Nos. 17-1717, 18-18

In the Supreme Court of the United States

THE AMERICAN LEGION, *ET AL.*,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *ET AL.*,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *ET AL.*,
Respondents.

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

CORRECTED BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Establishment Clause challenges to religious displays are governed by the "endorsement" test developed under *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), or whether that test has been supplanted by the historical analysis adopted in *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014).

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has appeared before this Court as counsel in numerous religious-liberty cases, including *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), and *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016).

Becket believes that because the religious impulse is natural to human beings, religious expression is natural to human culture. Becket therefore opposes attempts to use the Establishment Clause to banish acknowledgment of religion from the public square. Becket has long criticized the lower courts' subjective use of the *Lemon* test, arguing that the Establishment Clause should instead be applied with reference to its historical meaning. See, *e.g.*, Br. *Amicus Curiae* of the Becket Fund for Religious Liberty, *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696).

Becket is concerned with this case because the lower court's decision represents exactly the sort of hostility toward religion that the *Lemon* test encourages, and that a historical approach would rectify.

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission. Petitioners and Respondents have consented to the filing of this brief. The parties were notified at least ten days before the due date of this brief of the intention to file.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This brief makes two points. The first is about what sort of guidance lower courts need in Establishment Clause cases. Lower courts don't merely need guidance on how to apply the "endorsement" test under *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); they need guidance on whether *Lemon* still applies at all. This Court's next Establishment Clause case should make clear that the *Lemon* test has been replaced by the historical approach in *Town of Greece*.

The second point is about the ideal vehicle for providing this guidance. This is an easy case. The nearly century-old World War I memorial here easily satisfies both *Lemon* and *Town of Greece*. Accordingly, summary reversal is warranted. But if the Court does not summarily reverse, it should clarify that *Town of Greece* has displaced *Lemon*—either in this case or in another case with more representative facts.

ARGUMENT

I. Lower courts need further guidance on whether religious-display cases are controlled by *Lemon* or *Town of Greece*.

It is no secret that "[t]his Court's Establishment Clause jurisprudence is in disarray." *Rowan County* v. *Lund*, 138 S. Ct. 2564, 2564 (2018) (Thomas, J., dissenting from denial of certiorari). Petitioners highlight several splits over how *Lemon*'s "endorsement" test should be applied—including whether crosses are so "inherently religious" that they should be presumed unconstitutional under *Lemon*'s "effects" prong (Am. Legion Pet. 14-17; Comm'n Pet. 22-29); how much

knowledge to attribute to *Lemon*'s so-called "reasonable observer" (Am. Legion Pet. 23-24; Comm'n Pet. 29-31); and whether routine maintenance of a passive display constitutes "excessive entanglement" under *Lemon*'s third prong (Am. Legion Pet. 24-25).

Far more consequential than these disagreements over how *Lemon* should be applied, however, is the more fundamental question of whether *Lemon* still applies at all. Although some of this Court's cases have asked "whether a 'reasonable observer' would think that a government practice endorses religion," the Court's more recent cases have asked instead "whether a government practice is supported by this country's history and tradition." *Rowan County*, 138 S. Ct. at 2564-65 (Thomas, J., dissenting from denial of certiorari). This historical approach "[re-]aligns * * * Supreme Court practice" with "the original public meaning" of the Establishment Clause, *Felix* v. *City of Bloomfield*, 847 F.3d 1214, 1215-21 (10th Cir. 2017) (Kelly, J., joined by Tymkovich, J., dissenting from denial of rehearing en banc), and promises to free courts from the "judicial morass" of subjectivity that has characterized *Lemon* for decades. *Utah Highway Patrol Ass'n* v. *American Atheists, Inc.*, 132 S. Ct. 12, 15 n.3 (2011) (Thomas, J., dissenting from denial of certiorari) (internal quotation marks omitted). The most urgent need of the lower courts, then, is confirmation that the *Lemon* test has been replaced by an analysis based on history.

Justice Kennedy explained the history-based alternative to *Lemon* in his dissent from the first decision adopting the endorsement test: *County of Allegheny* v. *American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). There, the Court struck

down the display of a crèche as an endorsement of religion. But Justice Kennedy rejected the idea that "the meaning of the [Establishment] Clause" should depend on the perceptions of a "reasonable observer," arguing instead that it should "be determined by reference to historical practices and understandings." *Id.* at 670. Applying that test, and surveying various historical references to religion from the Founding era and later, Justice Kennedy concluded that the crèche was constitutional because it presented no more "realistic [a] risk" of a true establishment of religion than the many "tradition[al] * * * government accommodation[s] and acknowledgment[s] of religion that ha[ve] marked our history from the beginning." *Id.* at 662-63.

