No. 17-1717

In The Supreme Court of the United States

THE AMERICAN LEGION, ET AL.,

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONERS

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CatholicVote.org Education Fund ("CatholicVote") is a nonpartisan voter education program devoted to building a Culture of Life. It seeks to serve our country by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. CatholicVote believes that Catholic teaching often serves to illuminate the first principles set forth in the Declaration of Independence and the Constitution by situating those principles in the broader context of our Judeo-Christian tradition. This case directly implicates the ability of government officials to acknowledge that tradition (or any other religious tradition) in the public sphere through a cross-shaped monument or otherwise. Under the Fourth Circuit's opinion in this case, the reasonable observer test is used as a sword to preclude government officials from acknowledging the sacrifice of World War I soldiers and their families by employing a religious symbol commonly understood to represent such ultimate sacrifice, instead of as a shield to protect free exercise from actual governmental coercion of religious belief or practice. CatholicVote believes that its amicus brief provides this Court with an important perspective on the Establishment Clause issues in this case, particularly the historical meaning of the Establishment Clause and the

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[1] The parties have consented to the filing of this brief. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

problems that attend the application of the reasonable observer test to facially religious government speech, such as the Bladensburg World War I Memorial (the "Cross Memorial") displayed in the Veterans Memorial Park.

SUMMARY OF ARGUMENT

An inconsistent patchwork of Establishment Clause decisions has developed as to the proper test to apply to facially religious government speech—the *Lemon* test, *Allegheny*'s modification of *Lemon* through the endorsement/reasonable observer test, Justice Breyer's divisiveness test in *Van Orden*, or the historical approach used in *Marsh* and *Town of Greece*. *See*, *e.g.*, *Utah Highway Patrol Ass'n v. American Atheists, Inc.*, 132 S. Ct. 12, 15-16 (2011) (Thomas, J., dissenting from denial of cert.) (discussing the lower courts' "confusion" over the proper Establishment Clause test to apply and listing cases); *American Civil Liberties Union of Ky. v. Mercer Cty.*, 432 F.3d 624, 636 (6th Cir. 2005) (stating that "we remain in Establishment Clause purgatory" in the wake of *McCreary* and *Van Orden*). This uncertainty has made it virtually impossible for government officials to know whether a given acknowledgment of religion is constitutional without litigating the issue up through the federal court system. Such uncertainty not only belies the "unbroken history of official acknowledgment … of the role of religion in American life from at least 1789," *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984), but, if not clarified, also jeopardizes the ability of government officials to engage in facially religious speech (because either they do not dare incur the costs of litigating a threatened Establishment Clause challenge or their federal circuit severely curtails religious references in the public sphere through an expansive view of what the Establishment Clause precludes).

The present case illustrates the problem well. Confronted with an Establishment Clause challenge to the 93-year-old Cross Memorial, the Fourth Circuit applied a modified form of the *Lemon* test, invoking the reasonable observer as well as Justice Breyer's concurrence in *Van Orden*. *See American Humanist Assoc. v. Maryland-National Capital Park and Planning Comm'n*, 874 F.3d 195, 206-11 (4th Cir. 2017). Although acknowledging that the government had a "legitimate secular purpose," namely, "to honor World War I soldiers," *id*. at 206, the panel majority held that the monument violated the Establishment Clause because, among other things, "a reasonable observer would fairly understand the Cross to have the primary effect of endorsing religion." *Id*. at 210; c*f*. *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (plurality opinion) ("Here, one Latin cross … evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.").

There are at least two problems with the Fourth Circuit's "hybrid" Establishment Clause analysis. First, the reasonable observer test—and the *Lemon* "effects" prong on which it is based—are inconsistent with the meaning of the Establishment Clause as understood at the time of its ratification. The Religion Clauses of the First

Amendment work together to promote and to protect the right of believers to freely exercise their religion: "The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring and dissenting in part). The Establishment Clause protects free exercise by preventing the federal government from controlling the church or forcing people to support (or participate in) a particular faith. *Lynch*, 465 U.S. at 678 (quoting Joseph Story, 3 Commentaries on the Constitution of the United States 728 (1833)) ("'The real object of the [First] Amendment was … to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.'"). As a result, the Establishment Clause was understood to preclude only an actual establishment of religion (*e.g.*, a Church of the United States), governmental coercion to participate in (or abstain from) certain religious practices, and discrimination between and among sects. *See*, *e.g.*, *Wallace v. Jaffree,* 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting) ("It seems indisputable from these glimpses of Madison's thinking … that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion.").

