Nos. 17-1717, 18-18

In the Supreme Court of the United States

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

v.

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

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

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

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

BRIEF *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 still 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*, 572 U.S. 565 (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 many 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 longstanding and culturally appropriate acknowledgments of religion from the public square. In support of that mission, Becket has defended against Establishment Clause challenges to a multi-faith religious display, *ACLU of N.J.* v. *Schundler*, 168 F.3d 92 (3d Cir. 1999) (represented city); to privately-owned highway crosses erected to honor fallen state highway troopers, *American Atheists, Inc.* v. *Davenport*, 637 F.3d 1095 (10th Cir. 2010) (represented State *amici*); and to the Pledge of Allegiance, *Newdow* v. *Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010). In particular, Becket has long op-

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[1] No counsel for a party authored any part of this brief or made any monetary contribution toward its preparation or submission. All parties have consented to the filing of this brief.

posed application of the *Lemon* test, arguing that the Establishment Clause should instead be applied with reference to the historical question of what constituted a religious "establishment" at the time the Establishment Clause was drafted and ratified. See Br. *Amicus Curiae* of the Becket Fund for Religious Liberty, *Town of Greece* v. *Galloway*, 572 U.S. 565 (2014) (No. 12-696).

Becket is concerned that the lower court's decision here represents exactly the sort of religion-hostile iconoclasm that the *Lemon* test fosters, and that application of a historical approach would end.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Lemon has stalked this Court's Establishment Clause jurisprudence long enough. Almost nobody thinks it provides an objective basis for resolving Establishment Clause claims. Virtually everyone agrees it has produced confusion and uncertainty in the lower courts, not to mention in American public life. It is far past time to replace it.

But with what? This Court's cases already provide the answer: *Lemon* should be replaced with a historical test.

Long before Chief Justice Burger cobbled together the *Lemon* test from a handful of then-recent cases, Justice Brennan urged that "the 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." *School Dist. of Abington* v. *Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring); see also *Everson* v. *Board of Educ.*, 330 U.S. 1, 14 (1947) (Establishment Clause must be interpreted "in the light of its history"). In dozens of cases, Justices of this Court from every point on the jurisprudential spectrum have relied on historical materials to guide Establishment Clause analysis and protect it from descending into merely subjective judgments about intentions and appearances. Most recently, in *Town of Greece*, this Court returned to that approach, holding that "the Establishment Clause must be interpreted by reference to historical practices and understandings." 572 U.S. at 576 (internal quotation omitted).

But until it is overruled, the lower courts are stuck with *Lemon*—a "test" that makes no reference to history and instead takes a deep dive into subjectivity—asking unanswerable questions about "secular purposes," "primary effects," "excessive entanglement," and "advancement of religion," with no consistent baseline from which "advancement" or "inhibition" might be judged. It is time to direct the lower courts to interpret the Establishment Clause "in the light of its history," *Everson*, 330 U.S. at 14, as the most persuasive opinions of this Court typically do. It makes no sense for lower courts to follow a "test" that this Court freely ignores. No wonder such a high percentage of Establishment Clause cases in this Court are reversals: the lower courts are locked into a form of analysis this Court has effectively, but not explicitly, abandoned.

Under a historical approach to the Establishment Clause, the question is not whether a fictive "reasonable observer" would think the government is "endorsing" religion (as compared to what?). The question is whether the government's actions share the historic characteristics of an "establishment of religion" at the time of the founding. This is an objective inquiry that is not hard to apply, as there is abundant evidence of what constituted an establishment at the founding—namely, (1) government control over the doctrine and personnel of the established church; (2) mandatory attendance in the established church; (3) government financial support of the established church; (4) restrictions on worship in dissenting churches; (5) restrictions on political participation by dissenters; and (6) use of the established church to carry out civil functions. Michael W. McConnell, *Es-*

tablishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105 (2003) ("*Establishment*"); Stephanie H. Barclay et al., *Original Meaning and the Establishment Clause: A Corpus Linguistic Analysis*, SSRN (Dec. 4, 2018), goo.gl/vxja8E ("Barclay"). Where these characteristics are present, there is a forbidden establishment. But there is no hint in the historical record that any founding-era statesman, even the most disestablishmentarian, thought that government was proscribed from using religious symbology in public contexts. See *ibid.* (corpus linguistic analysis of how the term "establishment" was used at the time of the Founding).

This historical approach has several benefits. First, it is consistent with—and provides a more coherent explanation for—the bulk of this Court's prior Establishment Clause decisions. Second, it provides a more objective basis for resolving contentious claims about the separation of church and state. What history teaches about particular practices does not change from case to case or depend on the intuition of different judges. Third, it preserves, rather than disrupts, this nation's tradition of "benevolent neutrality" toward religion, *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970), avoiding both "corrosive secularism," *School Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373, 385 (1985), and government imposition. Finally, it avoids needless divisiveness over passive religious displays.

The historical approach also yields a clear outcome in this case. The Peace Cross has none of the characteristics of an establishment: It doesn't control religious doctrine or compel religious observance. It

doesn't send any money to a religious institution or penalize dissenters. And it doesn't use a church to carry out civil functions. Allowing the cross to remain is not an establishment, and anyone who dislikes the cross is free to ignore it. If the Peace Cross has to go, it is hard to imagine what religious referent could survive in the public sphere.

Applying a historical analysis also has important implications for Establishment Clause standing, because it exposes the lower-court doctrine of "offended-observer standing" as based on a misunderstanding. Rather than an *individual rights* provision ensuring that no one feel personal offense at passive religious displays, the Establishment Clause is a *structural* provision like the separation of powers, which provides a judicial remedy only when individuals have suffered a concrete, particularized, personal injury—such as coercion to engage in religious practices, or denial of equal treatment on the basis of religion.

Accordingly, the Court should make clear that standing under the Establishment Clause is no different from standing under the Free Exercise or Equal Protection Clauses. Mere offense at seeing a religious display is not enough; the plaintiff must show that she has been "personally denied equal treatment by the challenged discriminatory conduct." *Allen* v. *Wright*, 468 U.S. 737, 755 (1984) (internal quotations omitted). This approach is not only consistent with history and the doctrine of Article III standing, but also reduces needless divisiveness over passive religious displays.