More than a decade later, Justice Kennedy's approach commanded four votes in a plurality opinion upholding a Ten Commandments display. *Van Orden* v. *Perry*, 545 U.S. 677 (2005). There, the plurality expressly refused to apply *Lemon*, relying instead on the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Id.* at 686.

Finally, in *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014), a majority of the Court adopted Justice Kennedy's historical approach. Repeatedly invoking Justice Kennedy's *Allegheny* dissent, the Court explained that the primary question in evaluating governmental "symbolic expression" is whether it "accords with history and faithfully reflects the understanding of the Founding Fathers"; if so, it is constitutional no matter how it would fare under any previously articulated "test." *Id.* at 1819-20. And although *Town of Greece* involved legislative prayer, the Court emphasized that its decision should not be taken as "'carving

out an exception' to the Court's Establishment Clause jurisprudence [for] legislative prayer," but was instead articulating a basic principle of Establishment Clause law: If a practice is of a type "that was accepted by the Framers and has withstood the critical scrutiny of time," then it is simply not a law respecting an establishment of religion. *Id.* at 1818-19; see also *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("*Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings."). "After *Town of Greece*," then, treating *Lemon*'s "endorsement test" as the controlling legal standard "misstates the law." *Elmbrook Sch. Dist.* v. *Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from denial of certiorari).

Following *Van Orden* and *Town of Greece*, some circuits have rightly rejected *Lemon* in favor of a historical approach.[2] Other circuits, however, including the

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[2] See, *e.g.*, *Pelphrey* v. *Cobb County*, 547 F.3d 1263, 1276-77 (11th Cir. 2008) (rejecting characterization of *Marsh* as "an 'outlier'" and explaining that this Court has "considered historical practice to resolve * * * case[s] under the Establishment Clause"); *American Civil Liberties Union Neb. Found.* v. *City of Plattsmouth*, 419 F.3d 772, 776, 778 n.8 (8th Cir. 2005) (upholding Ten Commandments monument under *Van Orden*, explaining that in the wake of *Van Orden*, "we do not apply the *Lemon* test"); see also *Smith* v.

Fourth Circuit below, have continued to apply the *Lemon* test, treating *Town of Greece* as just the sort of "legislative prayer exception" that *Town of Greece* said it was not.[3] Indeed, several circuits have stated that

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Jefferson Cty. Bd. of Sch. Comm'rs, 788 F.3d 580, 596, 602-05 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result) (*Town of Greece* was a "watershed" decision that "rejected the endorsement test in favor of the historically grounded coercion test" "as the general rule for the Establishment Clause"); *Felix*, 847 F.3d at 1215-20 (Kelly, J., dissenting from the denial of rehearing en banc) (the "turn to history" culminating in *Town of Greece* is not "unique to legislative-prayer cases" and instead indicates that "the Establishment Clause should not be an impediment to certain, limited government displays of a religious nature").

[3] See, *e.g.*, Am. Legion Pet. App. 13a-15a (rejecting historical analysis without citing *Town of Greece*); *Felix* v. *City of Bloomfield*, 841 F.3d 848, 857-59 (10th Cir. 2016) (applying *Lemon* to a Ten Commandments display without mentioning *Town of Greece*); see also, *e.g.*, *Smith*, 788 F.3d at 588-89 (*Town of Greece* was "simply an application of * * * *Marsh*," and thus does not "general[ly]" displace "the endorsement analysis"); *Hewett* v. *City of King*, 29 F. Supp. 3d 584, 628-31 (M.D.N.C. 2014) (*Town of Greece* "specifically addressed" the "unique" context of legislative prayer and does not "extend[] to nonlegislative prayer practices"); *Freedom From Religion Found., Inc.* v. *Connellsville Area Sch. Dist.*, 127 F. Supp. 3d 283, 309-10 (W.D. Pa. 2015) (declining to apply *Town of Greece* in challenge to Ten Commandments display).

they will (and must) continue to apply *Lemon* until this Court expressly overrules it.[4]

