No. 17-1717

IN THE
Supreme Court of the United States

THE AMERICAN LEGION, *ET AL.*,

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *ET AL.*,

Respondents.

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

REPLY BRIEF FOR THE AMERICAN LEGION PETITIONERS

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INTRODUCTION

In *Town of Greece v. Galloway*, 572 U.S. 565 (2014), this Court reiterated that the Establishment Clause "must be interpreted 'by reference to historical practices and understandings,'" 572 U.S. at 576 (citation omitted), and concluded that the Establishment Clause does not prohibit sectarian legislative prayer unless exploited to coerce nonadherents. The Court ignored the *Lemon* test and the "endorsement" standard—developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989)—rejected sectarianism as a workable standard, and specifically abrogated aspects of *Allegheny* prohibiting "sectarian" government speech.

Closely following *Town of Greece*, the Legion's opening brief traced the First Amendment's original meaning and concluded that its text and history show the Establishment Clause prohibits religious coercion, not mere endorsement. The Legion acknowledged that speech—whether public prayer or symbolic displays—could amount to establishment or *de facto* coercion if exploited to proselytize or exclude nonadherents. But those circumstances are not remotely implicated by a war memorial built by private citizens to honor their deceased loved ones. Seeing no principled distinction between government speech as prayer or symbolic displays, the Legion argued that the coercion approach of *Town of Greece* likewise controls here.

Respondents nonetheless dramatically contend that applying *Town of Greece* to symbolic displays would constitute a "cataclysmic overhaul in Establishment Clause jurisprudence." Resps. Br. 66.

Respondents note, correctly, that the Establishment Clause guarantees neutrality, forbidding "favoritism" for one religion and "discrimination or exclusion of religious minorities." *Id.* at 30-31, 86. But the question here is not whether favoritism toward a sect violates the Establishment Clause; the question is what *constitutes* unconstitutional favoritism. Does a government unconstitutionally favor religion merely by using speech associated with the religious beliefs of only some citizens because nonadherents may "feel like 'outsiders,'" as the "endorsement test" requires? *Allegheny*, 492 U.S. at 670 (Kennedy, J., dissenting). Or does unconstitutional favoritism require some tangible, real-world threat to liberty, as would be required in any other First Amendment context? Only the latter test fits the text and history of the Establishment Clause.

Respondents and their *amici* attack a caricature of this liberty-focused coercion standard. To correct Respondents' mischaracterization: Governments can violate the Establishment Clause in two ways under this test. First, they can establish a religion *per se*, by designating an official religion, taking official positions on religious doctrine, or similar actions—even if arguably non-coercive. Legion Br. 26 n.8. Second, governments can take actions that, while short of a full-fledged establishment, replicate the coercive hallmarks of State establishments, such as granting a favored religion preferential access to government benefits, political participation, or public functions, or regulating religious institutions' doctrine, practices, or personnel. Respondents are therefore wrong to claim this standard would allow governments to form an "oppressive, but non-coercive,

'union of civil and ecclesiastical control,'" "approv[e] the core beliefs of a favored religion over" others, or engage in "discrimination and exclusion of religious minorities." Resps. Br. 83-86 (citations omitted).

The Court's precedents, moreover, clarify that the "coercion" prohibited by the Establishment Clause need not be "direct" but can be indirect or *de facto*. *See, e.g.*, *Engel v. Vitale*, 370 U.S. 421, 430 (1962). For example, forced participation in prayer is obviously coerced religious exercise, and the Court's precedent extends this principle to where there is strong pressure to participate, at least either where attendance is required (*Engel*) or where nonadherents are forced to forgo important education-related functions that they would otherwise attend (*Lee* and *Santa Fe*).

The only question presented here, then, is whether government speech imposing no tangible consequences can constitute "establishment." The answer is yes, but only in extreme cases rarely encountered in the real world. Speech that simply "endorses" religion, prevalent at the Founding, does not constitute establishment. "Endorsing" is not "establishing"—in the dictionary, or the words and actions of the Framers. But speech could be impermissible if it bears the hallmarks of establishment or if it amounts to *de facto* coercion. Thus, under *Town of Greece*, outright proselytization—i.e., "threaten[ing] damnation, or preach[ing] conversion," *see* 572 U.S. at 583—is forbidden because it poses dangers functionally equivalent to formal establishment or coercive practices. That is, per this Court's precedent, no significant difference exists between a law

establishing Lutheranism as the official religion, and the "government annually [sending] a letter to everyone in the country respectfully urging the recipients to join the Lutheran church." Legal Scholars Br. 25-26; *cf. Town of Greece*, 572 U.S. at 583.