ARGUMENT

I. The Court should replace *Lemon* with a historical approach.

Although lower courts continue to be bound by the *Lemon* test, this Court has abandoned it in practice. No majority opinion in the last thirteen years has applied *Lemon* to decide an Establishment Clause case. Most decisions fail even to cite or mention *Lemon*. In a variety of contexts, the Court has crafted more specific doctrinal frameworks, putting *Lemon* aside. For example, when evaluating inclusion of religiously-affiliated organizations in public-benefit programs, the Court asks whether the program distributes benefits to a broad class of recipients "on the basis of neutral, secular criteria." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 652-54 (2002) (quoting *Agostini* v. *Felton*, 521 U.S. 203, 231 (1997)). When evaluating statutory religious accommodations, the Court asks whether the statute "alleviates exceptional government-created burdens on private religious exercise." *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005). When evaluating statutes that explicitly discriminate among religious denominations, the Court applies traditional equal protection strict scrutiny. *Larson* v. *Valente*, 456 U.S. 228, 246-47 (1982). When evaluating prayers in public-school settings, the Court asks whether the prayer practice "has the improper effect of coercing those present to participate in an act of religious worship." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 312 (2000) (citing *Lee* v. *Weisman*, 505 U.S. 577, 594 (1992)). And so on.

A plurality of this Court has already declared that *Lemon* is "not useful" in the context of public displays. *Van Orden* v. *Perry*, 545 U.S. 677, 686 (2005).

In this context, *Lemon* is fatally ambiguous and unhelpful, leading to decisions based on the eye of the beholder. (The beholder, the federal judge, is by definition a reasonable observer, at least in his or her own mind. But that doesn't make the test any more useful.)

Lemon has created massive confusion and inconsistency in the lower courts—and in American public discourse—for decades. Countless appellate judges have deplored *Lemon*, partly because of its utter ambiguity and partly because of its tendency to press toward greater and greater secularization. Although this Court has often criticized *Lemon* and avoided applying it, the Court has never expressly overruled it. *Agostini*, 521 U.S. at 237. Thus, lower courts continue to think they are bound by *Lemon*, even as they ask this Court to get rid of it.

The Court should accept their invitation and replace *Lemon* with a historical approach. Such an approach follows naturally from this Court's earliest Establishment Clause cases and its jurisprudence emphasizing the role of history with respect to other parts of the Bill of Rights. It provides a workable framework for resolving future cases. And it respects the proper separation of church and state.

A. History has long played an important role in interpreting the Establishment Clause.

This 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). In the first modern Establishment Clause decision, the Court emphasized that the Clause must be interpreted "in the light of its histo-

ry." *Everson*, 330 U.S. at 14. Although the substance of Justice Black's historical analysis left much to be desired, both the majority and dissent agreed that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment." *Id.* at 33 (Rutledge, J., dissenting).

For the next two decades, the Court repeatedly looked to history to guide its Establishment Clause decisions. In *McGowan* v. *Maryland*, which involved a challenge to Sunday closing laws, the Court began by examining "the place of Sunday Closing Laws in the First Amendment's history," noting that James Madison introduced a Sunday closing bill in Virginia in 1785—the same year Virginia enacted "A Bill for Establishing Religious Freedom." 366 U.S. 420, 437-440 (1961). Similarly, in *Walz*, the Court upheld church tax exemptions because they were supported by "more than a century of our history and uninterrupted practice." 397 U.S. at 680. And in *Torcaso* v. *Watkins*, the Court struck down a religious test oath after concluding that such oaths were one of the elements of "the formal or practical" religious "establishment[s]" that "many of the early colonists left Europe and came here hoping to" avoid. 367 U.S. 488, 490-91 (1961).

Lemon was a departure. Claiming that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," and citing just two cases decided in the previous three years, Chief Justice Burger "gleaned" the now-familiar *Lemon* test, which prohibits any government action that (1) lacks a secular purpose, (2) has the primary effect of advancing or inhibiting (or, as later

cases said, "endorsing") religion, or (3) excessively entangles the government in religion. 403 U.S. 602, 612 (1971) (citing *Board of Educ.* v. *Allen*, 392 U.S. 236, 243 (1968); *Walz*, 397 U.S. at 668).

Lemon has proven to be misleading and "unworkable." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 855 (1992). Members of this Court have repeatedly criticized it as "flawed in its fundamentals," "unworkable in practice," and "inconsistent with our history and our precedents." *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 655, 669 (1989) (Kennedy, J., concurring in part and dissenting in part).[2] A remarkable number of decisions based on *Lemon* later had to be overruled in substantial part. See *Agostini*, 521 U.S. 203 (overruling *Ball*, 473 U.S. 373 and *Aguilar* v. *Felton*, 473 U.S. 402 (1985)); *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality) (overruling *Wolman* v. *Walter*, 433 U.S. 229 (1977) and *Meek* v. *Pittenger*, 421 U.S. 349 (1975)). Lower courts have routinely described *Lemon* as, among other things, a "morass," "indefinite," "chaotic," "unhelpful," and a form of "Establishment Clause

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[2] See also *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.,* 508 U.S. 384, 398-400 (1993) (Scalia, J., concurring) (collecting criticism by Scalia, Thomas, Kennedy, O'Connor, White, JJ., and Rehnquist, C.J); *Committee for Pub. Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting); *Utah Highway Patrol Ass'n* v. *American Atheists, Inc.*, 132 S. Ct. 12, 21 (2011) (Thomas, J., dissenting from denial of certiorari) (collecting criticism by Kennedy, Alito, Thomas, and Scalia, JJ., and Roberts, C.J.).

purgatory." *Utah Highway Patrol Ass'n* v. *American Atheists, Inc.*, 132 S. Ct. 12, 15 & n.3 (2011) (Thomas, J., dissenting from denial of certiorari) (collecting criticism). And this Court has repeatedly avoided applying *Lemon*.[3]

Not surprisingly, then, this Court's more recent cases have returned to history as the key to understanding what constitutes an establishment of religion. In *Van Orden*, after noting that *Lemon* is "not useful" in dealing with passive displays, the plurality declared that instead, "our analysis is driven both by the nature of the monument and by our Nation's history." 545 U.S. at 686. Similarly, in *Hosanna-Tabor*, the Court relied on the historical relationship between church and state at the founding as the basis for the "ministerial exception," which is rooted in both religion clauses. See *Hosanna-Tabor,* 565 U.S. at 183 (noting that "[i]t was against this background [of a historical establishment of the Church of England] that the First Amendment was adopted").

