

No. 18-\_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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MARYLAND-NATIONAL CAPITAL PARK AND PLANNING  
COMMISSION,

*Petitioner,*

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether the Establishment Clause requires the removal or destruction of a 93-year-old memorial to American servicemen who died in World War I solely because the memorial bears the shape of a cross.

**PARTIES TO THE PROCEEDING**

The Maryland-National Capital Park and Planning Commission, petitioner on review, was the defendant-appellee below.

The American Humanist Association, Steven Lowe, Fred Edwards, and Bishop McNeill, respondents on review, were the plaintiffs-appellants below.

The American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131, respondents on review, intervened as defendants in the District Court and were defendant-appellees in the Court of Appeals.

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**PETITION FOR A WRIT OF CERTIORARI**

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The Maryland-National Capital Park and Planning Commission (the Commission) respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit in this case.

**OPINIONS BELOW**

The Fourth Circuit's opinion (App. 1a-52a) is reported at 874 F.3d 195. The District Court's opinion (App. 53a-85a) is reported at 147 F. Supp. 3d 373. The Fourth Circuit's order and opinions denying rehearing en banc (App. 86a-105a) are reported at 891 F.3d 117.

## **JURISDICTION**

The Fourth Circuit entered judgment on October 18, 2017. Petitioner filed a timely petition for rehearing en banc, which was denied on March 1, 2018. On May 9, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 2018. *See* No. 17A1175. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

The Establishment Clause of the First Amendment, U.S. Const. amend. I, provides:

Congress shall make no law respecting an establishment of religion.

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

## **INTRODUCTION**

In this case, the Fourth Circuit ordered the removal or destruction of a 93-year-old memorial to the veterans of Prince George’s County, Maryland, who perished in World War I, solely because the memorial bears the shape of a Latin cross. In an opinion that ultimately splintered the Fourth Circuit 8-6, the panel reasoned that the Latin cross is the “preeminent symbol of Christianity.” App. 20a. Accordingly, it concluded, virtually no amount of secular content, context, and history—including the monument’s exclusively secular dedication and inscriptions; its

placement alongside other secular war memorials in Veterans Memorial Park; its consistent use as a site for patriotic events for nearly a century; and the history of the Latin cross as a symbol of the World War I dead—could render the memorial a nonsectarian symbol of commemoration. App. 20a-31a.

That decision is, to be blunt, grievously incorrect. This Court has time and again made clear that the Establishment Clause “does not require eradication of all religious symbols in the public realm.” *Salazar v. Buono*, 559 U.S. 700, 718 (2010) (plurality opinion) (citing *Lee v. Weisman*, 505 U.S. 577, 598 (1992)). Rather, this Court has recognized that passive displays—particularly displays that have stood without challenge for decades—may constitutionally employ religious symbols in order to convey a predominantly nonreligious message. See *Lynch v. Donnelly*, 465 U.S. 668, 678-679 (1984). It is difficult to conceive of a monument whose content, context, and history more clearly convey a nonsectarian message of remembrance and respect than this one. The Fourth Circuit’s holding that the mere use of a cross tars this memorial as an unconstitutional establishment of religion “has no place in our Establishment Clause traditions,” and will engender the very sort of “religiously based divisiveness that the Establishment Clause seeks to avoid.” *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring).

The Fourth Circuit’s decision also continues a worrying trend in the lower courts. Despite this Court’s pronouncements, several circuits, including the Ninth, the Tenth, and the Fourth, have adopted an effectively *per se* prohibition on the use of crosses as

secular symbols of commemoration. The Ninth Circuit has issued an unbroken string of decisions invalidating every cross-shaped war memorial it has encountered, including some, like the Peace Cross, that are nearly a century old. See *Trunk v. City of San Diego*, 629 F.3d 1099, 1110-12 (9th Cir. 2011). Likewise, the Tenth Circuit has effectively adopted a “presumption of unconstitutionality” for commemorative crosses. *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1102-03 (10th Cir. 2010) (Kelly, J., joined by Gorsuch, J., dissenting from denial of rehearing en banc). These decisions split from the approaches taken by other circuits, including the Second and Fifth, that have recognized that the Latin cross may, in appropriate contexts, convey a nonsectarian message of commemoration. And they rest on multiple outlier understandings of this Court’s Establishment Clause precedents that other circuits have properly rejected.