This state of affairs may be "a law professor's dream," Am. Legion Pet. App. 63a, but the dispute over the governing test—history or endorsement—is anything but academic. Indeed, at least two courts have recently explained that they would have upheld religious displays under the type of historical analysis this Court adopted in *Town of Greece*, but nonetheless felt constrained to strike them down under *Lemon*. *Kondrat'yev* v. *City of Pensacola*, No. 3:16-cv-195, 2017 WL 4334248, at *1 (N.D. Fla. June 19, 2017), *oral argument on appeal heard* May 16, 2018; *Freedom From Religion Found., Inc.* v. *County of Lehigh*, No. 16-4504, 2017 WL 4310247 (E.D. Pa. Sept. 28, 2017), *briefing on appeal completed* May 24, 2018.

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[4] *E.g.*, *Freedom From Religion Found., Inc.* v. *Concord Cmty. Schs.*, 885 F.3d 1038, 1045-46 & n.1 (7th Cir. 2018) (although *Town of Greece* may have "rejected" "the endorsement test," "[f]or now, we do not feel free to jettison that test altogether"); *Newdow* v. *Peterson*, 753 F.3d 105, 107 (2d Cir. 2014) (similar); *Green* v. *Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 797 n.8 (10th Cir. 2009) ("[W]e are still obliged to apply *Lemon*, as refined by Justice O'Connor's endorsement test, * * * because the Supreme Court, in the series of splintered Establishment Clause cases since *Lemon*, has never explicitly overruled the case." (citation and internal quotation marks omitted)); *American Civil Liberties Union of Ky.* v. *Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005) (applying *Lemon* because, although "Justice Breyer's concurrence [in *Van Orden*] arguably provided a fifth vote as to *Lemon*'s inapplicability," the decision did not explicitly "instruct" against applying it).

Kondrat'yev, like this case, involves a longstanding cross on government property. The district court concluded that "the historical record indicates that the Founding Fathers did not intend for the Establishment Clause to ban crosses and religious symbols from public property." 2017 WL 4334248, at *3. Nevertheless, the court held that it was bound to apply the "widely criticized (and sometimes savaged)" *Lemon* test and strike down the cross. *Id.* at *2-4, 11 ("*Lemon* * * * is still the law of the land and I am not free to ignore it."). *Kondrat'yev* has now been fully briefed and argued on appeal, and much of the oral argument focused on whether to apply the *Lemon* test or the historical approach in *Town of Greece*. See Oral Argument, *Kondrat'yev* v. *City of Pensacola*, No. 17-13025, goo.gl/XseQRC (May 16, 2018).

Likewise, in *Lehigh County*, which involves a county seal that includes a cross, the district court reasoned that although "a passive symbol" like the seal does not "establish religion in the way the drafters of the First Amendment imagined," the seal was unconstitutional under the *Lemon* test. 2017 WL 4310247, at *5-8, 11. In both *Kondrat'yev* and *Lehigh County*, the courts concluded their opinions by "invit[ing] the Supreme Court to revisit and reconsider its Establishment Clause jurisprudence" in light of the original meaning of the Establishment Clause and long-accepted historical religious acknowledgments. Order 3, *Kondrat'yev* v. *City of Pensacola*, No. 3:16-cv-195 (N.D. Fla. July 3, 2017), ECF No. 44; see also *Kondrat'yev*, 2017 WL 4334248, at *12; *Lehigh County*, 2017 WL 4310247, at *8, 11.

The Court's next religious-display case should make clear that it already accepted this invitation four

years ago in *Town of Greece*, and that *Town of Greece* means what it says: "[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" 134 S. Ct. at 1819 (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

II. The Court should either rule broadly in this case or await another case with more representative facts.

The need for clarity is particularly acute if the Court's next religious-display case is this one. As petitioners have shown, the facts of this Memorial make it an "easy case," Comm'n Pet. 12, which can be resolved in favor of the display no matter which of the "the various tests articulated by this Court" is applied, Am. Legion Pet. 25-33. But a "factbound" decision leaving the continuing vitality of *Lemon* unclear is the last thing Establishment Clause jurisprudence needs. See *Utah Highway Patrol*, 565 U.S. at 21-22 (Thomas, J., dissenting from denial of certiorari). There are thousands of religious displays across the country, and many of them don't share the facts that make this such an easy case under both *Lemon* and *Town of Greece*. Thus, the Court should either take this case as an opportunity to clarify that *Town of Greece* has already replaced *Lemon*, or it should summarily reverse the lower court's decision and await another case with more representative facts.