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[3] See *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (not applying *Lemon*); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002) (same); *Cutter* v. *Wilkinson*, 544 U.S. 709, 727 n.1 (2005) (Thomas, J., concurring) ("The Court properly declines to [apply] the discredited test of *Lemon*."); *Van Orden* v. *Perry*, 545 U.S. 677, 686 (2005) (plurality) (not applying *Lemon*); *id.* at 698-99 (Breyer, J., concurring) (same); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012) (same); *Town of Greece* v. *Galloway*, 572 U.S. 565 (2014) (same); *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018) (same).

In *Town of Greece*, the Court emphasized that a historical analysis is not an "exception" to the *Lemon* test, but is instead the norm: "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." 572 U.S. at 577. Thus, "the Establishment Clause *must* be interpreted by reference to historical practices and understandings." *Id.* at 576 (quotation omitted; emphasis added).

Nor is historical analysis unique to the Establishment Clause. Rather, the Court looks to history to interpret many other provisions of the Bill of Rights. See *id.* at 602-03 (Alito, J., concurring) (citing *Harmelin* v. *Michigan*, 501 U.S. 957, 980 (1991) (Eighth Amendment); *Carroll* v. *United States*, 267 U.S. 132, 150-152 (1925) (Fourth Amendment)).

In short, a historical approach to the Establishment Clause is the norm; *Lemon* is the aberration. Yet because this Court has never expressly overruled *Lemon*, lower courts still (reluctantly) apply it. See, *e.g., Kondrat'yev* v. *City of Pensacola*, 903 F.3d 1169, 1174 (11th Cir. 2018) (per curiam) (*Lemon* controls until it is "directly overruled"); *FFRF* 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"). The Court should expressly overrule *Lemon* and replace it with a historical approach.

B. A historical approach provides a workable framework for resolving Establishment Clause claims.

As this Court explained in *Town of Greece*, a historical approach must begin with an understanding of "historical practices" at the time of the founding.[4] 572 U.S. at 576. "[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." *Town of Greece*, 572 U.S. at 577 (quoting *Schempp*, 374 U.S. at 294 (Brennan, J., concurring)).

1. At the founding, an "establishment of religion" had a well-defined meaning. Nine of the thirteen col-

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[4] Focusing on practices at the founding is appropriate because, apart from federalism concerns, the "establishment of religion" prohibition incorporated against the states via the Fourteenth Amendment was essentially the same as that in the First Amendment. See *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) ("In applying the First Amendment to the states through the Fourteenth Amendment, * * * it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government.") (citation omitted). An examination of practices in the late 1860s would yield similar conclusions, only more so. Because of the annexation of lands settled by the French and Spanish, the United States west of the Mississippi and south of Georgia is filled with cities named for religious celebrations and figures (Corpus Christi, Texas; San Francisco, California) and contains numerous religious symbols on public property. There is no evidence that these were viewed at the time as an establishment of religion.

onies had established churches of some sort, and the Founders were familiar with the centuries-old establishment in England. *Establishment* at 2105. Although these establishments varied in their particulars—some, for example, narrowly established a single denomination and harshly punished dissenters, while others broadly supported multiple denominations and were more tolerant of dissent—they shared six common characteristics. *Id.* at 2131-2180:

First, the government exerted legal control over the doctrine and personnel of the established church. In the Church of England, Parliament determined the articles of faith, approved the Book of Common Prayer, established the King as head of the Church, and required all ministers to accept established doctrine. The early colonies adopted similar practices. In Virginia, the General Assembly required that worship be conducted only in accordance with the canons of the Church of England—as prescribed by the British Parliament—and ministers had to be approved by the governor. In Massachusetts, local laws regulated who could preach and how local ministers would be selected.

Second, the government mandated attendance in the established church. For example, Virginia, Massachusetts, and Connecticut all imposed fines for failing to attend worship in the established church, and failure to attend church was a commonly prosecuted offense.

Third, the government financially supported the established church. This financial support took two main forms: land grants and religious taxes. Land grants provided not only a site for churches and parsonages, but also a source of income for ministers.

Most colonies also levied mandatory religious taxes to support churches and ministers.

Fourth, the government punished worship in dissenting churches. Massachusetts, for example, banned preaching outside the established church and severely punished Quakers, Catholics, and Baptists. Virginia, too, repeatedly imprisoned Baptists for preaching without a license. And some colonies banned Catholic priests and prohibited the formation of Catholic churches.

Fifth, the government restricted political participation by dissenters. Almost every state adopted religious tests for public office and placed religious restrictions on the right to vote. Maryland's version of a religious test was not repealed until it was struck down in *Torcaso*, 367 U.S. 488.