As is apparent from the numerous religious references that government officials used at the time of the founding, the Establishment Clause did not (and does not) prohibit any and all references to the Divine or to the role religion has played in our Nation's history. Thus, the reasonable observer test, which has been used to strike down a variety of religious acknowledgments that do not coerce or otherwise infringe on free exercise, is inconsistent with the original understanding of the Establishment Clause and should be rejected. *See Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014) ("A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent."); *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) ("But the Establishment clause does not compel the government to purge from the public sphere all that in any way partakes of the religious" because "[s]uch absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.").

Second, the reasonable observer test is inconsistent with the government speech doctrine, which protects the government's ability to say what it wants and to convey its desired message independently of how others might interpret (or misinterpret) that message. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009). Although the Court previously has considered religion-themed monuments in *Summum* and *Van Orden*, a majority of this Court has not directly addressed the intersection of the Establishment

Clause and the government speech doctrine. The Cross Memorial requires the Court to do so now, clarifying the circumstances under which the government can acknowledge religion without incurring the threat of a constitutional challenge. If the government is precluded from invoking any reference to religion whenever a reasonable observer might interpret the message as impermissibly promoting religion, the government (1) lacks the ability to know *ex ante* whether its speech violates the Establishment Clause and (2) loses its right to determine the content of its own message, which (as in the present case) may be a legitimate and permissible secular message. Thus, to provide certainty and predictability to its Establishment Clause jurisprudence and to reconcile that analysis with the government speech doctrine, this Court should adopt the historical test articulated in *Marsh*, *Van Orden*, and *Town of Greece*. Under this test, facially religious government speech, like the Cross Memorial, is constitutional if it poses no greater threat of coercion, proselytizing, or discrimination than longstanding public acknowledgments of religion, such as legislative prayers and Ten Commandments monuments.

ARGUMENT

As members of this Court have noted, the Court's Establishment Clause jurisprudence has not been a paragon of clarity. *Utah Highway Patrol Assoc. v. American Atheists, Inc.*, 132 S.Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of certiorari) (stating that "our [Establishment Clause] jurisprudence has confounded the lower courts and rendered the constitutionality of displays of religious imagery on government property anyone's guess"); *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting) ("As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve."). The confusion and attendant lack of predictability stem in large measure from the proliferation of tests that the Court has applied to facially religious government speech, such as monuments and other displays with religious elements. At different times, the federal courts have applied one or more of the following: (1) *Lemon*'s three-pronged test (requiring courts to consider the secular purpose, primary effect, and threat of excessive entanglement); (2) the historical approach applied in *Marsh*, *Town of Greece*, and the *Van Orden* plurality opinion; (3) the endorsement/reasonable observer test adopted in *Allegheny*, and (4) Justice Breyer's divisiveness approach in *Van Orden* (which was the controlling opinion in the case). *See American Humanist Assoc.*, 874 F.3d at 205-06 (discussing the various tests but deciding to "analyze this case pursuant to the three-prong test in *Lemon* with due consideration given to the factors outlined in *Van Orden*").

But, as the plurality explained in *Van Orden*, at least in the context of a "passive monument" like the Cross Memorial in Veterans Memorial Park, the endorsement test "is not useful" and should yield to "the rich American tradition of religious acknowledgements." *Van Orden*, 545 U.S. at 687 (plurality opinion). Under this approach, "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece*, 134 S. Ct. at 1819 (citation omitted); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) ("In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society."); *Van Orden*, 545 U.S. 686 (plurality opinion) (explaining that the constitutionality of the Ten Commandments monument was "driven both by the nature of the monument and by our Nation's history").

As discussed below, the appeal to historical practice serves two important functions. First, it illuminates the meaning of the Establishment Clause. Rather than grandfather in "a practice that would amount to a constitutional violation if not for its historical foundation," *Town of Greece*, 134 S. Ct. at 1819, historical practice reveals what "establishment" meant at the time of the founding:

> Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress…. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the

> First Congress—their actions reveal their intent.