Significantly, Respondents (at least in this case), seem to agree that non-coercive religious speech is acceptable if "generic" or "non-denominational" (by which they sometimes seem to mean words accepted by Christians, Jews, and Muslims), but they argue it becomes forbidden if "sectarian," i.e., specific to one of those three religions. Resps. Br. 29-30. Granted, sectarian speech *can* raise more acute Establishment Clause concerns than general references to "God," because of the greater potential that sectarian speech is really an effort to proselytize. But making Establishment Clause claims turn exclusively on "sectarian" content was rejected in *Town of Greece* as ahistorical and unworkable. This distinction is even less applicable to passive religious symbols, given that *all* such symbols are sectarian. Thus, Respondents' real argument is that the Establishment Clause bans *all* religious symbols, despite this Court's admonition that "the Establishment Clause does not require eradication of all religious symbols from the public realm." *Salazar v. Buono*, 559 U.S. 700, 718 (2010) (plurality).

In short, the Establishment Clause proscribes religious symbols only in the rare cases where they are so intrusive, pervasive, or divorced from historical practices that they constitute a governmental effort to exploit the symbol to proselytize or exclude. Such features are nowhere present in the Commission's maintenance of the Peace Cross as a memorial to the

49 men from Prince George's County who died in WWI.

ARGUMENT

I. COERCION IS THE PROPER STANDARD FOR ESTABLISHMENT CLAUSE CLAIMS

A. Respondents' Endorsement Approach Cannot Be Squared With The Text Or History Of The First Amendment

At the Founding, "establishment" was understood to include laws designating an official church or compelling adherence to or support of that church through the preferential distribution of special benefits or the imposition of special burdens. *See* Legion Br. 24-40; *see also* Taos Br. 12-13 (reviewing Founding-era uses of the phrase "establishment of religion"). Moreover, the process of disestablishment, debates over the First Amendment, and the Framers' post-ratification actions show the Establishment Clause does not prohibit government speech pertaining to religion absent some tangible threat to liberty. It follows that coercion, not endorsement, is the proper standard for Establishment Clause claims.[1]

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[1] Some *amici* have proposed a purely historical test asking whether a challenged action is sufficiently similar to the hallmarks of Founding-era establishments. *See* Becket Br. 13-29; *cf.* Legion Br. 29 (discussing hallmarks). The Legion proposes a general coercion standard because coercion is the common denominator underlying these hallmarks, it would likely be more manageable to apply, and it has already been adopted in this Court's cases—but either formulation will lead to the same results.

Respondents offer little in response. Textually, they do not explain why the word "establishment" should be counterintuitively interpreted to mean "endorsement," and why, if the Framers really meant to prohibit non-inclusive speech, they did not use more expansive words like the rejected proposal to prohibit laws "touching religion." *See* Legion Br. 34. They do not explain how symbolic endorsement without tangible consequence can impair the "liberty" protected by the Fourteenth Amendment, through which the First Amendment applies to the States. And they do not explain why the Establishment Clause permits laws tangibly benefiting religion—such as RLUIPA and RFRA, *Cutter v. Wilkinson*, 544 U.S. 709 (2005), and tax exemptions, *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)—but condemns speech with no tangible effect.

Respondents simply argue that "if coercion were a necessary element, then the Establishment Clause would be redundant of the Free Exercise [Clause]." Resps. Br. 82. Not so. The Religion Clauses work together to ensure freedom of conscience in religious matters by, "[o]n the one hand, . . . forestall[ing] compulsion by law of the acceptance of any creed or the practice of any form of worship," and "[o]n the other hand, . . . safeguard[ing] the free exercise of the chosen form of religion." *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *see also* Legion Br. 24-25. For example, while extracting "three pence" to support a favored church would not infringe the positive right to free exercise, it infringes the negative right against compelled support of a church.