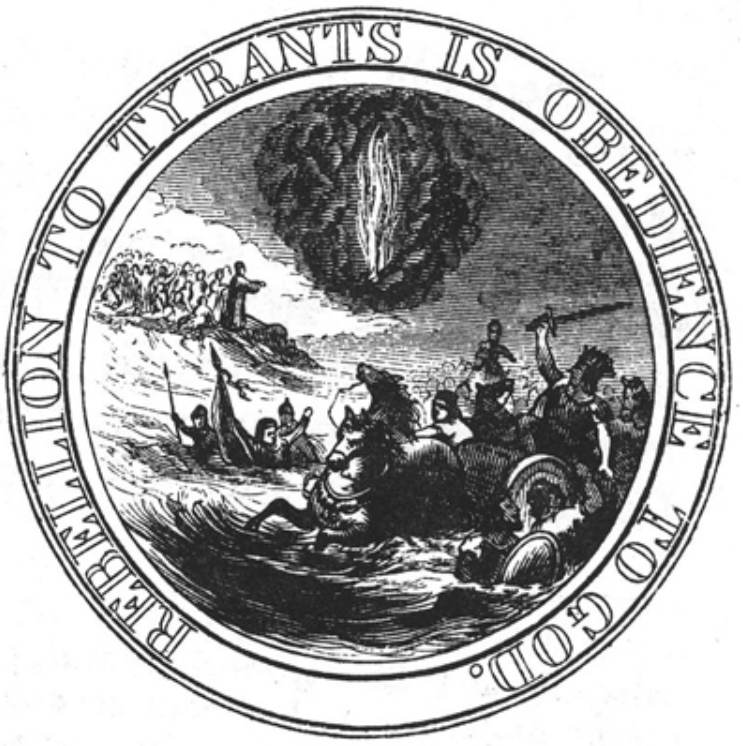
Sixth, the government used the established church to carry out civil functions. For example, the established church or minister was often made responsible for keeping public records, providing elementary education, caring for the poor, and prosecuting "moral offenses," such as drunkenness, swearing, adultery, and sabbath-breaking.

2. By contrast, there is no hint in the historical record that the Founders believed that religious symbols in governmental settings constituted an establishment of religion. Quite the contrary. As this Court noted in *Lynch* v. *Donnelly*, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." 465 U.S. 668, 674 (1984); see also Barclay at *50 ("government display of religious symbols was not a particular concern dis-

cussed in the context of an establishment. Instead, when concerns about religious symbols did arise, they arose in the context of government suppressing or destroying symbols of dissenting churches.")

For example, a committee formed on July 4, 1776, that included Benjamin Franklin and Thomas Jefferson—both of them religiously unorthodox and disestablishmentarian—was tasked by the Continental Congress with designing a seal for the new nation. They chose a scene from the Bible—Moses leading the Jewish people across the Red Sea—with the words "Rebellion to Tyrants is Obedience to God."[5]

[5] James H. Hutson, *Religion and the Founding of the American Republic* 50-51 (1998) ("Hutson").



There is no difference, in principle, between justifying the Revolution by use of a biblical reference on the national seal and honoring the war dead with a cross in Bladensburg.

The seal that was officially adopted in 1782 likewise had religious imagery: an eye representing "the Eye of Providence" surrounded by "Glory" above the

motto *Annuit Coeptis*—"He [God] has favored our undertakings."[6]

President Washington's 1789 Thanksgiving Day Proclamation recommended "a day of public thanksgiving and prayer" for the "Supreme Being['s]" role in "the foundations and successes of our young Nation." *Van Orden*, 545 U.S. at 686-87. The same Congress

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[6] *The Great Seal of the United States*, U.S. Dep't of State, Bureau of Pub. Affairs 4-6 (July 2003), goo.gl/v4Tikb.

that approved the Establishment Clause "provided for the appointment of chaplains" to open its sessions with often "decidedly Christian" prayer. *Town of Greece*, 572 U.S. at 576-80. A church service was part of Washington's first inaugural, *Newdow* v. *Roberts*, 603 F.3d 1002, 1019 (D.C. Cir. 2010) (Kavanaugh, J., concurring); but no member of Congress refused to attend because of separationist concerns. Washington's personal addition to the oath of office—"So Help Me God," see *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 885 (2005) (Scalia, J., dissenting)—was controversial in some quarters, but not because it was a religious reference. It was because that was the way the King ended his oath.[7] The Constitution was dated "the Year of our Lord" and exempted Sunday from the count of days for the President to sign legislation, see U.S. Const. art. I, § 7; today, every state constitution likewise refers to "God" or an equivalent term.[8] Churches across America doubled as town meetinghouses and schools.[9] And no less disestablishmentarian a President as Jefferson allowed various denominations to use the Capitol and other federal buildings

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[7] See Martin J. Medhurst, *From Duche to Provoost: The Birth of Inaugural Prayer*, 24 J. Church & State 573, 585-87 (1982).

[8] Aleksandra Sandstrom, *God or the Divine Is Referenced in Every State Constitution*, Pew Research Center (Aug. 17, 2017), goo.gl/mY9ba4.

[9] Edmund W. Sinnott, *Meetinghouse & Church in Early New England* 23 (1963).

for weekly worship services—which he even attended.[10]

Under the lower court's interpretation of *Lemon*, none of these practices would survive.

These early acknowledgments of religion included monuments analogous to the Peace Cross. The "first federal monument," installed in 1808, noted the deaths of American sailors in "the year of our Lord, 1804." *Van Orden*, 545 U.S. at 689 n.9. The galleries of the Library of Congress include statues of St. Paul and Moses. *Van Orden*, 545 U.S. at 689, 741 n.4. And one of the earliest monuments in the nation's capital—the Washington Monument (begun in 1848)—has inscribed in Latin at its apex "Praise be to God." *Id.* at 689 n.9.

Even more specifically, there is "lots of history underlying the practice of placing and maintaining crosses on public land." *Kondrat'yev* v. *City of Pensacola*, 903 F.3d 1169, 1180 (11th Cir. 2018) (Newsom, J., concurring) (internal citation omitted), *petition for cert. filed*, No. 18-351 (U.S. Sept. 17, 2018). Crosses were planted in American soil by the first explorers—a fact illustrated by a sculpture (completed in 1863) on the doors of the U.S. Capitol showing Columbus's crew carrying a cross,[11] and by a painting

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[10] Hutson at 84-94.

