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

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents do not seriously dispute that the Fourth Circuit applied a *per se* rule banning government displays involving crosses. Indeed, rather than disclaiming such a rule, Respondents embrace it, arguing that no circuit split exists because, aside from a few alleged "outliers" based on "exceptionally unique facts," "[t]here are at least thirty cases holding crosses unconstitutional," and "every Circuit that has addressed the constitutionality of a cross *memorial* . . . held that it violates the Establishment Clause." Opp. 2-3, 19. For Respondents, not only was the Fourth Circuit correct to rule that the Establishment Clause prohibits a government from displaying a cross, no matter the circumstances, but the *Lemon*/reasonable observer/endorsement test actually compels this result.

That is not the law. The Fourth Circuit's *per se* rule is inconsistent with this Court's jurisprudence and cannot be reconciled with contrary decisions of the Second, Fifth, and Tenth Circuits. But more to the point: Perhaps the strongest reason to grant review here is the fact that Respondents can plausibly assert that the Court's precedent compels hostility to memorials that use religious imagery. This blatant misinterpretation of the Establishment Clause should end.

Indeed, Respondents' litany of cases shows that it is hardly "alarmist in the extreme" to conclude the similar WWI memorials in Arlington National Cemetery will be condemned by the decision below, rather than becoming the first (and only) cross-shaped

memorials to survive the *Lemon*/reasonable observer/endorsement test. Opp. 32.

Moreover, nothing about this case precludes the Court from using it to clarify the proper Establishment Clause analysis. The central facts have never been in dispute: The Memorial was built to be a war memorial, has always been a war memorial, and has been consistently regarded by the community as a war memorial. Rather than contesting these facts, which should have been dispositive, Respondents rely on irrelevant, immaterial, or plainly misleading assertions that do not bear on certiorari.

Nor can Respondents avoid review by claiming the case arises in an interlocutory posture. There is no bar to jurisdiction, and this case arises in precisely the same posture as many other Establishment Clause cases decided by this Court, including *Allegheny* and *Hosanna-Tabor*.

The Court should grant review, reverse the Fourth Circuit's plainly incorrect decision, and adopt a simple, historically-based rule that will end the confusion and unsupportable results generated by the *Lemon*/reasonable observer/endorsement test.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT AND DECISIONS OF OTHER COURTS OF APPEALS

Respondents principally argue that certiorari is not warranted because "there is overwhelming consensus that government crosses violate the Establishment Clause." Opp. 15. Citing thirty

cases applying the *Lemon*/reasonable observer/ endorsement test to strike down government uses of a cross, ten of which involved cross-shaped memorials, Respondents argue that the contrary decisions from the Second, Fifth, and Tenth Circuits upholding cross displays are "outliers" based on "exceptionally unique facts." *Id.* at 19. These claims do not weigh against certiorari.

A. A *Per Se* Rule Banning Crosses Conflicts With This Court's Precedent

First, the fact that *more* lower courts have applied the *Lemon*/reasonable observer/endorsement test to strike down displays involving crosses is not an argument *against* certiorari. Rather, although the decision below is the most extreme example of hostility to religious symbolism in government displays, Respondents' brief shows that the Fourth Circuit's *per se* rule was simply the extension of a line of cases applying the *Lemon*/reasonable observer/ endorsement test to strike down displays involving crosses.

These decisions reflect "a troubling development in . . . Establishment Clause cases." *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1101-02 (10th Cir. 2010) (Kelly, J., dissenting from denial of rehearing). Courts applying the *Lemon*/reasonable observer/endorsement test to displays involving crosses often (1) "effectively presum[e] that religious symbols on public property are unconstitutional"; (2) engage in "selective observation" by a "nominally 'reasonable' observer'" of a display's physical appearance, context, and history; and (3) "equate[] the religious nature of the cross with a message of

endorsement." *Id.* They put governments to "the impossible burden of proving that Latin crosses are secular symbols," rather than asking whether "the memorial crosses at issue conveyed a message of memorialization, not endorsement." *Id.* And they "strike[] down [displays] *only* because [they are] able to imagine a hypothetical 'reasonable observer' who *could think* [the State] means to endorse religion—even when it doesn't." *Id.* at 1110 (Gorsuch, J., dissenting from denial of rehearing).