Indeed, recognizing that Establishment Clause claims, like Free Exercise Clause claims, require some

tangible threat to liberty actually *reconciles* these "complementary clauses," *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947), and avoids interpreting "establishment" to put the Clauses in tension. It is passing strange that, under *Lemon* and *Allegheny*, the Free Exercise Clause is itself unconstitutional because it "advances" and "endorses" religion.

Regarding history, Respondents provide no comprehensive counter-narrative, instead contending that history provides "neither a workable nor principled approach to religious-display cases," because the "Framers simply did not share a common understanding of the Establishment Clause," Resps. Br. 78-79 (citation omitted). But "[t]his Court has always purported to base its Establishment Clause decisions on the original meaning of that provision." *Town of Greece*, 572 U.S. at 602 (Alito, J., concurring); Legion Br. 18-19. Indeed, perhaps no other constitutional provision's history reveals so completely both the problem to be addressed and the contemporaneous understanding of the solution. Thus, *Town of Greece* repudiated reading it or *Marsh* as an exception to the Establishment Clause or as "permitting a practice that would amount to a constitutional violation if not for its historical foundation." 572 U.S. at 576. These cases mean instead that "[w]hatever test [the Court] choose[s] to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Allegheny*, 492 U.S. at 670 (Kennedy, J., dissenting).

Respondents' claim that history is at best mixed is also demonstrably wrong, as this Court has conclusively resolved. *E.g.*, *Lynch v. Donnelly*, 465

U.S. 668, 674 (1984) (describing an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789"). Overwhelming historical evidence shows both that disestablishment involved dismantling laws that tangibly burdened or benefited churches, and that the Framers did not believe mere symbolic speech posed any Establishment Clause concerns. Legion Br. 24-35. Respondents' main responsive historical points are Jefferson's decision not to issue Thanksgiving Proclamations for fear of "*indirectly* assum[ing] to the U.S. an *authority* over religious exercises," Letter from Thomas Jefferson to Samuel Miller, Jan. 23, 1808, goo.gl/6ybp7g (second emphasis added), and Madison's late-in-life concern that choosing an official congressional chaplain would "shut the door of worship" and undermine the "voluntary" religious acts of minorities. *See* Detached Memoranda, 3 Wm. & Mary Quarterly 534, 558-59 (1946).

But Jefferson's concern that Thanksgiving Proclamations prescribed "religious exercises" suggests only that he worried such directives would indirectly interfere with religious doctrine. Similarly, that Madison, after supporting the legislation authorizing paid chaplains, later came to question it reflects only that selectively funding religious ministers raises legitimate coercion questions. Neither personal writing suggests that endorsing religious speech constituted an establishment, particularly in light of what these Framers *did*: Madison issued several Thanksgiving Proclamations as President; Jefferson's Second Inaugural Address sought "the favor of that Being in whose hands we

are"; and the Religious Freedom Bill advocated by both pursued disestablishment by eliminating religious compulsion, not by regulating speech. *See* Legion Br. 31, 36; Becket Br. 22-23; *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 888 (2005) (Scalia, J., dissenting).

No historical explanation of the First Amendment would ban mere endorsement. "The contemporaneous evidence is all on one side." *Am. Jewish Congress v. City of Chicago*, 827 F.2d 120, 136 (7th Cir. 1987) (Easterbrook, J., dissenting). The *only* interpretation of the Establishment Clause that is faithful to its original meaning is, as Madison explained, 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.* 758 (J. Gales ed. 1834) (Aug. 15, 1789).

B. Respondents' Sectarian Endorsement Exception, Rejected In *Town of Greece*, Is Ahistorical And Unworkable

Respondents do not seriously defend the *Lemon/Allegheny* endorsement standard, declining to take it up until page 89 of their brief. Instead, accepting that *nonsectarian* speech endorsing religion is permissible, Respondents seek to carve out an exception prohibiting *sectarian* endorsement. While sectarian speech runs a greater risk of proselytization, it makes no sense to create a separate test banning sectarian speech *regardless* of whether it proselytizes or otherwise coerces. Respondents' approach is fatally flawed as a matter of history, precedent, and pragmatics, and was specifically rejected in *Town of Greece*.

1. *Town of Greece* Rejected Respondents' Rule

In *Town of Greece* the respondents sought to distinguish *Marsh* by arguing that, under *Allegheny*, "prayer must be nonsectarian, or not identifiable with any one religion." *Town of Greece*, 572 U.S. at 578. The Court rejected this argument as ahistorical and unworkable and, in fact, specifically abrogated *Allegheny*'s claim that "[h]owever history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." *Id.* at 580 (quoting *Allegheny*, 492 U.S. at 603).