[11] *The Columbus Doors*, Architect of the Capitol, goo.gl/99nGcr (last updated May 9, 2018).

in the Capitol's Rotunda (placed in 1855) showing De Soto's crew erecting a crucifix on the banks of the Mississippi.[12] In the eighteenth and nineteenth centuries, large crosses were erected (and still stand) in what is now Grant Park in California in 1782 and Cross Mountain Park in Texas in 1849. *Kondrat'yev*, 903 F.3d at 1180-81 (Newsom, J., concurring). In 1858, a chapel was erected on federal land at Fort Monroe in Virginia; "a cross has perched atop" it ever since. *Id.* at 1181. After the Civil War—when the First Amendment was incorporated against the states—a cross commemorating war dead was erected on public land in Gettysburg, Pennsylvania (1888). *Ibid*; see also *Trunk* v. *City of San Diego*, 660 F.3d 1091, 1100 (9th Cir. 2011) (Bea, J., dissenting) ("114 Civil War monuments include a cross"). And in 1890, the Naval Academy commissioned a monument of a cross to memorialize officers who died exploring the Arctic. *Kondrat'yev*, 903 F.3d at 1181. The logic of the decision below would say that all these civic measures were unconstitutional establishments of religion.

Today, crosses appear on government property across the country—from the Father Serra Cross in Monterey, California (erected 1908); to the Wayside Cross in New Canaan, Connecticut (erected 1923); to the Father Millet Cross in upstate New York (erected

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[12] *Discovery of the Mississippi by De Soto*, Architect of the Capitol, goo.gl/JHB9Y2 (last updated Sept. 12, 2018).

in 1925, on land specifically dedicated by President Coolidge "for the erection of a[] cross"), just to name a few. *Kondrat'yev*, 903 F.3d at 1180-81 (Newsom, J., concurring). Outside the D.C. Circuit Courthouse stands "a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross." *Van Orden*, 545 U.S. at 689. And Arlington National Cemetery includes the famous Argonne (1923)[13] and Canadian crosses (1927).[14]

Put simply, "the erection of crosses as memorials is a practice that dates back centuries." *Kondrat'yev*, 903 F.3d at 1180 (Newsom, J., concurring) (citing examples); see also *Trunk*, 660 F.3d at 1099-100 (Bea, J., dissenting) (collecting additional examples); *Buono* v. *Kempthorne*, 527 F.3d 758, 765 n.6 (9th Cir. 2008) (O'Scannlain, J., dissenting from denial of rehearing en banc) (same). Many common symbols have more than one meaning, and crosses used in connection with memorials to the fallen are clear examples.

The best examples pointing the opposite direction were the objections of Jefferson (publicly) and Madison (privately) to the presidential proclamation of Thanksgiving. See *Lee*, 505 U.S. at 623-25 (Souter, J., concurring). Putting aside that Jefferson and Madi-

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[13] *Argonne Cross (WWI)*, Arlington National Cemetery, goo.gl/iJcsoC (last updated Dec. 12, 2018).

[14] *Canadian Cross of Sacrifice (WWI/WWII/Korea)*, Arlington National Cemetery, goo.gl/iKh9kQ (last updated Dec. 12, 2018).

son were definitely in the minority, their objections were not that the proclamations "endorsed" religion, but that prescribing "religious exercises" was "an act of discipline" that interfered with the right of "[e]very religious society * * * to determine for itself the times for these exercises, & the objects proper for them, according to their own particular tenets." *Letter from Thomas Jefferson to the Rev. Samuel Miller* (Jan. 23, 1808), National Archives, Library of Congress, Founders Online, goo.gl/qffF1p; see also James Madison, Detached Memoranda (ca. 1820), National Archives, Library of Congress, Founders Online, goo.gl/vBcwSx (opposing proclamations "recommending thanksgiving & fasts" because "[t]he members of a Govt. as such * * * can not form an Convocation, Council or Synod, and *as such* issue decrees or injunctions addressed to the faith or the Consciences of the people"). In other words, Jefferson thought Thanksgiving Proclamations *interfered with religious doctrine* by "involv[ing] the national government * * * in internal theological disputes" over "what holy days should be observed and [on] what dates." Steven D. Smith, The Establishment Clause and the "Problem of the Church," in *Challenges to Religious Liberty in the Twenty-First Century* 3, 15-16 (Gerard V. Bradley ed., 2012). Right or wrong, that reasoning provides no support for the idea that mere "endorsement" of religion in a passive display constitutes an establishment of religion.

The term "establishment of religion," at the time of the founding, referred to a well-understood set of legal arrangements constituting "the church by law established." *Establishment* at 2120. It was not a vague reference to manifestations of religion in

American public culture. No doubt many Americans were offended by some or all of the symbols discussed above, but no one thought—or at least, we have no record that anyone thought—they established a religion.

3. This historical understanding of "an establishment of religion" provides an objective basis for interpreting the Establishment Clause. After *Town of Greece*, the key question is no longer whether a "reasonable observer" would think the government is "endorsing" religion. Instead, it is whether the government is engaging in the kind of "historical practices" that characterized an establishment of religion at the time of the founding. 572 U.S. at 576.

This analysis parallels how the Court interprets other provisions of the Bill of Rights. Under the Fourth Amendment, for example, the Court considers "whether the action in question would have constituted a 'search' within the original meaning of the Fourth Amendment." *United States* v. *Jones*, 565 U.S. 400, 406 n.3 (2012). And under the Seventh Amendment, the Court must analyze whether the relevant cause of action "was tried at law at the time of the founding or is at least analogous to one that was." *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999); see also *District of Columbia* v. *Heller*, 554 U.S. 570, 625 (2008) (interpreting the Second Amendment with reference to "the historical understanding of the scope of the right"); *Apprendi* v. *New Jersey*, 530 U.S. 466, 478 (2000) (interpreting the Sixth Amendment by examining "the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding"); *Crawford* v. *Wash-*

ington, 541 U.S. 36, 43 (2004) (examining "the historical background of the [Sixth Amendment's Confrontation] Clause to understand its meaning"); *Austin* v. *United States*, 509 U.S. 602, 608 (1993) (assessing whether the "history of the Eighth Amendment require[s]" its limitation to criminal cases).