For instance, while the Memorial in this case is nearly a century old, many religious displays around the country aren't—and under a proper, historically-focused Establishment Clause test, a monument shouldn't have to be nearly a century old to be constitutional. As this Court made clear in *Town of Greece*,

the relevant question isn't the age of the particular religious display or activity at issue, but whether the display or activity "fits within the tradition long followed" throughout the Nation. 134 S. Ct. at 1819-20; see also *id.* at 1816 (upholding a prayer practice begun in 1999). Thus, a ruling that focuses too narrowly on the Memorial's age could prompt unnecessary disputes over more recent displays.

Second, the Memorial obviously commemorates a specific, secular, historical event: the death of American soldiers in World War I. But many religious displays are not so neatly tied to a specific historical event. Some serve as more general "acknowledgment[s] of the role of religion in American life." *Van Orden*, 545 U.S. at 686 (plurality) (internal quotation marks omitted). Others commemorate a historical event with obvious religious significance. See*, e.g.*, Troy Moon, *Pensacola Was Site of First Christian Service in New World*, Pensacola News J. (Apr. 19, 2014), goo.gl/NdvWvc (cross commemorating "first Christian religious service in America" held by Spanish explorers in 1559); Mass. Dep't of Conservation & Recreation, *Resource Management Plan: National Monument to the Forefathers, Plymouth, Massachusetts* (Sept. 2006), goo.gl/tqq7FT (statue of "Faith" holding a Bible, commemorating pilgrimage of the Pilgrims to the New World); Architect of the Capitol, *Father Junipero Serra* (Apr. 29, 2016), goo.gl/9bikm8 (statue in U.S. Capitol of St. Junipero Serra lifting a cross, commemorating his establishment of Catholic missions in California). This is no surprise, as this "Court has long recognized that an accurate account of human history" and culture "frequently requires reference to religion." *American Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*,

760 F.3d 227, 240 (2d Cir. 2014). *Town of Greece* also makes clear that the government's symbolic speech can be "forthrightly religious," so long as it harmonizes with our traditions and does not "proselytize" in favor of any one faith or "disparage any other." 134 S. Ct. at 1820-24. Yet if this Court's decision turns on the fact that the Memorial is obviously a war memorial that happens to be "in the shape of a cross," Am. Legion Pet. 5-6; Comm'n Pet. 21-27, the status of many other memorials may remain in dispute.

Finally, the Memorial has never been used as a site for private religious services. But many other religious displays have. *E.g., Salazar* v. *Buono*, 559 U.S. 700, 707 (2010) (Mojave Desert Cross was "a gathering place for Easter services since it was first put in place"); *American Atheists*, 760 F.3d at 234-35 (Ground Zero Cross used for extensive religious devotions and housed at a Catholic church); *Freedom From Religion Found., Inc.* v. *Weber*, 951 F. Supp. 2d 1123, 1128 (D. Mont. 2013) (church services held at large statue of Jesus), *aff'd*, 628 F. App'x 952 (9th Cir. 2015). Some courts have treated that fact as problematic. *Kondrat'yev*, 2017 WL 4334248, at *1, 5-6. But this Court has recognized that citizens have a First Amendment right to use government property "for purposes of religious worship" when the property is also available for similar secular use. *Widmar* v. *Vincent*, 454 U.S. 263, 265 (1981); see also, *e.g.*, *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001). Accordingly, the Court should clarify that under *Town of Greece*, it is not the public's reaction to religious expression that "should control," but "the nature of [the] display and our Nation's historical traditions." *Utah*

Highway Patrol Ass'n, 565 U.S. at 15 n.2, 19 n.7 (Thomas, J., dissenting from denial of certiorari).

In short, the facts of this case make it particularly easy and appropriate for summary reversal. But if the Court does not summarily reverse, it should clarify that *Town of Greece* has fully displaced *Lemon*—either in this case or in another case with more representative facts. Lower courts should no longer decide Establishment Clause cases based on "intuition and a tape measure"; they should rely on history. *Allegheny*, 492 U.S. at 675 (Kennedy, J., concurring in the judgment in part and dissenting in part).

CONCLUSION

The decision below should be summarily reversed. Alternatively, the petitions for certiorari should be granted and the case set for plenary review.

Respectfully submitted.

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