they were not then viewed—and should not now be regarded—as prohibited by the Establishment Clause. See *Town of Greece*, 572 U.S. at 577 ("Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."). "But the relevance of history is not confined

to the inquiry into whether the challenged practice itself is a part of our accepted traditions dating back to the Founding." *County of Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in judgment in part and dissenting in part). Even where a challenged practice was "not commonplace in 1791," the question remains whether the practice has any "greater potential for an establishment of religion" than "legitimate practices two centuries old." *Id.* at 670; see *Lynch*, 465 U.S. at 682 (evaluating constitutionality of a city's display of a crèche by reference to practices "previously held not violative of the Establishment Clause").

For certain practices, the answer will plainly be no. Congress's designation of a National Day of Prayer, 36 U.S.C. 119, inclusion of the language "one Nation under God" in the Pledge of Allegiance, 4 U.S.C. 4 (Supp. V 2018), and placement of the national motto "In God we trust" on coins and currency, 36 U.S.C. 302; see 31 U.S.C. 5112(d)(1), 5114(b), have no greater potential for an establishment of religion than the other governmental acknowledgements of religion that were accepted at the time of the Founding. See *Lynch*, 465 U.S. at 676; *County of Allegheny*, 492 U.S. at 672-673 (Kennedy, J., concurring in judgment in part and dissenting in part); see also *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in judgment). The same will generally be true of passive displays acknowledging the role of religion in the Nation's history and the lives of its people. In no meaningful sense are observers being made to espouse religious belief, to engage in religious observance, or to provide financial support targeted to any particular religion.

c. In *Engel* v. *Vitale*, 370 U.S. 421 (1962), the Court held that the Establishment Clause did not permit a

school district's practice of reciting an official prayer in its public schools. *Id.* at 424. In so doing, the Court 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.* at 430. The Court's statement, however, was in response to the school district's argument that the prayer was not coercive because students could "remain silent or be excused from the room." *Ibid.* The Court's point was that a directive to young children to pray may not cease to be coercive in that circumstance: there may still be "indirect coercive pressure * * * to conform to the prevailing officially approved religion." *Id.* at 431. *Engel* thus did not discard coercion as the touchstone for an Establishment Clause violation, though it did recognize that coercion may be direct or indirect.

In *Schempp*, the Court summarized *Engel* as holding that a violation of the Establishment Clause need not be "predicated on coercion." 374 U.S. at 223. And in *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), the Court relied on *Schempp* in turn for its statement that "proof of coercion" is "not a necessary element of any claim under the Establishment Clause." *Id.* at 786. Those isolated statements, however, ultimately trace to *Engel* and should be understood in the same way: "*direct* coercion need not always be shown to establish an Establishment Clause violation." *County of Allegheny*, 492 U.S. at 661 n.1 (Kennedy, J., concurring in judgment in part and dissenting in part). Otherwise, the Court's statements would have been inconsistent with its earlier cases

treating compulsion as the critical element of an Establishment Clause violation. See *Lost Element* 934-935.

Because coercion may be indirect, a display will violate the Establishment Clause when it involves "governmental exhortation to religiosity that amounts in fact to proselytizing." *County of Allegheny*, 492 U.S. at 659-660 (Kennedy, J., concurring in judgment in part and dissenting in part); see *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring) (stating that the Establishment Clause permits veneration of the Ten Commandments "in a nonproselytizing manner"). In *Town of Greece*, the Court explained that legislative prayer may not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." 572 U.S. at 583 (quoting *Marsh*, 463 U.S. at 794-795); see *id.* at 585 (noting that government could not engage in "a pattern of prayers" that "denigrate" or "proselytize"). The same is true of passive displays. "Symbolic recognition or accommodation of religious faith may violate the [Establishment] Clause in an extreme case," *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part), where a display (or series of displays) represents an effort "to proselytize or force truant constituents into the pews," *Town of Greece*, 572 U.S. at 587 (plurality opinion).

2. The Memorial Cross does not coerce religious belief or adherence in any relevant sense

The Memorial Cross does not raise any of the concerns against which the Establishment Clause protects. By displaying the memorial, the Commission has not "compelled" anyone "to observe or participate in any religious ceremony or activity." *County of Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in judgment in part and dissenting in part). "Passersby who disagree with

the message conveyed by the[] display[] are free to ignore [it], or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." *Ibid.* To be sure, respondents take offense at seeing the Memorial Cross while driving past it, Pet. App. 7a, but "[o]ffense * * * does not equate to coercion. Adults 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." *Town of Greece*, 572 U.S. at 589 (plurality opinion); see *id.* at 610 (Thomas, J., concurring in part and concurring in judgment) (same). Nor do the memorial's location and context indicate that it is an effort to proselytize, denigrate, or obtain adherents to a particular faith.