Under this analysis, the burden of proof is not on the *government* to demonstrate that the First Congress or the colonies engaged in precisely the same practices under review; rather, the burden is on the *plaintiffs* to show that the government's conduct shares the characteristics of an establishment as understood at the founding. This, too, is consistent with the Court's analysis under other provisions of the Bill of Rights, and with the general rule that "the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute." *N.Y. State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1, 17 (1988); see also *Portuondo* v. *Agard*, 529 U.S. 61, 67 (2000) ("We think the burden is rather upon [those] who assert the unconstitutionality of the practice [under the Sixth Amendment], to come up with a case [from the 18th or 19th century] in which [the practice] was held improper."); *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 336 (2001) (burden is on the challenger to cite "particular evidence that those who framed and ratified the Fourth Amendment sought to limit" the challenged practice). Of course, if the government can offer evidence that similar practices were engaged in at the founding and were not considered an establishment, that makes it even clearer. Cf. *Marsh*, 463 U.S. at 786-90; *McGowan*, 366 U.S. at 437-40; *Walz*, 397 U.S. at 676-80;

Town of Greece, 572 U.S. at 575-77. But such evidence is not required.

4. This historical analysis offers several benefits. First, it offers courts a far more objective basis for interpreting the Establishment Clause than the *Lemon* test. There is abundant historical evidence of what constituted an establishment of religion at the time of the founding. *Establishment* at 2110-2180. And while scholars still debate the *intent* of the Establishment Clause—whether it was merely a federalism provision, whether it prohibited a national church, whether it prohibited only denominational preferences, etc.—there is no meaningful debate over what an establishment of religion actually *was*. Thus, a historical analysis gives courts an objective and narrowly defined task: determine whether the challenged practice shares the characteristics of an establishment at the time of the founding. Under *Lemon*, by contrast, a judge has no basis for decision other than "intuition and a tape measure." *Allegheny*, 492 U.S. at 675 (Kennedy, J., concurring in part and dissenting in part).

A historical approach also makes more sense of the great body of this Court's existing precedent. In fact, many of this Court's cases already track the six historical characteristics of an establishment. The school prayer in *Engel* v. *Vitale* was unconstitutional because the government used its power to control religious doctrine (by composing an official prayer) and compel religious observance (by pressuring children to say it). 370 U.S. 421 (1962); see also *Hosanna-Tabor*, 565 U.S. 171. The test oath in *Torcaso* violated the Establishment Clause because it restricted political participation by those who refused to profess a

belief in God. 367 U.S. 488. And the statute giving churches power to veto liquor licenses in *Larkin* v. *Grendel's Den* was unconstitutional because it assigned civil authority to a church. 459 U.S. 116 (1982).

Similarly, a historical approach makes sense of the Court's funding cases. Exclusive subsidies for churches are unconstitutional, because they mirror the exclusive taxes that supported the established church. See Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 Harv. L. Rev. 133, 143 (2017). But government funding programs that merely include churches as one recipient among many others do not, because that was not how established churches were supported at the founding. *Ibid.*; see also *Trinity Lutheran Church* v. *Comer*, 137 S. Ct. 2012 (2017); *Mitchell*, 530 U.S. 793.

And a historical approach makes sense of opinions on symbolic acts like the inclusion of "under God" in the Pledge of Allegiance, "In God We Trust" on currency, or the Ten Commandments in a government display. *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 29-30 (2004) (Rehnquist, C.J., concurring); *Van Orden*, 545 U.S. at 691-92. These symbolic acts are permissible not because they don't "endorse" religion—for some observers, they obviously do—but because they don't share the historic characteristics of an establishment.

Finally, a historical approach honors the First Amendment's goal of neutrality toward religion. It rightly forbids the government from attempting to control religious doctrine, compel religious observance, punish dissenters, or prop up an estab-

lished church. But it also avoids needlessly scrubbing religion from the otherwise pluralistic public square.

When it comes to government speech, the proper "baseline" for assessing neutrality is not complete secularism, which would produce a public square that is de facto hostile toward religion. The proper baseline is instead the state of public culture in the "non-government-controlled sector," which has always included both religious and secular elements. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 193 (1992) ("*Crossroads*"). Thus, to the extent the government participates in public culture through symbolic displays, it should be a reflection of that culture, not an influence pushing for more or less religion. *Ibid*.

Unfortunately, under *Lemon*, "[f]ew of our traditional practices recognizing the part religion plays in our society can withstand scrutiny." *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part). So *Lemon* "sweep[s] away" what has "long been settled," ultimately producing hostility toward religion and an impoverished cultural and artistic life. *Town of Greece*, 572 U.S. at 577. History, by contrast, offers the closest thing to a status quo baseline. By relying on history, courts can distinguish between government actions that actually "threat[en]" to establish a religion, *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring), and those that merely reflect the fact that religion is a natural part of American history and culture.

5. A historical approach produces a clear result in this case: The government's decision to allow the Peace Cross to remain does not violate the Establishment Clause. The government has not attempted

to control religious doctrine or compel religious observance. It has not sent any money to a religious institution or punished any dissenting worship. The government has merely erected solemn monuments to fallen soldiers, using symbols that have deep resonance within our culture. It is not surprising, and should not be troubling, that deeply resonant symbols in any culture are likely to bear a relation to the deepest beliefs of that culture. The Peace Cross coerces no one and treats no one differently on account of religion. Anyone who dislikes it is free to ignore it. See *Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in part and dissenting in part) (noting that "[n]o one was compelled to observe," and everyone is "free to ignore," passive displays). Respondents have failed to show that maintaining a cross on public property shares any of the historic characteristics of an establishment of religion. Accordingly, their Establishment Clause claim fails.

II. Respondents lack standing.

Viewing the Establishment Clause through a historical lens also exposes the doctrine of "offended-observer standing" as a misunderstanding. Rightly understood, the Establishment Clause doesn't protect individuals from feeling "offended" at passive religious displays. Rather, it is a structural provision that strips government of authority to make laws effectuating an establishment of religion. It protects individuals only when they have suffered a concrete, personal injury—such as coercion to engage in religious practices, or denial of equal treatment on the basis of religion. Respondents have demonstrated no such injury here.

A. Standing under the Establishment Clause requires a concrete, personal injury.

Unlike the Free Exercise Clause, the Establishment Clause was not originally an individual rights provision. Rather, it was a structural feature leaving the question of religious establishment to the states. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1157–58 (1991); *Newdow*, 542 U.S. at 49-51 (Thomas, J., concurring). Even after every state rejected the idea of a religious establishment (the last to do so being Massachusetts, in 1832), and after incorporation through the Fourteenth Amendment, the Establishment Clause retains a structural character: It strips all governments, state and federal, of the authority to make laws in an entire field. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 32 (1998). Laws establishing religion are ultra vires.