Marsh, 463 U.S. at 788-89; *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring and dissenting in part) (citing *Marsh* for "the proposition … that the meaning of the [Establishment] Clause is to be determined by reference to historical practice and understandings."). The historical approach preserves "the rich American tradition of religious acknowledgments," *Van Orden*, 465 U.S. at 690 (plurality opinion), while precluding the government from (1) coercing religious practice or belief, *see Lee v. Weisman*, 505 U.S. 577, 587 (1992); (2) using the religion-themed speech to proselytize or disparage, *Marsh*, 463 U.S. at 794-95; or (3) discriminating between and among religious sects. *See Gillette v. United States*, 401 U.S. 437, 452 (1971) (noting that "the Establishment Clause forbids subtle departures from neutrality").

Second, a historical analysis provides a clearer and more reliable rule for adjudicating Establishment Clause controversies that is consistent with the government speech doctrine. Under the historical test applied in *Marsh* and *Town of Greece*, contemporary practices (whether prayers at the start of legislative sessions or cross memorials erected to honor those who died in service of our country) are constitutional if they are consistent with the historical practices that the founding generation understood to be "a benign acknowledgment of religion's role in society." *Id.* As Justice Kennedy explained in *Allegheny*, "[w]hatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." 492 U.S. at 670 (Kennedy, J., concurring and dissenting in part). Consequently, Justice Brennan's observation that "I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer [in *Marsh*], they would nearly unanimously find the practice to be unconstitutional," *Marsh*, 463 U.S. at 800-01 (Brennan, J., dissenting), does not show that *Marsh* was wrongly decided; rather, it forcefully demonstrates that Justice Brennan was applying the wrong test. Moreover, by focusing on how a reasonable observer would interpret the government's message, the endorsement test undermines the government's right when speaking to control the content of its messages, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (affirming "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message"), basing the constitutionality of facially religious government speech on a viewer's understanding of the message even where, as here, the government employed a religious symbol to send a legitimate and important secular message. *See Salazar*, 559 U.S. at 721.

I. The Establishment Clause protects free exercise by precluding the government from coercing religious observance and discriminating against religions, not by prohibiting the government from recognizing the important role that

religion continues to play in our country's history.

This Court repeatedly has recognized that, at the time of the founding, the Establishment Clause was not understood as precluding the federal government or its officials from engaging in facially religious speech that acknowledges the important role religion has played in the history of the Nation and the lives of its citizens. *See Lynch*, 465 U.S. at 675 ("Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."); *Town of Greece*, 572 U.S. at 591 (recognizing that the government may "acknowledge[e] the central place that religion, and religious institutions, hold in the lives of those present"). The list of such religious references is familiar to this Court: the First Congress' hiring chaplains to give legislative prayers within three days of agreeing on the language of the First Amendment, Congress' urging President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God," Thanksgiving Day Proclamations, the national motto "In God We Trust," "One nation under God" in the Pledge of Allegiance, National Days of Prayer, opening Supreme Court sessions with "God save the United States and this Honorable Court," the Northwest Territory Ordinance ("Religion, morality, and knowledge, being necessary to god government and the happiness of mankind, schools and the means of education shall forever be encouraged"), and various Presidential Inaugural Addresses. *See*

Lynch, 465 U.S. at 675-78; *McCreary*, 545 U.S. at 886-89 (Scalia, J., dissenting); *Marsh*, 463 U.S. at 786-89.

Thus, at the founding, government officials' acknowledging the Divine and the important role of religion in private and civic life did not constitute an "establishment." Instead, the Establishment Clause was directed at precluding governmental control of the church. *Lynch*, 465 U.S. at 678 (quoting Joseph Story, 3 Commentaries on the Constitution of the United States 728 (1833)) (""The real object of the [First] Amendment was … to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.'"); Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2109 (2003) ("Contrary to popular myth, the First Amendment did not disestablish anything. It prevented the newly formed federal government from establishing religion or from interfering in the religious establishments of the states."). As Professor McConnell has explained, an establishment at the founding involved: "(1) [state] control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church." *Id*. at 2131.