In the end, it cannot be said that the Memorial Cross bears any "greater potential for an establishment of religion" than "legitimate practices two centuries old," such as Thanksgiving Proclamations or legislative prayer. *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part); see *id.* at 665. Nor can it be said that the Memorial Cross presents any greater potential for an establishment than the passive displays this Court has previously upheld—namely, the crèche in *Lynch*, 465 U.S. at 687; the menorah in *County of Allegheny*, 492 U.S. at 621 (opinion of Blackmun, J.); or the Ten Commandments in *Van Orden*, 545 U.S. at 692 (plurality opinion). Just as the Constitution permits a government to "shar[e] with its citizens the joy of the holiday season" by displaying a crèche or menorah, *County of Allegheny*, 492 U.S. at 663 (Kennedy, J., concurring in judg-

ment in part and dissenting in part), so too the Constitution permits a government to join its citizens in honoring the war dead by displaying a cross.

C. The Memorial Cross Is Constitutional Under More Modern Understandings Of The Establishment Clause

Even if this Court looks to more modern understandings of the Establishment Clause, the Memorial Cross is constitutional. It is indistinguishable in every material respect from the Ten Commandments display this Court upheld in *Van Orden*. And the Memorial Cross neither endorses religion nor excessively entangles the Commission with religion.

1. The Memorial Cross conveys a secular message in its full context

In *Van Orden*, the Court upheld the constitutionality of a Ten Commandments display on state grounds. See 545 U.S. at 692 (plurality opinion); *id.* at 700-705 (Breyer, J., concurring in judgment). In his concurrence, Justice Breyer considered a number of factors, each relevant to "the message that the [display] conveys." *Id.* at 701. Those same factors demonstrate even more conclusively here that the Memorial Cross is constitutional.

a. First, "the context of [a] display" may make clear that a symbol or text associated with religion also conveys a "secular" or "historical" message. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in judgment). That can be true of a Latin cross, which is "certainly a Christian symbol." *Buono*, 559 U.S. at 715 (plurality opinion). But it is also "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." *Id.* at 721.

The Latin cross is associated with World War I in particular: it "evoke[s] the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict." *Id.* at 725 (Alito, J., concurring in part and concurring in judgment); see *id.* at 721 (plurality opinion) ("Here, one Latin cross in the desert * * * evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles.").

That is precisely the context in which a Latin cross appears here, as part of a memorial to fallen World War I servicemembers. The cross itself contains the emblem of the American Legion—a veterans service organization—on both sides where the bars meet. Pet. App. 52a; J.A. 931. Words inscribed into the cross pay tribute to the "valor," "endurance," "courage," and "devotion" of those it honors. Pet. App. 52a. The plaque at the base of the cross makes its purpose explicit: "This Memorial Cross Dedicated to the heroes of Prince George's County Maryland who lost their lives in the Great War for the liberty of the world." *Ibid.* The plaque then lists the names of the 49 local servicemembers who died. *Ibid.* Far more expressly than in *Van Orden*, the Memorial Cross "communicates not simply a religious message, but a secular message as well," 545 U.S. at 701 (Breyer, J., concurring in judgment)—namely, a message of commemoration and respect for the fallen.

b. Second, the "circumstances surrounding [a] display's placement on [public] grounds" may confirm its secular message. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in judgment). In *Van Orden*, a "private civic (and primarily secular) organization" had "donated" the monument "to highlight the Commandments' role in shaping civic morality." *Ibid.* Similarly

here, two private civic organizations—the Memorial Committee and the American Legion—financed the construction of the memorial to honor the local service-members who had died in the war. Pet. App. 52a-56a. And just as the monument in *Van Orden* "prominently acknowledge[d]" the private organization's role, both faces of the Memorial Cross prominently display the American Legion's emblem, thus "distanc[ing] the State itself from the religious aspect" of the memorial's design. *Van Orden*, 545 U.S. at 701-702 (Breyer, J., concurring in judgment); see Pet. App. 52a; J.A. 931 (noting that an American Legion symbol also appears in each corner of the plaque).