The fact that the Establishment Clause is a structural restraint has important implications for Article III standing. Like violations of the separation of powers—*e.g.*, *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014); *INS* v. *Chadha*, 462 U.S. 919, 935-36 (1983)—violations of the separation of church and state sometimes inflict a concrete injury on individuals, in which case those individuals have standing to sue. See, *e.g.*, *Schempp*, 374 U.S. at 224 n.9 (coercion of religious observance); *Torcaso*, 367 U.S. at 489 (exclusion from government office); *McDaniel* v. *Paty*, 435 U.S. 618, 621-22 (1978) (same); *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 7-8 (1989) (tax penalty); *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440,

442-43 (1969) (loss of property rights); *Hosanna-Tabor*, 565 U.S. at 180 (interference with internal church operations). But the mere violation, absent personal injury, does not demand judicial intervention in every case. Again like separation of powers, violations of the purely structural features of the Establishment Clause sometimes do not inflict a concrete injury on individuals, in which case they do not give rise to standing. *Hein* v. *FFRF, Inc.*, 551 U.S. 587, 593-94 (2007); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 485 (1982); *Doremus* v. *Board of Educ. of Hawthorne*, 342 U.S. 429, 434 (1952).

In suits against states, this point is reinforced by the principles underlying incorporation of the Bill of Rights. Only provisions that guarantee individual rights are incorporated. *McDonald* v. *City of Chicago*, 561 U.S. 742, 765 (2010). It should follow that only those violations of the Establishment Clause that inflict concrete injury on individuals should support standing to sue.

The leading example of this requirement is *Valley Forge*. There, the plaintiffs challenged the transfer of federal property to a religious college as a violation of the Establishment Clause. 454 U.S. at 468. The plaintiffs weren't seeking to buy the property; they simply heard about the transfer through a news release and believed it was unlawful. *Id.* at 487. This Court concluded that the plaintiffs lacked standing, because there must be a "personal injury" beyond mere feelings of offense: "[T]he psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury

sufficient to confer standing under Art. III." *Id.* at 485.

The same is true here. Respondents have not alleged any personal injury beyond the "psychological consequence" produced by observing the Peace Cross and finding it offensive. Accordingly, they lack standing to sue.

B. Offended-observer standing is an anomaly.

The lower court reached the opposite conclusion based on the doctrine of offended-observer standing—which says that a plaintiff has standing "in religious display cases" if he alleges "unwelcome direct contact with a religious display that appears to be endorsed by the state." Pet. App. 13a. Lower courts created this doctrine in response to *Lemon*'s endorsement test. As they have explained, because "[t]he Establishment Clause prohibits the Government from *endorsing* a religion," a "different injury-in-fact analys[i]s" is required. *Moore* v. *Bryant*, 853 F.3d 245, 250 (5th Cir. 2017) (emphasis added). The standing inquiry must be "tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer"—which means that feeling offended at government endorsement of religion must "suffice to make an Establishment Clause claim justiciable." *Suhre* v. *Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997); see also *ACLU of Georgia* v. *Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1102-03 (11th Cir. 1983) (courts "have often placed Establishment Clause cases in a separate category of standing concerns"). But if, as argued in the previous section, symbolic offense is not one of the attributes of religious establishment in the legal and historical

meaning of that term, there was no need to twist the rules of standing to pick up that kind of non-legal injury.

Offended-observer standing is problematic at many levels. First, this Court has never adopted it. Although the Court has reached the merits of five cases involving passive religious displays, in none of those cases did the Court address standing. *Van Orden*, 545 U.S. 677; *McCreary County*, 545 U.S. 844; *Allegheny*, 492 U.S. 573; *Lynch*, 465 U.S. 668; *Stone* v. *Graham*, 449 U.S. 39 (1980). And "drive-by jurisdictional rulings of this sort" have "no precedential effect." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998); see also *ACSTO* v. *Winn*, 563 U.S. 125, 144-45 (2011).

Recognizing that fact, some lower courts have tried to find support for offended-observer standing in *Schempp*, in which this Court enjoined prayer in public schools. *E.g.*, *Suhre*, 131 F.3d at 1086. But *Schempp* didn't involve a passive religious display; as this Court explained in *Valley Forge*, *Schempp* involved a captive audience of public-school children, who were coercively "subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." 454 U.S. at 487 n.22. So there is no basis in this Court's decisions for offended-observer standing.

Second, offended-observer standing conflicts with this Court's standing jurisprudence under the Equal Protection Clause. In *Allen* v. *Wright*, 468 U.S. 737 (1984), the parents of African-American public-school children sued the Internal Revenue Service (IRS), claiming that the IRS had violated its obligation to deny tax-exempt status to racially discriminatory

private schools. According to the parents, as a result of the IRS's discriminatory practices, they and their children suffered "stigmatic injury, or denigration," on the basis of their race. *Id.* at 754. This injury is analogous to the injury alleged in many Establishment Clause cases, where plaintiffs complain of being stigmatized as "outsiders, not full members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

Yet this Court denied standing, because the plaintiffs did not allege that they had been "personally denied equal treatment" by the IRS. *Allen*, 468 U.S. at 755. Of course, the stigma caused by unequal treatment is a principal reason why racial discrimination is so odious, but it is the unequal treatment, not the resulting stigma, that constitutes the legal injury and thus supports standing. *Ibid.*; *Heckler* v. *Mathews*, 465 U.S. 728, 739-740 (1984). Government communication of a racist message, as such, is not actionable in court. Those who object to flying the Confederate flag go to the legislature or demonstrate in the streets; they cannot sue in court.