Still, Respondents put forward the very rule *rejected* by *Town of Greece*, arguing that case was a narrow decision that should not be applied to other forms of government speech. Yet Respondents' test poses the same problems observed in *Town of Greece*, and more.

First, as explained in *Town of Greece*, Respondents' sectarian-endorsement exception finds no basis in history and fails to explain the sectarian acknowledgements implied in the Constitution and common at the Founding. The Constitution dates itself from "the Year of our Lord," referencing Jesus's birth, and exempts only Sunday from the time to exercise a veto, *see* Art. I, § 7. Moreover, "[t]he Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable," such as "a prayer seeking 'the grace of our Lord Jesus Christ, &c.,'" and these "decidedly Christian . . . prayers must not be dismissed as the

relic of a time when our Nation was less pluralistic than it is today." *Town of Greece*, 572 U.S. at 578-79 (citations omitted). Presidents also employed faith-specific language. For example, President Adams encouraged religious citizens to come "before God . . . through the Redeemer of the World . . . by his Holy Spirit," Proclamation of Day of Fasting, March 23, 1798, goo.gl/UtqmE5, and President Madison's Thanksgiving Proclamation quoted the New Testament by referring to the "Author of every good and perfect gift," *Proclamations for Thanksgiving* 38 (1858), goo.gl/GB9e42; *see* James 1:17 ("Every good and perfect gift is from above . . . ."). Moreover, the Great Seal of the United States incorporates faith-specific imagery. *See* Legion Br. 37; Taos Br. 15.

Overlooking this, Respondents' *amici* contend the Founders' commitment to pluralism generally led them to "avoid[] any identifiably Christian references, let alone language or imagery associated with a particular Christian denomination." Legal Scholars Br. 6. But such political prudence should not be confused with constitutional command. Notably absent from *amici*'s narrative is any statement by any Founder suggesting the *Establishment Clause* mandated inclusive language or that disestablishment required elimination of sectarian public speech. Rather, whatever the Founders believed was the most effective way to govern, no one believed sectarian language fell below the minimum standards of liberty guaranteed by the Constitution.

Second, as *Town of Greece* recognized, tests turning on "sectarianism" are unworkable. For one, "[t]o hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and

the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing nor approving prayers in advance nor criticizing their content after the fact." 572 U.S. at 581. Moreover, noting "[t]he difficulty, indeed the futility, of sifting sectarian from nonsectarian speech," the Court stated that "[t]here is doubt . . . that consensus might be reached as to what qualifies as generic or nonsectarian." *Id.* at 582.

Just as the Constitution does not compel governments to remove all sectarian content from prayers, it "does not require eradication of all religious symbols from the public realm." *Buono*, 559 U.S. at 718 (plurality). Nor can courts straightforwardly determine when a symbol is "sectarian." Even Respondents appear to acknowledge (Br. 75) that some forms of a cross—such as the Cross of Malta—would be permissible despite their obvious religious heritage, *see* VFW Br. 26. Similarly, the centerpiece of the New Mexico flag is a cross that has nothing to do with Christianity but is actually a religious sun-symbol of Zia Native Americans. *See State Flag*, N.M. Secretary of State, goo.gl/WqbRhE. In reality, Respondents and their *amici* seem concerned with the Latin cross because it is "the most *recognizably* sectarian religious symbol familiar to our society." Legal Scholars Br. 17 (emphasis added). Yet a rule prohibiting symbols that reflect traditions shared by more of society, while permitting more obscure symbols shared by fewer citizens, is not neutral among sects.