Each of these hallmarks of a government-established religion was deemed problematic because, among other things, each threatened the free exercise of religion. *See Felix v. City of Bloomfield*, 847 F.3d 1214, 1217 (10th Cir. 2017) (Kelly, J., dissenting from denial of reh'g en banc) ("Opponents and religious dissenters … were concerned that an official establishment, even if good for civic virtue, would come at the cost of free exercise and true religion."). Forcing citizens to go to a particular church, prohibiting them from worshipping in their desired churches or synagogues, dictating religious doctrine, selecting religious leaders, and limiting political participation to those who were members of the established church directly interfered with an individual's free exercise of religion, making the individual answer to the State on matters of religion instead of to her God. To prevent such improper influences, the Establishment Clause and the Free Exercise Clause were drafted to provide robust protection for individuals to pursue the religion of their choice: "The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses." *Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring and dissenting in part); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970) (interpreting the Religion Clauses to preclude government "involvement that would tip the balance toward government control of churches or governmental restraint on religious practice"); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (noting that the Religion Clauses sought to "assure the fullest possible scope of religious liberty and tolerance for all"); *Cantwell v. Connecticut*, 310 U.S. 296, 303

(1940) (explaining that the Religion Clauses "forestal[l] compulsion by law of the acceptance of any creed or the practice of any form of worship"). The First Amendment, therefore, provided broad protection for religious liberty to ensure that neither the federal government nor particular factions could interfere with the free exercise of religion: "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects." The Federalist No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961). *See also McGowan v. State of Maryland*, 366 U.S. 420, 441 (1961) (quoting 1 Annals of Congress 730 (1989) (explaining that James Madison "'apprehended the meaning of the [Religion Clauses] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.'").

Accordingly, the Establishment Clause was meant to preclude only those governmental actions that created a national church, coerced people to participate in religious practices, provided funding to only a particular denomination or sect, or discriminated between and among sects: "The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). As Justice Kennedy explained in *Allegheny*, "[t]he ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector" is subject to "two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it is fact 'establishes a [state] religion or religious faith, or tends to do so.'" *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring and dissenting in part) (quoting *Lynch*, 465 U.S. at 678). *See also McCreary*, 545 U.S. at 893 (Scalia, J., dissenting) ("[T]he principle that the government cannot favor one religion over another … is indeed a valid principle where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue, but it necessarily applies in a more limited sense to public acknowledgement of the Creator."); *Wallace,* 472 U.S. at 98 (Rehnquist, J., dissenting) ("It seems indisputable from these glimpses of Madison's thinking … that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion.").

As the long list of governmental actions acknowledging religion since the founding demonstrates, governmental practices that served to promote religious exercise or that recognized the role of religion in our Nation's history did not (and, therefore, do not) violate the Establishment Clause. *See Felix*, 847 F.3d at 1220-21 (Kelly, J., dissenting from denial of reh'g en banc) ("[T]he Establishment Clause should not be an impediment to certain, limited government displays of a religious nature … when, as in the case of national days of prayer or with public monuments of a religious nature, the governmental action helps to promote, instead of inhibit, citizens' free exercise of religion."). Under this historical test, a facially religious monument, such as the Cross Memorial, generally does not implicate Establishment concerns because the government is not dictating church doctrine or governance, compelling church attendance, financing a particular church or sect, restricting anyone's ability to worship in her desired way, or limiting political participation based on one's agreement with or acceptance of the religious element of the monument. That is, the government does not "establish" a church or any particular religion through a passive monument display whether it is in the shape of a cross or contains the Ten Commandments (even though crosses and the Ten Commandments "were … viewed [as religious] at their inception and so remain") because "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 690 (plurality opinion).

Moreover, contrary to the Fourth Circuit's suggestion, this Court need not find a specific historical practice of cross monuments dating back to the founding for the Cross Memorial to survive the present First Amendment challenge. *American Humanist Ass'n*, 874 F.3d at 208 (distinguishing the Cross Memorial from the Ten Commandments and the national motto "In God We Trust" because "Appellees have not sufficiently demonstrated that the Latin cross has a similar connection" to our

Nation's history). Instead, whether a passive cross monument constitutes an establishment is determined in relation "to the other types of church-state contacts that have existed unchallenged throughout our history, or that have been found permissible in our case law." *Allegheny*, 492 U.S. at 662 (Kennedy, J., concurring and dissenting in part). For example, in *Marsh*, this Court upheld Nebraska's employing the same Presbyterian minister for 16 years to give invocations at the start of legislative sessions because "legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations." 463 U.S. at 791.