This Court’s intervention is urgently needed. If permitted to stand, the Fourth Circuit’s decision will compel the removal or dismemberment of a cherished war memorial that has served as a site of solemn commemoration and civic unity for nearly a century. It will deepen division among the circuits on questions of profound importance to state and municipal governments. And it will imperil “hundreds of monuments with similar symbols standing on public grounds,” including “those in nearby Arlington National Cemetery, where crosses of comparable size stand in commemoration of fallen soldiers.” App. 101a (Niemeyer, J., dissenting from denial of rehearing en banc).

**STATEMENT****A. Factual Background**

The United States' entry into World War I led to death on a scale that America had not witnessed since the Civil War. In little over a year, more than 300,000 American soldiers were killed or wounded in Europe. An enduring symbol of this sudden and brutal loss of life became the Latin cross, which marked the graves of countless servicemen overseas. App. 77a-78a. Widely published photographs recorded the rows of wooden crosses commemorating the soldiers who perished at Argonne and Flanders Field. D. Ct. Dkt. 83-5, at 12-21. And the poet John McCrae wrote, in a celebrated remembrance, of "the crosses, row on row, / That mark our place \* \* \* We are the Dead." John McCrae, *In Flanders Fields* (1915), *reprinted in* *In Flanders Fields and Other Poems* 3 (G.P. Putnam's Sons ed., 1919).

Almost a century ago, in 1925, the American Legion and a group of bereaved mothers erected a memorial in Bladensburg, Maryland, to honor the forty-nine men from Prince George's County who died in World War I. App. 55a-59a. To evoke the grave markers on the battlefields of Europe, the memorial bears the shape of a cross. App. 54a. It has no religious text or content. At its base, a large plaque lists the names of the dead, and contains a dedication to "the heroes of Prince George's County Maryland who lost their lives in the Great War for the liberty of the world." App. 55a. The plaque also bears a quotation from President Wilson, stating that "[t]he right is more precious than peace." App. 44a. Four words are inscribed on the monument, one on each face: "valor; endurance; courage; devotion."

App. 55a. The symbol of the American Legion is displayed at the monument's center, and an American flag flies at one side. *Id.*

In the decades since this monument, commonly referred to as the "Peace Cross," was erected, other memorials have been built nearby to honor the veterans and fallen of other conflicts—a collection now known as Veterans Memorial Park. App. 60a. In 1944, a local American Legion post constructed a monument 200 feet south of the Peace Cross to honor the men and women of Prince George's County who died in World War II. *Id.* On July 4, 1983, a monument was constructed beside the World War II memorial to honor the veterans of the Korean and Vietnam Wars. App. 60a-61a. Other memorials within this small park commemorate the War of 1812, the victims of Pearl Harbor, and the lives lost on September 11, 2011. App. 9a, 60a-61a. Recently, the community added two thirty-eight-foot-tall statues of soldiers who fought in the Battle of Bladensburg. App. 61a.

From its inception, and up through the present day, the Peace Cross has consistently been used by the local community as the site of patriotic events to honor the Nation's veterans. App. 61a-62a. These events usually take place on Veterans Day or Memorial Day, and typically follow the same format: there is the presentation of colors, a singing of the national anthem, an invocation, a keynote speaker—often a veteran or military official—a song or readings, the laying of a wreath or flowers, a benediction, and a reception. App. 62a. No religious ceremony has ever been held at the memorial. *Id.* The only mention of a religious event of any kind occurred 87 years ago,

and there is no record that the event actually took place. *Id.* Until the present suit, no one ever challenged the monument's legality. App. 23a.

In 1961, the Commission acquired the Peace Cross in order to preserve the monument and address traffic safety concerns arising from the expansion of a nearby roadway. App. 59a-60a, 72a. When the Commission obtained the Peace Cross, the American Legion reserved the right to "to hold memorial services to departed veterans and other ceremonies" at the memorial. App. 60a. Today, the Commission funds routine maintenance and lighting of the Peace Cross, which is listed on the National Register of Historic Places and forms a part of the Star Spangled Banner National Historic Trail. App. 63a; *see* D. Ct. Dkt. 86-9, 86-11. The Commission has expended or budgeted roughly \$217,000 in recent decades to refurbish the monument and ensure its continued preservation. App. 63a.