This trend, however, cannot be squared with the Court's precedent. There is nothing "neutral" about condemning war memorials using crosses to commemorate while preserving memorials pursuing the same secular purpose without religious imagery. Nor does the Constitution allow—as Respondents urge—different treatment for crosses relative to other religious symbols. *See, e.g.*, Opp. 21 (arguing *Van Orden* applies only to Ten Commandments displays); *id.* at 32 (acknowledging a Star of David can have both secular and religious meaning). As multiple Justices of this Court have recognized, "a Latin cross is not merely a reaffirmation of Christian beliefs," but is "often used to honor and respect" national heroes and "evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles." *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (plurality opinion). Far from weighing against certiorari, Respondents' asserted "consensus" is the strongest reason to grant review.

B. The Decisions of the Second, Fifth, And Tenth Circuit Cannot Be Distinguished

Second, there is nothing "exceptionally unique" about the decisions of the Second, Fifth, and Tenth Circuits upholding government displays involving crosses, nor can they be persuasively distinguished.

For one, just as the display upheld by the Second Circuit in *Port Authority* communicated a historical message by reflecting how people reacted to the losses of September 11, the Memorial reflects how people reacted to the losses of WWI in that war's immediate aftermath. *See Am. Atheists, Inc., v. Port Auth.*, 760 F.3d 227, 243 (2d Cir. 2014). It makes no difference that the Memorial was built by private parties while the Ground Zero Cross was found among the World Trade Center rubble. Like the Ground Zero Cross, the Memorial was already a historically significant landmark when the Commission obtained it.

Nor can Respondents distinguish the Tenth Circuit's decision in *Weinbaum* and the Fifth Circuit's decision in *Murray* by claiming they "involved small crosses *integrated* into government seals with highly unique 'localized secular meanings.'" Opp. 19 (quoting *Mount Soledad Memorial Ass'n v. Trunk*, 629 F.3d 1099, 1111 (9th Cir. 2011)). Just as the city seals in *Weinbaum* and *Murray* included crosses because crosses were associated with secular, historical events—the field of cross-shaped gravemarkers at Las Cruces and the crosses on Stephen Austin's coat of arms—the Memorial has its shape because crosses were a widely recognized symbol of the losses of WWI in its immediate aftermath. *See infra* at 8; *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1035 (10th Cir.

2008); *Murray v. City of Austin*, 947 F.2d 147, 155 (5th Cir. 1991).[1]

C. The Fourth Circuit's Decision Will Have Dramatic Consequences

Third, despite claiming every court to consider a cross-shaped war memorial has found it unconstitutional, Respondents argue it is "alarmist in the extreme" to believe the decision below will lead to the destruction of the two cross-shaped WWI memorials at Arlington. Opp. 32.

There is no basis for this feigned confidence. If Respondents and the Fourth Circuit are correct that the "inherent religious meaning" of crosses necessarily sends a message of endorsement and exclusion, there is no reason to believe the Arlington memorials may remain. Pet. App. 17a-18a. Indeed, although the Fourth Circuit strained to distinguish the Arlington memorials, it then went out of its way to preserve a future challenge to them. *See* Pet. App. 26a-27a, n.16. Such a challenge will come soon, and the result is not in doubt.

Nor will the impact of the decision below be limited to the Fourth Circuit. If a century-old war memorial that is only in government hands because of traffic safety considerations arising forty years after it was built is unconstitutional, it is difficult to

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[1] Without overruling *Weinbaum*, the Tenth Circuit subsequently struck down a series of cross memorials in *Davenport* based on sweeping reasoning comparable to the panel's below. Petitioners share the Commission's view that *Davenport* was incorrect, and that *Davenport*'s "[p]resumption of [u]nconstitutionality" is inconsistent with this Court's precedent. 637 F.3d at 1102 (Kelly, J., dissenting).

conceive of any cross-shaped monument that will survive.