Similarly, in *Lynch*, the Court concluded that a crèche, which was part of a larger holiday display, did not provide a greater benefit to religion than a wide range of other "church-state contacts" that it previously had found constitutional. Against the backdrop of the government's being allowed to (1) support "church-sponsored schools" through public funding for textbooks, transportation, and certain building projects, (2) provide "tax exemptions for church properties," (3) pass Sunday Closing Laws, (4) release students from school "for religious training," and (5) allow "legislative prayers," the crèche posed no Establishment Clause threat, providing at most an "indirect, remote and incidental" benefit to religion generally or any particular sect. *Lynch*, 465 U.S. at 681-83. Consequently, this Court concluded that the Establishment Clause did not preclude the City's "tak[ing] note of a significant historical religious event long celebrated in the Western World … [and] depict[ing] the historical origins of this traditional event long recognized as a National Holiday." *Id.* at 680.

This "unbroken history of official acknowledgment … of religion in American life," *id.* at 674, also confirmed the constitutionality of the Ten Commandments monument in *Van Orden* and requires the same conclusion in the present case. As the plurality in *Van Orden* detailed, the Decalogue is found on buildings throughout the Nation's Capital and "[r]ecogni[zes] the role of God in our Nation's heritage." 545 U.S. at 687 (plurality opinion); *id.* at 701 (Breyer, J., concurring) (noting that "the tablets can also convey a historical message (about a historic relation between those standards and the law)—a fact that helps explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States"). The Cross Memorial is part of this same "rich tradition" and also "partake[s] of both religion and government." *Id.* at 692; *id.* 689 (describing "a 24-foot-tall sculpture" outside the federal courthouse in the District of Columbia "depicting, among other things, the Ten Commandments and a cross"). The Cross Memorial, like the Decalogue, "has religious significance" but also has "an undeniable historical meaning," *id.* at 690, standing for 93 years as a reminder of the ultimate sacrifice that those from Prince George's County (and the Nation) made during World War I. *American Humanist Assoc.*, 874 F.3d at 206 (recognizing that the local government "preserves the memorial to honor World War I soldiers");

Salazar, 559 U.S. at 721 (plurality opinion) ("Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten."). Given that the Cross Memorial poses no more of a threat to Establishment Clause principles than the Ten Commandments monument in *Van Orden* and the legislative prayers in *Marsh*, this Court should reverse the Fourth Circuit and allow the Maryland-National Capital Park and Planning Commission (the "Commission") to honor the fallen in and through "the rich American tradition of religious acknowledgments." *Van Orden*, 545 U.S. at 690 (plurality opinion).

II. The reasonable observer test undermines the government's right under the government speech doctrine to control the content of its own messages by allowing a hypothetical third party to decide whether a passive and historically grounded acknowledgement of religion violates the Establishment Clause.

In the wake of *Summum*, there is no question that the Cross Memorial is government speech. *Summum*, 555 U.S. at 470 ("Permanent monuments displayed on public property typically represent government speech."). As a result, the Commission "has the right 'to speak for itself'" and, when speaking, "'is entitled to say what it wishes'" and "to select the views that it wants to express." *Summum*, 555 U.S. at 467-68 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)). Having taken on the role of speaker, the Commission may claim "the fundamental rule of protection under the First Amendment that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573.

And that is exactly what the Commission did. It "selected those monuments that it wants to display for the purpose of presenting the image of the City [of Bladensburg] that it wishes to project to all who frequent the [Veterans Memorial] Park." *Summum*, 555 U.S. at 473. The Cross Memorial honors those from the local community who made the ultimate sacrifice during World War I. The shape of the monument and the inscriptions on it speak directly to that sacrifice. The group responsible for building the Cross Memorial designed the monument to reflect the cross-shaped headstones marking the graves of American soldiers in overseas cemeteries. Pet. App. 74a; *Salazar*, 559 U.S. at 721 (plurality opinion) ("But a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people."). The wording on the monument testifies to the "valor," "endurance," "courage," and "devotion" of the 49 men from Prince George's County "who lost their lives in the Great War for the liberty of the world," Pet. App. at 52a, and holds them up as exemplars of all who fulfilled President Wilson's exhortation "to fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives." *American Humanist Assoc.*, 874 F.3d at 201 n.3.

Of course, the government speech doctrine does not insulate government speech from all First Amendment challenges. *See Summum*, 555 U.S. at 467-68 (making clear that "government speech must comport with the Establishment Clause" even though "the Free Speech Clause has no application"). In *Summum*, only the First Amendment speech issue was litigated, so the Court did not have the opportunity to consider the appropriate test to apply when the Establishment Clause and the government speech doctrine intersect. As Justice Souter noted in his *Summum* concurrence, "[t]he interaction between the 'government speech doctrine' and Establishment Clause principles has not, however, begun to be worked out." *Summum*, 555 U.S. at 486 (Souter, J., concurring).