Offended-observer standing under the Establishment Clause has the bizarre consequence that an African-American offended by the display of a Confederate flag cannot sue under the Equal Protection Clause, *Moore*, 853 F.3d at 250, but an atheist who is offended by the cross *on the same flag* can sue under the Establishment Clause. See *Briggs* v. *Mississippi*, 331 F.3d 499, 503-08 (5th Cir. 2003) (entertaining such a claim on the merits). This is not only absurd, it contradicts this Court's repeated admonition that "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted

right." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 576 (1992); see also *Valley Forge*, 454 U.S. at 484 (no "'sliding scale' of standing" depending on the constitutional provision).

Third, offended-observer standing is inconsistent with this Court's rulings on standing under the Free Exercise Clause. In *Harris* v. *McRae*, for example, a religious group brought a free exercise challenge to federal restrictions on abortion funding, alleging that the restrictions would burden some women who, "as a matter of religious practice and in accordance with their conscientious beliefs," would otherwise have obtained an abortion. 448 U.S. 297, 320-21 (1980). This Court denied standing, reasoning that no member of the religious group "contended that the [statute in question] in any way coerce[d] them as individuals in the practice of their religion." *Id.* at 321 n.24 (quoting *Allen*, 392 U.S. at 249); see also *Braunfeld* v. *Brown*, 366 U.S. 599, 615 (1961) (Brennan, J., concurring and dissenting) (plaintiff must "show that his good-faith religious beliefs are hampered before he acquires standing to attack a statute under the Free-Exercise Clause"). "There is no evident reason to treat establishment claims with greater solicitude" than free exercise claims. *Crossroads* at 165.

Finally, in addition to contradicting this Court's standing jurisprudence, offended-observer standing invites "the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring). Most public monuments using religious imagery generate little controversy unless a lawsuit is threatened—very frequently by out-of-state actors with an ideological axe to grind. Then, lax standing rules turn

every display into yet another flashpoint in an unnecessary culture war. Many municipalities, or their insurers, simply cave—roiling their communities and throwing out irreplaceable history because they fear the unpredictable endorsement test or do not wish to bear the costs of litigation. Others resist—resulting in a lawsuit generating more divisiveness than the underlying display ever did—and implicating the judiciary in that divisiveness. A ruling upholding the display is taken as a message of endorsement of religion, while a ruling eliminating the display communicates a message of hostility. This dynamic would not exist without the anomaly of offended-observer standing.

C. The Court should harmonize standing under the Establishment Clause with standing under the Equal Protection and Free Exercise Clauses.

Thankfully, eliminating the *Lemon*/endorsement test also eliminates any basis for continuing to indulge offended-observer standing. As this Court held in *Town of Greece*, "[a]dults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out" just because "a person experiences a sense of affront from the expression of contrary religious views." *Town of Greece*, 572 U.S. at 589. If the Establishment Clause was *not* intended to provide relief for every "sense of affront," then there is no reason to bend the rules of Article III to find standing for offended observers. Instead, standing under the Establishment Clause can be harmonized with standing under the Equal Protection and Free Exercise Clauses. Each plaintiff must prove that he suffered a cognizable injury beyond mere offense—

such as coercion, loss of benefits, or denial of "equal treatment" by the government. *Allen*, 468 U.S. at 755.

Applying this traditional standing analysis to the Establishment Clause would still produce the same results in most cases. For example, when the government gives a benefit (such as a tax exemption) to religious groups but not secular groups, a secular group that was denied the benefit would have standing to sue based on unequal treatment. See *Texas Monthly*, 489 U.S. at 7-8. Similarly, public-school students who complain of religious exercises at school events—such as prayer at graduation, *Lee*, 505 U.S. at 580, or Bible reading in the classroom, *Schempp*, 374 U.S. at 205—would have standing on the ground that, as a captive audience, they had been coercively subjected to government-sponsored religious exercises.

Taxpayer standing under the Establishment Clause obviously remains a contested area. See *Winn*, 563 U.S. 125; *Hein*, 551 U.S. 587; *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Doremus*, 342 U.S. 429. But eliminating offended-observer standing would have no effect on taxpayer standing. The theory of taxpayer standing is that using a taxpayer's compelled payments for religious purposes is tantamount to a religious tax, which is "one of the specific evils" of the established church as historically understood. *Flast*, 392 U.S. at 103. Whether or not that theory is valid, it has nothing to do with claims of standing based on mere offense, which was no part of the historic understanding of an establishment.

The principal area where a traditional standing analysis might alter outcomes is in cases involving

passive displays. Plaintiffs who were merely offended at seeing a passive display, but could not allege government coercion, denial of benefits, or unequal treatment on the basis of religion, would lack standing to sue. But that is all to the good. This Court's religious display decisions have failed to draw intelligible lines and arguably have exacerbated rather than dampened the taste for divisive litigation. The "symbol" offended observers often care most about is a court decision affirming their view about church and state. If this Court were to withdraw from the field, cities and states who have an interest in civic harmony will be able, again, to make these judgments based on the needs of their communities, without divisive litigation, headlines, and attorneys' fees.

Of course, this may mean in some cases that there would be no plaintiff with standing to challenge a religious display. But *pace* Voltaire, the absence of a party with standing is no reason to invent one. As this Court said in *Valley Forge*, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Id.* at 489. Rather, the absence of anyone with standing to sue is a strong indication that the subject matter is more appropriately committed "to the surveillance of Congress, and ultimately to the political process." *United States* v. *Richardson*, 418 U.S. 166, 179 (1974).

* * * * *

Respondents claim standing not because they have been denied equal treatment based on religion (*Larson*), not because they have been deprived of any public benefit (*Torcaso*), and not because they have been coercively subjected to government-sponsored

religious exercises (*Schempp*), but simply because they "allege specific unwelcome direct contact with the Cross." Pet. App. 10a. Such psychological offense is an insufficient basis for standing under Article III.

CONCLUSION

Under any Establishment Clause test, the decision below should be reversed. But many cases in the lower courts become hard because the *Lemon* test and its "endorsement" corollary continue to be the predominant method of deciding Establishment Clause cases. The Court should expressly overrule *Lemon* and confirm that the Establishment Clause must be interpreted in light of its history, and that Establishment Clause claims are subject to normal standing requirements under Article III.

Respectfully submitted.

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