### **B. Procedural History**

1. In 2014, the American Humanist Association and three local residents sued the Commission. They contended that, because of its shape, the Peace Cross constitutes an unconstitutional endorsement of Christianity, and asked that the court order the Commission to "remove" the memorial, "demolish" it, or "remove [its] arms \*\*\* to form a non-religious slab." D. Ct. Dkt. 78, at 2. The American Legion and its local affiliates intervened as defendants, and the parties cross-moved for summary judgment.

The District Court granted summary judgment to the defendants. The court found "overwhelming evidence" that "the predominant purpose of the [Peace Cross] was for secular commemoration." App.



73a. Furthermore, it found that the monument’s “history and context”—including the numerous “secular elements” on its face, the “secular memorials” that surround it, the monument’s “nearly exclusive use” as a war memorial “for its entire history,” and the absence of any legal challenge for nearly nine decades—made clear to any “reasonable observer” that the Peace Cross does not serve to “endor[s] religion.” App. 77a-83a.

2. A divided panel of the Fourth Circuit reversed. Writing for the majority, Judge Thacker “s[aw] fit to apply *Lemon* in this case.” App. 17a. The panel acknowledged that the memorial “satisfied the first prong of *Lemon*”: The Commission had “obtained the Cross” to “maint[ain] \*\*\* safety near a busy highway intersection,” and it “preserve[d] the memorial to honor World War I soldiers,” both plainly “legitimate secular purposes.” App. 19a. But the panel concluded that the memorial “fails the second and third prongs of *Lemon*” because it “endorses Christianity—not only above all other faiths, but also to their exclusion.” App. 28a, 31a.

The panel rested this conclusion on a single, overriding consideration: that the Memorial bears the shape of a large cross. “The Latin cross,” the panel reasoned, “is the ‘preeminent symbol of Christianity.’” App. 20a (quoting *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004)). Although a cross “may generally serve as a symbol of death and memorialization,” the court continued, “it only holds value as a symbol of death and resurrection *because* of its affiliation with the crucifixion of Jesus Christ.” App. 20a-21a. Thus, the panel concluded, “[e]ven in the memorial context, a Latin cross serves not simply as

a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ.” App. 21a.

The panel found that neither the history of the Peace Cross nor its secular content and context altered this exclusively religious meaning. The historical use of the cross “as a commemorative symbol of World War I” was “of no moment,” the panel reasoned, because crosses “on World War I battlefields were *individual*—rather than universal—memorials to the lives of Christian soldiers.” App. 21a-22a. Likewise, it was immaterial that the Peace Cross had “stood unchallenged for 90 years,” and “primarily” been used for “veteran-focused ceremonies” throughout that time. App. 23a. The “invocations and benedictions” at veterans’ events, the panel stated, were themselves “group prayer[s].” *Id.* And, notwithstanding *Van Orden*, it was “too simplistic” to consider the monument’s long history without challenge to be evidence of its “secular effect.” App. 23a-24a. “Perhaps the longer the violation persists,” the panel countered, “the greater the affront to those offended.” *Id.*

The panel likewise discounted the monument’s exclusively secular content and context. “Admittedly,” the panel said, “the Cross contains a few secular elements,” including “the plaque,” “the Legion symbol,” “the words ‘valor,’ ‘endurance,’ ‘courage,’ and ‘devotion’ inscribed on its base,” the “American flag flying in its vicinity”, and “its location in the Veterans Memorial Park.” App. 24a. But the panel expressed concern that “passers-by” might not view all of the monument’s secular features, since it is “located in a high-traffic area” where “one could [not] easily park,” and the plaque is “weathered” and once

was partially “obscured” by “bushes.” App. 24a-26a (citing *Davenport*, 637 F.3d at 1121). In addition, the panel noted that the Peace Cross is taller and more “prominent” than the surrounding monuments, which the panel thought “evoke[d] a message of aggrandizement and universalization of religion.” App. 24a-25a (quoting *Trunk*, 629 F.3d at 1116 n.18)).