II. THE MATERIAL FACTS HAVE NEVER BEEN IN DISPUTE

The central facts have never been in dispute: The Memorial was built 93 years ago to honor the original builders' sons and comrades who died in WWI. At that time, crosses were a widely recognized symbol for memorializing the WWI fallen. The Commission was not involved with the Memorial's design or construction, only acquiring it decades later for traffic safety reasons. The Memorial stands alongside secular, commemorative monuments and no religious monuments. And the Memorial has always included a large plaque and other secular features that explain its commemorative message.

While Respondents assert numerous "important omissions and errors," Opp. 3, they do not take issue with any of these central facts. Instead, attempting to avoid review, Respondents focus on facts that are irrelevant, immaterial, or plainly misleading. None bear on certiorari.

A. The Private Builders' Motivations Are Not Relevant, And, In Any Event, Were Entirely Secular

Rather than focusing on the circumstances surrounding the Commission's acquisition of the Memorial, Respondents focus on the circumstances surrounding the construction of the Memorial by its private builders. *See* Opp. 9-11. This is both irrelevant and inaccurate.

It is irrelevant because this Court has made clear that the motivations of a monument's private

sponsors cannot be imputed to the government entity acquiring it: "By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument." *Pleasant Grove City v. Summum*, 555 U.S. 460, 476-77 (2009). Thus, even if the private builders intended to construct a religious monument—which they clearly did not—those motivations would not bear on the constitutionality of the Commission's decision to maintain the Memorial after acquiring it—four decades later—for mundane, secular traffic safety reasons.

And it is inaccurate because, when read in context, every snippet quoted by Respondents show the builders sought to construct a memorial to honor their sons and comrades, not to endorse religion. For example, although Respondents and the Fourth Circuit highlight language in a 1918 donation pledge sheet asserting a "TRUST[] IN GOD"—an unremarkable sentiment in 1918—the sheet's full context makes clear that the Memorial was being constructed to "COMMEMORAT[E] THE MEMORY OF THOSE WHO HAVE NOT DIED IN VAIN." Pet. App. 3a-4a.

Not a single statement in the thousands of pages of record material detailing the Memorial's origins refers to the Memorial as a religious monument, rather than a commemorative one.

B. The Only Relevant "Government" Is The Commission

Throughout its brief, Respondents assert that "[t]he government" was involved with the Memorial. But in fact, Respondents reference the actions of at

least three governments: the Town of Bladensburg, the United States, and the Maryland-National Capital Park and Planning Commission. By piecing together the unconnected actions of three different governments, Respondents hope to build a constitutional case.

However, the only "government" whose actions are relevant to the constitutionality of the Memorial is the Commission. And it is undisputed that the Commission acquired the Memorial decades after it was built because of traffic safety concerns, not any desire to endorse religion.

C. Crosses Were A Well-Recognized Means to Commemorate The Fallen Of WWI

Respondents claim there is no evidence the Memorial was designed to mirror the cross-shaped gravemarkers in overseas cemeteries. *See* Opp. 9-10. This is wrong. As both sides' experts acknowledged, and as Petitioners' *amici* overwhelmingly show, crosses were a universally recognized symbol for the losses of WWI in its immediate aftermath and "quickly emerged as a cultural image of the battlefield." CA JA2256 (Respondents' expert); *see also* Br. of Veterans of Foreign Wars of the United States and National WWI Museum and Memorial, at 7-17; Br. of Retired Generals and Flag Officers, at 8-14.

Indeed, that the Memorial is located within 40 miles of four other cross-shaped WWI memorials, including the two principal WWI monuments in Arlington, vividly confirms this. Pet. App. 98a. And, a 1920 letter from Mrs. Martin Redman—who, far from being merely "one woman," Opp. 10, was the

Treasurer of the Memorial Committee, the mother of one of the men honored, and a driving force behind the Memorial—in which she explained that she regarded the Memorial as akin to her son's gravestone, leaves no doubt. Pet. App. 102a.

D. Prayers At Commemorative Veterans' Events Are Unremarkable And Do Not Transform Those Events Into Religious Services

Respondents, like the Fourth Circuit, emphasize that the Veterans Day and Memorial Day events held each year at the Memorial have included prayers. And Respondents repeatedly note that the Commission invited a Catholic priest to pray at a commemorative ceremony held at the Memorial. These facts are unremarkable and irrelevant.