To provide "coherence within the Establishment Clause law" and consistency with the government speech doctrine, Justice Souter proposed a "reasonable observer" test for facially religious government speech. *Id.* Under his proposed test, courts would have to determine first "whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land," *id.* at 487, and second, whether the same observer would view the facially religious speech as an impermissible endorsement of religion.

Contrary to Justice Souter's suggestion, however, the endorsement test is not the proper way to reconcile the Establishment Clause and the government speech doctrine. The central problem with applying the reasonable observer test in the context of government speech that includes religious references is that the test focuses on the wrong person in the communicative process—the observer instead of the speaker. Rather than analyze what is critical in the government speech context (namely, the message that the government intends to convey in and through the monument), the endorsement test considers the effect of the message on a reasonable observer. In so doing, the endorsement test presupposes a premise that *Summum* and *Marsh* reject—that the constitutionality of the government's message is determined by the meaning that others attribute to the government. *See*, *e.g.*, *Allegheny*, 492 U.S. at 599 (finding an Establishment Clause violation based on the "effect of the crèche on those who viewed it").

As *Summum* illustrates, though, the government's message (and its reasons for engaging in facially religious speech) may differ significantly from how others interpret that message. In the present case, it is undisputed that the Commission preserves the Cross Memorial for "safety near a busy highway intersection" and "to honor World War I soldiers." *American Humanist Assoc.*, 874 F.3d at 206. Under the government speech doctrine, the Commission has the right to control the content of its speech and to preserve the Latin cross as "a significant war memorial." *Id.*[2]

[2] Even if those who designed or created a monument did so to promote religion or a religious message, *Summum* precludes imputing that impermissible religious message to the government

But the Commission cannot control how others interpret (or misinterpret) the Cross Memorial. *See Utah Highway Patrol Ass'n*, 132 S. Ct. at 19 n.7 (Thomas, J., dissenting from denial of cert.) ("That a violation of the Establishment Clause turns on an observer's potentially mistaken belief that the government has violated the Constitution, rather than on whether the government has *in fact* done so, is perhaps the best evidence that our Establishment Clause jurisprudence has gone hopelessly awry."). After all, monuments are not limited to "convey[ing] only one 'message.'" *Summum*, 555 U.S. at 474; *Salazar*, 559 U.S. at 721 (plurality opinion) (recognizing that "a Latin cross" may reflect "Christian beliefs" while also serving "to honor and respect those" who served and sacrificed "for this Nation and its people"). As a result, those who see the Cross Memorial may interpret it in various ways: "[e]ven when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Summum*, 555 U.S. at 474.

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without evidence that the government entity adopted the monument to coerce or proselytize: "[A] painting of a religious scene may have been commissioned and painted to express religious thoughts and feelings. Even if the painting is donated to the museum by a patron who shares those thoughts and feelings, it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same 'message.'" *Summum*, 555 U.S. at 476 n.5.

Summum illustrated this point by asking the (presumably reasonable) observer to consider "'the message' of the Greco-Roman mosaic of the word 'Imagine' that was donated to New York City's Central Park in memory of John Lennon." *Id.* While some may view the monument and consider the "musical contributions that John Lennon would have made" if he lived longer, "[o]thers may think of the lyrics of the Lennon song that obviously inspired the mosaic and may 'imagine' a world without religion, countries, possessions, greed, or hunger." *Id.* at 474-75. Similarly, some (reasonable) observers who view the Cross Memorial may reflect on "the 49 soldiers from Prince George's County whom the Cross memorializes," while others consider one or more of the words inscribed on the base of the monument—"valor," "endurance," "courage," and "devotion." *American Humanist Assoc.*, 874 F.3d at 201. Still other (reasonable) observers may view the monument as part of the larger memorial to all veterans and think about all of the soldiers (and their families) who have sacrificed for our nation. Some other (reasonable) observers may view the monument as a recognition of "the strong role played by religion and religious traditions throughout our Nation's history," *Van Orden*, 545 U.S. at 683 (plurality opinion), or as "a tolerable acknowledgment of beliefs widely held among the people of this country," *Marsh*, 463 U.S. at 792.