Thus, the panel held, “the Cross \* \* \* ha[s] the primary effect of endorsing religion.” App. 27a. And, for much the same reason, the panel found that the Commission’s maintenance of the Peace Cross resulted in “excessive entanglement between government and religion.” App. 30a. By expending even “de minimis” funds to preserve the monument, the panel said, the Commission impermissibly “promot[ed] \* \* \* a religious doctrine, Christianity.” App. 30a-31a & n.18. It concluded that the Commission’s ownership of the memorial “says to any reasonable observer that the Commission either places Christianity above other faiths, views being American and Christian as one in the same, or both.” App. 31a.

Chief Judge Gregory dissented. He explained that “the Supreme Court has consistently concluded that displays with religious content—but also with a legitimate secular use—may be permissible under the Establishment Clause.” App. 43a (internal quotation marks omitted). That principle resolved this case: Through its “appearance, context, and factual background,” the Peace Cross made clear to the reasonable observer that “the Memorial, while displaying a religious symbol, is a war memorial built to celebrate the forty-nine Prince George’s County residents who gave their lives in battle.”

App. 44a-45a, 49a (emphasis omitted). The majority's conclusion that "the size of the Latin cross \*\*\* overwhelms these secular elements," Chief Judge Gregory wrote, "would lead to per se findings that all large crosses are unconstitutional despite any amount of secular history and context." App. 44a-45a.

3. The Fourth Circuit voted 8-6 to deny rehearing en banc. Judge Wynn concurred in the denial of rehearing. He asserted that "sanctioning a governmental body's attempt to imbue a traditionally religious symbol, like the Latin cross, with secular meaning" would itself violate the First Amendment. App. 95a (quoting *Lee*, 505 U.S. at 608 (Blackmun, J., concurring)).

Chief Judge Gregory, Judge Wilkinson, and Judge Niemeyer all filed dissents. Chief Judge Gregory reiterated the views in his panel dissent, and stated that "wherever one's views fall on the matter, I am certain [the case] raises an important question worthy of the full Court's review." App. 98a. Judge Wilkinson agreed: "I would let the cross remain and let those honored rest in peace." App. 100a. Judge Niemeyer explained that "[i]t strains established judicial analysis to conclude that *Van Orden* does not allow the monument in this case to stand," given that every "observation[ ]" that Justice Breyer made of the monument in *Van Orden* is applicable to the Peace Cross, too. App. 105a. Judge Niemeyer added that, by striking down the memorial, the panel's decision "puts at risk hundreds, and perhaps thousands, of similar monuments," including "those in nearby Arlington National Cemetery, where crosses

of comparable size stand in commemoration of fallen soldiers.” App. 101a, 105a.

## **REASONS FOR GRANTING THE PETITION**

### **I. THE FOURTH CIRCUIT’S DECISION IS PLAINLY WRONG.**

This should have been an easy case. The Peace Cross’s dedications, its inscriptions, its context, and nearly a century of practice make abundantly clear that this monument was erected to serve—and, for 93 years, *has served*—as a secular commemoration of American servicemen who perished in World War I. The panel’s conclusion that this cherished war memorial is in fact an effort to “aggrandize[]” Christianity defies common sense, and contradicts the long-settled understanding of the surrounding community. App. 31a. Furthermore, it flouts this Court’s directive that the Establishment Clause “does not require eradication of all religious symbols in the public realm,”—including the Latin cross, which has attained a “historical meaning \* \* \* beyond the expression of religious views.” *Buono*, 559 U.S. at 716-718.

The panel’s decision to strike down a nearly century-old war memorial itself raises “a question of substantial importance.” *Mount Soledad Mem’l Ass’n v. Trunk*, 132 S. Ct. 2535, 2535 (2012) (statement of Alito, J., respecting denial of certiorari). And its decision to do so on the basis of such clear errors of law is intolerable. This Court should grant certiorari and correct the Fourth Circuit’s grievous error.

1. a. This Court has long made clear that, whatever its outer bounds, the Establishment Clause does not prohibit public displays that employ religious sym-

bolism where neither the purpose nor the primary effect of the display is to endorse religious belief or practice. See *Lynch*, 465 U.S. at 680-681. Every Justice to address the issue has agreed that such displays do not violate the Establishment Clause. See, e.g., *Van Orden*, 545 U.S. at 691-692 (plurality opinion); *id.* at 703 (Breyer, J., concurring in the judgment); *Buono*, 559 U.S. at 747 n.7 (Stevens, J., dissenting). And, applying that principle, this Court has repeatedly affirmed the constitutionality of displays that use religious symbols to convey a nonsectarian message—from the crèche in *Lynch*, to the menorah in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), to the text of the Ten Commandments in *Van Orden*.