In addition, the American Legion retained control of the memorial for more than three decades after it was built. Pet. App. 54a n.4. It was not until 1961 that the Commission came to own the memorial and the median on which it stands. *Id.* at 57a. And when the Commission finally acquired the property, it did so "for a secular reason—maintenance of safety near a busy highway intersection." *Id.* at 16a; see *id.* at 56a-57a, 69a, 77a. Even then, the American Legion retained the right to use the Memorial Cross for commemorative events, as it has done for decades. *Id.* at 57a-59a; J.A. 1386-1387. Those circumstances "further distance[] the State itself from the religious aspect" of the memorial's design. *Van Orden*, 545 U.S. at 701-702 (Breyer, J., concurring in judgment).

c. Third, the "physical setting" of the Memorial Cross underscores its meaning as a secular war memorial. *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment). In *Van Orden*, the Ten Commandments display sat "in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the

'ideals' of those who settled in Texas and of those who have lived there since that time." *Ibid.* (citation omitted). The physical setting of the Memorial Cross is similar. It sits in Veterans Memorial Park, which contains six other memorials and a "Star-Spangled Banner National Historic Trail" marker, all designed to "commemorate [local] residents in service and in death." J.A. 1517; see Pet. App. 57a-58a; 17-1717 Br. in Opp. 11 & n.48. The precise location of the Memorial Cross, moreover, was chosen not because it would "readily lend itself to meditation or any other religious activity," *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment), but because of its "strategic position" at one end of the National Defense Highway, itself a memorial to fallen servicemembers, Pet. App. 52a-53a; see J.A. 928, 1082, 1246.

d. Fourth, the passage of time sheds light on how the community has viewed the Memorial Cross. In *Van Orden*, the Ten Commandments display had stood for 40 years without legal challenge. 545 U.S. at 702 (Breyer, J., concurring in judgment). Here, the Memorial Cross went unchallenged for even longer—nearly 90 years after it was built, and over 50 years after the Commission took ownership. That so many years went by without legal challenge "suggest[s] that the public visiting the [memorial] has considered the religious aspect of the [memorial's] message as part of * * * a broader [secular] message" of commemoration. *Id.* at 702-703. "[F]ew individuals, whatever their system of beliefs, are likely to have understood the [memorial] as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect." *Id.* at 702. And the many events the public has attended at the Memorial

Cross over the past century—commemorating Memorial Day or Veterans Day, for instance—can only have reinforced that secular understanding. Pet. App. 58a-59a.

e. Fifth and finally, declaring the Memorial Cross unconstitutional would "lead the law to exhibit a hostility toward religion that has no place in [this Court's] Establishment Clause traditions." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in judgment). For nearly the last century, "the cross and the cause it commemorate[s] ha[ve] become entwined in the public consciousness." *Buono*, 559 U.S. at 716 (plurality opinion). Removing the cross's arms or razing the cross entirely—as the panel majority suggested, Pet. App. 29a n.19—would be "viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor." *Buono*, 559 U.S. at 726 (Alito, J., concurring in part and concurring in judgment). It would also be "interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage." *Ibid.*

Moreover, if the decision below were permitted to stand, it would lend support to similar litigation across the country, thereby "put[ting] at risk hundreds of monuments with similar symbols * * * , such as those in nearby Arlington National Cemetery, where crosses of comparable size stand in commemoration of fallen soldiers." Pet. App. 97a (Niemeyer, J., dissenting from the denial of rehearing en banc); see *Kondrat'yev*, 903 F.3d at 1180-1182 (Newsom, J., concurring in judgment) (giving examples of crosses on public grounds across the country). In *Van Orden*, Justice Breyer expressed concern that ordering removal of the State's display there "might well encourage disputes concerning the removal

of longstanding depictions of the Ten Commandments from public buildings across the Nation" and "thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." 545 U.S. at 704 (Breyer, J., concurring in judgment). That concern applies here with full force, and taken together with the considerations detailed above, it should lead the Court to conclude that the Memorial Cross does not violate the Establishment Clause.

2. The Memorial Cross neither endorses religion nor excessively entangles the State with religion

Although the panel majority purported to give "due consideration" to "the factors outlined in *Van Orden*," Pet. App. 15a, it ultimately determined that the Memorial Cross is unconstitutional under the *Lemon* test, *id.* at 29a. The majority found that the memorial satisfies *Lemon*'s first prong because the "Commission has articulated legitimate secular purposes for displaying and maintaining the Cross"—namely, "maintenance of safety near a busy highway intersection" and "preservation of a significant war memorial." *Id.* at 16a. The majority incorrectly concluded, however, that the Memorial Cross fails *Lemon*'s second and third prongs. *Id.* at 29a.

a. The inquiry under *Lemon*'s second prong is whether a reasonable observer, "who knows all of the pertinent facts and circumstances surrounding the symbol and its placement," would view the Memorial Cross as a governmental endorsement of Christian beliefs. *Buono*, 559 U.S. at 721 (plurality opinion); see *Zelman*, 536 U.S. at 655. At a minimum, a reasonable observer here would be aware that the Memorial Committee and the American Legion conceived, financed, and built the

cross as a war memorial; that the cross is expressly dedicated to the memory of 49 local servicemembers who died in World War I; that the cross is inscribed with four secular values; that the cross sits in Veterans Memorial Park among other memorials; and that the Memorial Cross has been a common site for commemorative and patriotic events. Faced with that knowledge, a reasonable observer would not conclude that "the government intends to endorse the Christian beliefs represented by the [cross]." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