That reasonable observers might ascribe different meanings to the Cross Memorial, though, does not change the fact that the Commission adopted the monument to honor the fallen, not to proselytize or disparage any sect or religion: "[I]t frequently is not possible to identify a single 'message' that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor." *Summum*, 555 U.S. at 476. Given that monuments "evoke different thoughts and sentiments in the minds of different observers," whether government speech violates the Establishment Clause must be determined by looking at the government's intended message, not at how others interpret (or misinterpret) that message. *Id.* at 475; *McCreary*, 545 U.S. at 901 (Scalia, J., dissenting) (criticizing the reasonable observer test because "[u]nder this approach, even if a government could show that its actual purpose was not to advance religion, it would presumably violate the Constitution as long as the Court's objective observer would think otherwise"). And where, as here, the government speaks through a passive monument that "has religious significance" (a Latin cross) as well as "an undeniable historical meaning" (a memorial to those from the local community who gave their lives in service to their country during World War I), *Marsh*, *Van Orden*, *Town of Greece*, *Lynch*, *Walz*, *Zorach*, and *McGowan* demonstrate that the Establishment Clause is not violated. *Van Orden*, 545 U.S. at 690 (plurality opinion); *see id.* ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."); *Lynch*, 465 U.S. at 675.

Moreover, given that the government is sending a permissible secular message through a memorial, the shape of the monument, just like the "content of the prayer" in *Marsh*, "is not of concern to judges where, as here, there is no indication that" the Cross Memorial "has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. That is, *Marsh* and *Summum* do not allow courts to reject a facially religious monument simply because it "has religious significance;" rather, where such a monument has "a dual significance, partaking of both religion and government," *Van Orden*, 545 U.S. at 691-92 (plurality opinion), the monument should not violate the Establishment Clause absent evidence that the government somehow sought to use the monument to coerce, proselytize, or disparage.

The fact that the Fourth Circuit found that the Cross Memorial violates the endorsement test despite its legitimate secular purposes demonstrates that the reasonable observer provides an improper lens through which to evaluate facially religious government speech, such as the Cross Memorial. *See Town of Greece*, 572 U.S. at 577 ("A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent."); *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring and dissenting in part) ("A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.").

The majority in *Marsh* rejected the reasonable observer analysis for just this reason—the test would have invalidated a practice that was "deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. While Justice Brennan argued that legislative prayers were unconstitutional because they "explicitly link religious belief [and] the power and prestige of the State … 'in the minds of some,'" *id.* at 798 (Brennan, J., dissenting), the majority declined to apply *Lemon*'s effect prong. Instead, the majority explained that the Establishment Clause requires the Court objectively to assess the speech at issue in relation to longstanding historical practice, not to consider the effect of the government practice on the minds of third party observers: "[That some,] like respondent, believe that to have prayer in this context risks the beginning of the establishment … is not well founded [because] [t]he unbroken practice for two centuries in the National Congress … gives abundant assurance that there is no real threat 'while this Court sits.'" *Id.* at 795 (citation omitted). And *Van Orden* and *Town of Greece* confirm that a historical approach is the proper constitutional analysis for facially religious speech, such as monuments and legislative prayer. *See Van Orden*, 545 U.S. at 686 ("[O]ur analysis is driven both by the nature of the monument and by our Nation's history."); *Town of Greece*, 572 U.S. at 576 ("[*Marsh*] teaches … that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'") (citation omitted).

Under the government speech doctrine, then, a court's Establishment Clause analysis of a facially religious monument must be based on "the nature of the monument" and its connection to "our

Nation's history." *Van Orden*, 545 U.S. at 686 (plurality opinion). Otherwise, under the endorsement test the Establishment Clause would require the government to convey only those messages that a reasonable observer would view as neutral towards religion, thereby undermining the government's "right to 'speak for itself.'" *Summum*, 555 U.S. at 467 (citation omitted). Instead of "say[ing] what it wishes," the government would be forced to filter its speech to account for how a reasonable observer might interpret the government's message—even though, as *Summum* instructs, such an observer may very well interpret the message differently from how the government intended.