More fundamentally, while it is possible to imagine a nonsectarian prayer, there is no nonsectarian religious symbol. Nor is it feasible (or desirable) to require that governments displaying the symbol of one religion, must, to avoid sectarian "favoritism," display the symbols of all religions. Indeed, Arlington National Cemetery offers 71 different emblems of belief for headstones (including 25 distinct crosses), and also allows individuals to submit their own emblems. *See Available Emblems*, National Cemetery Admin., goo.gl/Atm4BC. Incorporating this many symbols into every public memorial would not only be impractical, but counterproductive—including 71 religions' symbols would only make adherents to the 72nd feel even more excluded for having every faith recognized but their own. This impracticability means that prohibiting "sectarian" religious displays will ultimately lead to a blanket prohibition on religious symbolism, resulting in hostility toward religion.[2]

Finally, Respondents are wrong that prayer is less problematic than symbols because spoken words are "fleeting." For one, the consistent practice of praying immediately before every weekly city council meeting is far less "fleeting" than a passing glance at the Peace Cross. More important, many citizens cannot avoid attending city council meetings to conduct business directly affecting them. And, while there, they face

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[2] During oral argument, one member of the Fourth Circuit panel twice suggested the "easiest compromise position" was "chopping the arms off" the Peace Cross to eliminate its sectarian character. *See* Oral Arg. at 11:00-11:15, 22:00-22:17 (Dec. 7, 2016), goo.gl/kejWS9.

real social pressure to participate in communal prayer or stand out. By contrast, there is no pressure to observe the Peace Cross, which can be avoided by simply keeping one's eyes on the road. *See Allegheny*, 492 U.S. 664-65 (Kennedy, J., dissenting).

2. Respondents' Rule Rests On Unreasonable Assumptions

Respondents' rule also rests on the unreasonable assumption that whenever a symbol represents religious beliefs held by some, but not all, citizens, it necessarily amounts to preferential access and inherently "discriminates against patriotic soldiers who are not Christian." Resps. Br. 21.

Of course, actually granting preferential access to symbols of one religion would be unconstitutional. *See Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995). But the simple fact that Veterans Memorial Park contains only one memorial with religious symbolism does not demonstrate preferential access. Rather, the Peace Cross has merely been provided the same access to a park dedicated to veterans memorials as the purely secular memorials that surround it. It is "peculiar to say that government 'promotes' or 'favors' a religious display by giving it the same access to a public forum that all other displays enjoy." *Id.* at 763-64 (plurality). Indeed, if the Peace Cross had been *excluded* because of its religious connotations, this would have violated the Free Exercise and Free Speech Clauses. *Id.* at 766.

Moreover, *even if* Respondents were correct that the Peace Cross "honor[s] only Christian veterans," Resps. Br. 41, that would no more violate the

Establishment Clause's prohibition against discrimination against non-Christians than the Irish Brigade Monument at Gettysburg violates the Equal Protection Clause's prohibition against ethnic discrimination. Nor does it send a discriminatory *message* to those outside the group being honored. No one viewing the Women in Military Service for America Memorial at Arlington National Cemetery thinks the government is "callously discriminat[ing]" against men. Resps. Br. 21. Nor does anyone observing the Japanese War Memorial in Fresno's Roeding Park assume that the city "views being American and [Japanese] as one in the same," Resps. Br. 54 (quoting Pet. App. 31a).[3] A viewer instead would assume either that private groups, for reasons of their own, chose to fund a memorial to honor members of their group, or that the honored group did something particularly noteworthy. And that is all that happened here: The memorial was privately built and owned for four decades before the Commission became involved, and the government's decision to accommodate the private builders' decision to use a cross to honor their loved ones says nothing about whether the government favors Christianity. There was no actual or symbolic discrimination

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3 Respondents' claim that "Jews, Humanists, Muslims, Atheists, Buddhists, Unitarians and others have made it clear . . . that, when used as a government war memorial, the cross signifies that their sacrifices are unworthy even of mention," Resps. Br. 37, is belied by the *amicus* briefs filed in support of Petitioners by members of these groups. *See* Brs. of Jewish Coalition for Religious Liberty, Kamal S. Kalsi, the Islam and Religious Freedom Action Team of the Religious Freedom Institute, and the National Jewish Commission on Law and Public Affairs.

against non-Christians; there was simply accommodation and neutrality toward parents wishing to honor their sons through a symbol with religious connotations.

Not even the reasonable observer under the endorsement test, aware of these facts, he would, *at most* conclude that the government is *endorsing* Christianity, much less proselytizing for it. He would recognize that the government was simply accommodating one group's effort to honor their sons just as (there is no reason to doubt) it would have accommodated Jewish parents seeking to honor their fallen with a symbol of *their* shared religious values.[4]

Finally, despite Respondents' protestations, the two cross memorials at Arlington National Cemetery would clearly fail their test. These "sectarian" crosses are not honoring particular Christian soldiers, and Jewish or Islamic (or other) groups do not have analogous monuments memorializing all members of their faiths. Indeed, the 13- and 24-foot cross memorials dwarf the size of the 3-inch religious emblems on nearby individual headstones, which would seem to send a message of "aggrandizement" of Christianity far exceeding that of the Peace Cross. As this reflects, it is illogical to conclude that surrounding crosses with *other religious* imagery somehow makes the display's message *less* religious.