They are unremarkable because military events, like many other secular events in this Nation, have traditionally included prayer. Indeed, the United States Army has promulgated official guidelines for using prayer at military events. *See* CA JA3407 (U.S. Army Command Policy on Public Prayers at Official Functions).

And they are irrelevant because, as recognized in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the fact that a secular event includes public prayer does not turn that event into a religious ceremony. These Veterans Day and Memorial Day events are no more religious than the town council meetings of the Town of Greece or the legislative sessions of the U.S. Congress.

That Respondents have found—in the Memorial's 93-year history—only one purported religious event

(in 1931) and a series of unremarkable prayers at secular events confirms that the community has consistently treated the Memorial as it would any other secular war memorial.

III. THE CASE IS RIPE FOR REVIEW

Respondents argue that the Court should deny certiorari because the case comes "at an interlocutory stage, making the case unripe for this Court's review." Opp. 1. Respondents are wrong, for several reasons.

First, and most importantly, Respondents' arguments do not concern the Court's *jurisdiction*. The Fourth Circuit's decision fully resolved the legal question in this case, and it is entirely within this Court's discretion to review that judgment. *See Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) ("[O]ur cases make clear that there is no absolute bar to review of nonfinal judgments[.]"); *see also* Stephen M. Shapiro *et al.*, Supreme Court Practice § 4.18 (10th ed. 2013) ("[Where] there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status.").

Second, this Court routinely grants review of interlocutory judgments in cases involving the Religion Clauses of the First Amendment. *See, e.g., County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 589 (1989); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 181 (2012). Here, as in *Allegheny*, the District Court found that the display passed constitutional muster, and the Court of Appeals

reversed and remanded, setting up the legal issue for this Court's review.

Third, although Respondents rely on Justice Alito's statement respecting denial of certiorari in *Mount Soledad Memorial Association v. Trunk*, 567 U.S. 944 (2012), the basis underlying Justice Alito's statement is conspicuously missing here. In *Mount Soledad*, Justice Alito reasoned that it was "unclear precisely what action" would be required after remand because the Court of Appeals "emphasized that its decision 'd[id] not mean that the Memorial could not be modified to pass constitutional muster [or] that no cross can be part of [the Memorial].'" 567 U.S. at 945-46 (Alito, J.) (citation omitted). Here, in contrast, the Fourth Circuit's *per se* prohibition against crosses on public land leaves the District Court little room to fashion an alternative remedy and effectively "mean[s] that no cross can be part of [the Memorial]." *Id.*

Because the question of whether the Memorial violates the Establishment Clause is a "clear-cut issue of law that is fundamental to the further conduct of th[is] case," this Court may—and should—grant certiorari now to correct the Fourth Circuit's clearly erroneous decision. Shapiro, *supra*; *see also Mazurek*, 520 U.S. at 975 (granting certiorari prior to final judgment because "the Court of Appeals' decision [wa]s clearly erroneous under [Supreme Court] precedents").

IV. A TEST FOCUSED ON NATIONAL TRADITIONS AVOIDS ABSURD RESULTS

As emphasized in the Petition, the Memorial should be upheld under any test articulated by this

Court—*Lemon*, *Van Orden*, or *Town of Greece*. Pet. 25-33. But as the long list of cases cited by Respondents confirm, the *Lemon*/reasonable observer/endorsement test does a poor job of distinguishing between benign, historical acknowledgements of religion's role in the Nation's history and genuinely coercive displays.

Rather than perpetuating this trend, the Court should clarify that when a government uses religious imagery in a way consistent with "the rich American tradition of religious acknowledgments," *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (plurality opinion), the display will be presumptively valid unless it is shown that the government was exploiting this tradition to coerce or convert nonadherents.

Respondents call this "a *per se* 'rule' that upholds all sectarian displays so long as the *government's purpose* is not to 'coerce or convert.'" Opp. 41. But this is not true. Presumptions are made to be rebutted, and government displays of religious imagery that are unconstitutionally coercive will do just that. Adopting a historically grounded test similar to that applied in other Establishment Clause contexts will avoid unsupportable results like the decision below and end the confusion currently plaguing the lower courts.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant certiorari.

Respectfully submitted,

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