Stated differently, neither the government speech doctrine nor the Establishment Clause should be interpreted to allow for a "heckler's veto" with respect to facially religious government speech the "reason or effect [of which] merely happens to coincide or harmonize with the tenets of some religions." *McGowan*, 366 U.S. at 442; *Marsh*, 463 U.S. at 792 (upholding Nebraska's legislative prayer practice because "it is simply a tolerable acknowledgment of beliefs widely held among the people of this country"). Under the Free Speech Clause, third parties who do not like the government's message cannot force the government either to remain silent or to express the third parties' desired message:

> When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally

> required to fund a program to encourage competing lines of political philosophy such as communism and fascism. Petitioners' assertions ultimately boil down to the position that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition.

Rust v. Sullivan, 500 U.S. 173, 194 (1991) (citation omitted); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.").

The same is true under the Establishment Clause. When the government engages in facially religious speech (whether through a Ten Commandments monument, the Cross Memorial, or legislative prayer), those who disagree with the message (or object to all religious references in the public sphere) cannot force the government to be silent or to change its preferred message (absent a showing of coercion or the government's using the opportunity to proselytize or disparage), no matter how sincere the objectors' concerns might be: "We do not doubt the sincerity of those, who like respondent, believe that to have prayer in this context risks the beginning of the establishment the Founding Fathers feared. But this concern is not well founded." *Marsh*, 463 U.S. at 795; *Town of Greece*, 572 U.S. at 576, 581 (explaining that the

Establishment Clause is not violated where the context demonstrates that the government speech was not "exploited to proselytize or advance any one, or to disparage any other, faith or belief.") (citations and internal quotation marks omitted); *Allegheny*, 492 U.S. at 662 (Kennedy, J., concurring and dissenting in part) (concluding that "where the government's act of recognition or accommodation is passive and symbolic, … any intangible benefit to religion is unlikely to present a realistic risk of establishment").

After all, as this Court has explained, the Establishment Clause does not require the government to remove all religious references and symbols from the public square: "Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy." *Town of Greece*, 572 U.S. at 581. *See also Schempp*, 374 U.S. at 306 (Goldberg, J., concurring) (warning that "untutored devotion to the concept of neutrality" must not result in "a brooding and pervasive devotion to the secular"). The fact that some observers might find such facially religious speech offensive or exclusionary does not convert facially religious government speech, which is consistent with "traditional practices that recognize the role religion plays in our society," *Town of Greece*, 572 U.S. at 579, into an Establishment Clause violation. *See id*. at 589 ("Offense, however, does not equate to coercion."); *Lee*, 505 U.S. at 597-98 ("We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. … We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity."); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring) ("The compulsion of which Justice Jackson was concerned … was of the direct sort—the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree."); *Allegheny*, 492 U.S. at 673 (Kennedy, J., concurring and dissenting in part) ("If the intent of the Establishment Clause is to protect individuals from mere feelings of exclusion, then legislative prayer cannot escape invalidation.").

Moreover, to preclude the government and its leaders from recognizing "that 'religion has been closely identified with our history and government,'" *Van Orden*, 545 U.S. at 687, would demonstrate a hostility toward religion, which would itself violate the Establishment Clause:

> Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

Allegheny, 492 U.S. at 576 (Kennedy, J., concurring and dissenting in part); *Zorach*, 343 U.S. at 314 ("[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."); *Wallace*, 472 U.S. at 85 (Goldberg, J., dissenting) ("For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion."). Using the endorsement test here to strike down the Cross Memorial not only undermines the Commission's right to control the content of its own messages (using a cross image, which marks graves of servicemen across Europe, to commemorate those from the community who gave their lives in World War I), but also threatens the free exercise rights of those in the community who want to participate in the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life…." *Lynch*, 465 U.S. at 674. *See also Masterpiece Cakeshop, Ltd. v. Colo. Human Rights Comm'n*, 138 S.Ct. 1719, 1731 (2018) (emphasizing that "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion.") (citation omitted). This Court, therefore, should adopt the historical approach used in *Marsh*, *Van Orden*, and *Town of Greece* to promote free exercise, to provide greater clarity and guidance to the lower courts, and to harmonize the Court's Establishment Clause jurisprudence with the government speech doctrine.

CONCLUSION

For the reasons set forth above, this Court should hold that the Religion Clauses permit the government to engage in facially religious expression, such as the Cross Memorial, because such speech is part of a longstanding tradition of religious acknowledgments and promotes the free exercise of religious believers without coercing or disparaging nonbelievers.

Respectfully submitted,

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