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[4] At the time of WWI, over 95% of religious Marylanders were Christian, and the Census Bureau in 1916 recorded no members of "non-Christian" congregations in Prince George's County. *See* Dellinger/Lederman Br. 31-32 & n.30. It is therefore unsurprising that nothing in the record suggests any of the 49 men honored were not Christian.

C. Respondents Mischaracterize The Legion's Standard

Respondents and their *amici* next mischaracterize the standard adopted in *Town of Greece* and advocated by the Legion.

First, and most oddly, Respondents contend the coercion standard *permits* what its foremost proponents say it *prohibits*. They cite Justice Scalia's *Lee v. Weisman* dissent stating the coercion standard prohibits the Government from "specifying details upon which . . . believe[rs] in a benevolent, omnipotent Creator . . . are known to differ (for example, the divinity of Christ)." 505 U.S. 577, 641 (1992). Similarly, they cite Justice Kennedy's *Allegheny* dissent stating the coercion test would *not* "permit the permanent erection of a large Latin cross on the roof of city hall." 492 U.S. at 661. These quotations thus establish that the coercion standard would *not* allow the government to take sides in a religious dispute or prominently display a Latin cross in every U.S. government building. But Respondents and their *amici* bizarrely claim that this parade of horribles necessarily follows from this standard.

If Respondents and their *amici* are arguing that these quotations somehow establish the general invalidity of sectarian symbols under the coercion standard advocated by Justices Kennedy and Scalia, that contention is refuted not only by what those opinions repeatedly say, but also by the *Allegheny* dissent's unequivocal conclusion that the sectarian passive symbols at issue—a menorah and crèche—were constitutional. *See* 492 U.S. at 655 (Kennedy, J., dissenting).

Respondents' parade of horribles thus flows not from the coercion standard actually advocated by the Legion, but from Respondents' own mischaracterizations. The Government may not opine on the "divinity of Christ" because one hallmark of proscribed establishment, as Justice Scalia commonly noted, is "tak[ing] sides in a theological dispute." *McCreary*, 545 U.S. at 894-95 n.4 (Scalia, J., dissenting). The cross criticized in Justice Kennedy's *Allegheny* dissent was impermissible because it would be "an obvious effort to proselytize on behalf of a particular religion." *Allegheny*, 492 U.S. at 661. Again, as *Town of Greece* makes explicit, such direct proselytization is impermissible both because it is indistinguishable from establishment *per se* and can *de facto* coerce adherence to the established religion. *See* 572 U.S. at 583, 587, 592; Legion Br. 18.

Respondents further err in suggesting the Legion seeks a "categorical rule" giving the "greenlight" to all sectarian symbols. Resps. Br. 67. To the contrary, even passive sectarian symbols can be invalid—but only when a "fact-sensitive" analysis shows a "real and substantial likelihood" that the symbol has been used as a "means to coerce or intimidate others." *Town of Greece*, 572 U.S. at 587, 589-90.

This is a very different approach than that of the endorsement test. Respondents seek a categorical rule against recognizable sectarian symbols and commend the endorsement test's invalidation of *every* cross-shaped memorial considered by a federal court. Resps. Br. 41. Unlike the endorsement test, however, the proper approach recognizes that, because "[o]ffense . . . does not equate to coercion," the use of sectarian symbols "acknowledging the central place

that religion . . . hold[s] in the lives" of many private citizens will usually be valid, and any outliers "can be addressed in the regular course." *Town of Greece*, 572 U.S. at 589, 591.

Most important, when those passive displays are assessed, it will be pursuant to a standard derived from the Establishment Clause's text and history, rather than under the anti-historical and atextual endorsement test. Indeed, it is noteworthy that while the endorsement test routinely overturns commonplace and unobjectionable acknowledgements of religion, *none* of Respondents' parade-of-horrible coercion-standard hypotheticals are derived from the real world. Establishment Clause jurisprudence should not chase purely academic hypotheticals with overbroad prophylactic rules that severely impinge religious toleration and freedom in the real world. "The Constitution deals with substance, not shadows." *Salazar*, 559 U.S. at 723 (Roberts, C.J., concurring) (citation omitted).