In holding otherwise, the panel majority committed at least three errors. First, the majority erred in believing that a Latin cross communicates only a religious message. According to the majority, even when a Latin cross serves as a "symbol of death and memorialization," it does so solely because of its religious significance—*i.e.*, "its affiliation with the crucifixion of Jesus Christ." Pet. App. 18a. Similar views were espoused by the dissenters in *Lynch* about the crèche display there, see 465 U.S. at 668 (Brennan, J., dissenting), and by the dissenters in *Van Orden* about the Ten Commandments display there, see 545 U.S. at 707 (Stevens, J., dissenting). In both cases, however, the Court rejected the notion that symbols or texts associated with religion can convey only a religious message. See *Lynch*, 465 U.S. at 680-681; 465 U.S. at 692-693 (O'Connor, J., concurring); *Van Orden*, 545 U.S. at 690 (plurality opinion); 545 U.S. at 701 (Breyer, J., concurring in judgment). Here, a Latin cross "evokes far more than religion" when used as a World War I memorial. *Buono*, 559 U.S. at 721 (plurality opinion). It "evoke[s] the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who

fell in that conflict." *Id.* at 725 (Alito, J., concurring in part and concurring in judgment).

Second, because the panel majority believed that the Memorial Cross itself can send only a religious message, it proceeded to ask whether the display's "secular" elements "overwhelm" its "sectarian" ones. Pet. App. 22a. That misframes the relevant inquiry. The question is not whether the cross's secular inscriptions, plaque, and setting in Veterans Memorial Park somehow "neutralize[]" the cross's otherwise religious message. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). Rather, the question is whether, in light of the cross's secular context, a reasonable observer would view the cross as a religious display *in the first place*. Here, the Memorial Cross's physical features, plaque, and location inform "what viewers may fairly understand to be the purpose of the display" and "negate[] any message of [governmental] endorsement" of religion. *Ibid.*

Third, the panel majority dismissed the "secular" elements of the display as too obscure for "passers-by" to notice. Pet. App. 22a. The majority reasoned, for example, that passers-by might not read the plaque at the base of the memorial because it is "on only one side of the Cross," is "badly weathered," and was, for a time, "obscured" by "bushes." *Id.* at 23a. Imagining an observer who views the Memorial Cross from a poor angle, at a distance, or with poor eyesight hardly does justice to the inquiry. *Lemon*'s endorsement test hypothesizes a different kind of observer, one "who knows all of the pertinent facts and circumstances surrounding the symbol and its placement." *Buono*, 559 U.S. at 721 (plurality opinion). Those facts include information that can be gleaned from fully and fairly viewing the challenged display, and here that information makes clear that the

Memorial Cross commemorates local servicemembers lost in World War I.

b. The panel majority likewise erred in concluding that the Memorial Cross involves "excessive entanglement between government and religion." *Lemon*, 403 U.S. at 614. The majority pointed to the fact that the Commission "has spent at least $117,000 to maintain the Cross and has set aside an additional $100,000 for restoration." Pet. App. 28a. The past funds, however, were spent over the course of more than 50 years, to pay for such things as groundskeeping, lighting, and repairs. *Id.* at 59a-60a; J.A. 69. And the future funds are hardly an exorbitant sum for maintaining a 93-year-old memorial. More important, none of these expenditures entangles the State in religion in any way. They would all be necessary to maintain *any* similar war memorial in that location, regardless of its shape. At the least, the Commission's expenditures do not involve the kind of "comprehensive, discriminating, and continuing state surveillance" of religion that constitutes excessive entanglement. *Mueller* v. *Allen*, 463 U.S. 388, 403 (1983) (quoting *Lemon*, 403 U.S. at 619).[*]

[*] The panel majority also reasoned that the Memorial Cross excessively entangles the State with religion because "the Commission is displaying the hallmark symbol of Christianity in a manner that dominates its surroundings and * * * excludes all other religious tenets." Pet. App. 28a. That reasoning simply repeats the majority's erroneous conclusion that the cross fails *Lemon*'s second prong because it conveys governmental endorsement of a religious rather than a secular message.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General[*]
JEFFREY BOSSERT CLARK
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
FREDERICK LIU
Assistant to the Solicitor General
ANDREW C. MERGEN
LOWELL V. STURGILL JR.
JOAN M. PEPIN
Attorneys

DECEMBER 2018

[*] The Solicitor General is recused in this case.