Finally, and most obviously, the vast majority of Respondents' and *amici*'s parade of horribles could never survive the coercion test because they involve (1) government conduct which tangibly harms nonadherents—such as granting adherents "religious preferences" in employment, Legal Scholars Br. 22—or (2) asserting direct, coercive control over religious organizations and activities—such as "seiz[ing] control" of a religious institution and "governmental selection of ministers," *id.* at 23; Religious Denominations Br. 20.

D. The Legion Is Not Seeking A "Sea Change" In The Law

Respondents and their *amici* next contend that the Legion is seeking a "cataclysmic overhaul in Establishment Clause jurisprudence." Resps. Br. 66-67. Respondents misunderstand the law.

For one, *Town of Greece* has *already* "abandoned the antiquated 'endorsement test,'" and adopted a coercion standard in the analogous context of legislative prayer. *Elmbrook School Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from denial of certiorari); *see also New Doe Child #1 v. United States,* 901 F.3d 1015, 1021 (8th Cir. 2018) (analyzing national motto under *Town of Greece*). And, as Respondents acknowledge, *Town of Greece* essentially adopted the reasoning of Justice Kennedy's *Allegheny* dissent, which analyzed symbols under the coercion standard. Resps. Br. 68.

Nor was *Town of Greece* itself a "sea change." Resps. Br. 61. The *Lemon*/endorsement test has always been anti-historical, applied intermittently, and oft-criticized by Justices, courts, and commentators; it has produced incomprehensible and inconsistent results; and was rejected as a standard for passive symbols by five Justices in *Van Orden*. Legion Br. 16-23.

Town of Greece has not led to an unravelling of Establishment Clause jurisprudence, and neither will this case. Indeed, the only decisions called into question if the Court applies the coercion standard to passive displays are *Allegheny* and (perhaps) *McCreary*. *Allegheny* has already been partially

abrogated by *Town of Greece* and *McCreary* was essentially limited to its facts by *Van Orden*.

Tellingly, no party actively advocates for application of the *Lemon*/endorsement test. And neither Respondents nor their *amici* make any effort to defend the *Lemon*/endorsement test on *stare decisis* grounds. Nor could they. Given *Town of Greece* and the Court's rejection of the *Lemon*/endorsement test in *Van Orden*, it is unlikely that *stare decisis* principles even apply here. But even if applicable, there is no plausible argument that *stare decicis* compels the endorsement test's continued existence. *See* Cato Br. 10-15; Citizens United Br. 21-25. That test "actually impedes the stable and orderly adjudication of future cases" because it cannot survive "without jury-rigging new and different justifications to shore up the original mistake." *Citizens United v. FEC*, 558 U.S. 310, 379 (Roberts, C.J., concurring). Indeed, rather than the customary practice of applying the same *standard* to different *facts*, the Court's modern practice has been that if religious speech is to be upheld, *Lemon* is jettisoned, but if it is to be invalidated, *Lemon* is invoked. Such an approach defies consistent application by courts or governments.

At most, the Legion is asking the Court to make explicit what *Town of Greece* already implied: The notion "that the endorsement test remains part of 'the prevailing analytical tool' for assessing Establishment Clause challenges misstates the law." *Elmbrook*, 134 S. Ct. at 2284 (Scalia, J., dissenting from denial of certiorari) (citation omitted).

E. The Court Must Address The Appropriate Standard

Finally, the Court should reject Respondents' claim, Resps. Br. 26-27, that this case can be resolved without articulating an applicable standard.

This Court exists "to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), not merely to engage in fact-bound error correction. The Court's Establishment Clause jurisprudence has long been criticized for its failure to provide any clear, workable standard to guide local governments and federal courts. And the Court's recent failure to articulate an applicable standard has made matters worse. Currently, some Circuits analyze passive displays under the *Lemon*/endorsement test, others apply the *Van Orden* concurrence's "legal judgment" framework, and, most recently, some courts have applied *Town of Greece*. *See* Pet. 22-23; *Doe Child*, 901 F.3d at 1021. As the District Court aptly put it, "Establishment Clause cases are a law professor's dream, and a trial judge's nightmare." Pet. App. 63a.

Issuing a fact-bound decision resolving this case without establishing an applicable standard is thus not an option. "It is irresponsible to make the Nation's legislators walk this minefield." *Pinette*, 515 U.S. at 768 n.3 (plurality). Local governments cannot assess whether their conduct is constitutional, and often simply self-censor religious symbols for fear of being embroiled in expensive litigation. Indeed, thirty states have asked the Court to provide "clear guidance about the Establishment Clause's meaning." States' Br. 5-6. Federal courts, meanwhile, are constrained to apply irreconcilable precedent and issue decisions often turning on trivialities, such as how far the

crèche is from the jumbo candy cane. And "[t]he unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections." *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring). Only this Court can provide the necessary clarity.

II. THE PEACE CROSS IS CONSTITUTIONAL

As the Legion's opening brief explained, the Peace Cross survives any test.

First, the memorial survives *Town of Greece*'s coercion approach because no preferential access has been given, and the Commission is not exploiting the memorial's cross-shape to proselytize or exclude nonadherents. Legion Br. 53-57. It makes no difference that the Commission has spent money for upkeep. *See* Resps. Br. 88. Historically, the type of compelled financial support that was the hallmark of an establishment was the direct and preferential funding of the established church. *See* Becket Br. 14-15; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion,* 44 Wm. & Mary L. Rev. 2105, 2146-59 (2003). Spending general tax revenue on government speech does not become unconstitutional because the speech is religious. Otherwise, expenditures for chaplains, cross-shaped military medals, and printing "In God We Trust" on coins would be unconstitutional. Indeed, every governmental action uses tax dollars; so if the Establishment Clause permits the government to do something—like display a war memorial with religious symbols—that necessarily means tax revenues can support it.

Second, even under the *Lemon*/endorsement test, a fully-informed reasonable observer—aware of the memorial's history and the context in which it appears—would not conclude that the memorial sends a message to nonadherents that they are "outsiders" or "excluded." *See* Legion Br. 57-60; *supra* at 14-16.

Respondents answer with mischaracterizations and irrelevancies. For example, Respondents frequently note "Christian prayers" during events at the memorial. Resps. Br. 3-4. But military and veterans events traditionally include prayers, and this does not somehow turn them into religious services. JA1588-91 (U.S. Army policy on public prayer). Similarly irrelevant is Respondents' preoccupation with a handful of sources from around the memorial's construction—three short newspaper articles and one speech—referring to a "Calvary" cross. JA428-33, 442. This simply reflects shared religious idioms of that time and that many sought solace in the belief that those honored "sacrifice[d]" their lives for the cause of freedom. JA441.[5]

Finally, Respondents attempt to disparage the Peace Cross and the Legion by insinuating (without *any* evidence) that the memorial and Legion were linked in the 1920s to anti-Semitism or the Ku Klux

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[5] Respondents also seek to minimize Mrs. Martin Redman's letter, conveying her "heart-felt appreciation" for a donation and stating that "[t]he chief reason I feel as deeply in this matter, my son, [Wm.] F. Redman, lost his life in France and because of that I feel that our memorial cross is, in a way, his grave stone," JA1244. Respondents call this a "mercenary plea," and question whether Mrs. Redman's son is even listed on the memorial, Resps. Br. 48. William Redman is listed on the memorial, though his name is misspelled as "William Redmond." Ct. App. JA 62.

Klan. Resps. Br. 5-8. As the District Court recognized, *see* Pet. App. 59a, these claims are as ludicrous as they are revolting. *Respondents'* expert wrote that, in the 1920s, the American Legion was a "remarkably diverse and ecumenical organization" with many Catholic and Jewish members (including national chaplains) during "an era of substantial nativism." JA1333. And one of the most influential leaders of Post 3 in the 1920s was J. Moses Edlavitch, a Jewish member who signed the deed acquiring the memorial's grounds and was one of the most "[p]rominent and "ardent supporters of the memorial effort." JA990; *see* JA65, JA205, JA1060. Moreover, ten African Americans are listed on the memorial, *see* JA1559-69, and, like all others listed, they appear in alphabetical order and without rank.

CONCLUSION

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

Respectfully submitted,

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