That straightforward principle should have resolved this case. There is no dispute that the Commission’s “purpose” in displaying the Peace Cross is wholly secular. App. 19a. The Commission assumed ownership of the Peace Cross in 1961 to promote traffic safety and historic preservation, and it maintains the memorial today to commemorate the men who died fighting in World War I. *Id.* As the panel conceded, those aims are both “secular” and plainly “legitimate.” *Id.*

Furthermore, no objective observer who was aware of the memorial’s content, context, and history would conclude that its effect is to endorse religion—let alone to proselytize or coerce religious practice. See *Buono*, 559 U.S. at 720-721. A large plaque on the front of the memorial expressly proclaims its secular purpose: to commemorate “the heroes of Prince George’s County Maryland who lost their lives in the Great War for the liberty of the world.” App. 55a.

Each of the memorial's faces honors one of the secular values that the war dead embody: "valor; endurance; courage; devotion." *Id.* The emblem of the American Legion, a civic organization dedicated to honoring the Nation's veterans, is prominently displayed on both sides. *Id.* And a secular quotation from President Wilson, declaring that "[t]he right is more precious than peace," is inscribed on the memorial's plaque. App. 44a. These dedications speak with a consistent voice, one wholly without religious content; they mark the Peace Cross as a war memorial commemorating the men who perished in World War I.

The shape of the memorial reaffirms that expressly secular meaning. While the Latin cross is "certainly a Christian symbol," no one aware of the background of the Peace Cross would think that it was erected "to promote a Christian message." *Buono*, 559 U.S. at 715. In 1925, the Latin cross was an indelible and widely recognized symbol of the servicemen who perished overseas fighting in World War I. *See id.* at 725 (Alito, J., concurring in part and concurring in the judgment). Poems, photographs, and other World War I memorials throughout the country regularly used this symbol as a simple marker of the dead. By using a cross to commemorate the forty-nine war dead of Prince George's County, the memorial "evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles," and seeks "simply to honor our Nation's fallen soldiers." *Id.* at 715, 721 (plurality opinion).

The "physical setting of the monument" confirms that it serves as a memorial to the fallen rather than an object of religious observance. *Van Orden*, 545

U.S. at 702 (Breyer, J., concurring). The Peace Cross is situated on a highway median that “suggests little or nothing of the sacred” and that “does not readily lend itself to meditation or any other religious activity.” *Id.* Furthermore, it is located in the middle of Veterans Memorial Park, an area dedicated to the veterans and war dead of other national conflicts. This collection of war monuments, secular all, “communicates to visitors” a single consistent message: commemoration and respect for soldiers who died in the Nation’s wars. *Id.*; see *Cty. of Allegheny*, 492 U.S. at 635 (O’Connor, J., concurring).

And, over the course of nearly a century, the community has made clear that it understands the Peace Cross to convey exactly that message. Since 1925, the Peace Cross has virtually exclusively been used for patriotic events honoring the Nation’s veterans. App. 61a-62a. No religious event has been held at the site for at least 87 years, if ever. *Id.* Beginning in 1944, the community began to erect other war memorials around the Peace Cross, evidencing their understanding of the memorial as a commemorative, not religious, monument. And for the first 89 years of its history—and for 53 years after it was transferred to the Commission—no one challenged the monument’s legality. This history testifies “more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting \*\*\* to a government effort to favor a particular religious sect.” *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring).

b. *Van Orden* confirms that the Peace Cross is constitutional. In his controlling concurrence in that



case, Justice Breyer determined that a Ten Commandments display on the Texas State Capitol grounds was constitutional because several considerations, taken together, made clear that the display “serv[ed] a primarily nonreligious purpose”: (1) the monument “prominently acknowledge[d]” that it was donated by a “primarily secular” organization; (2) the monument’s “physical setting” did not lend itself to religious activity or suggest the sacred; (3) the display was part of a collection of “monuments” and “historical markers” celebrating the “historical ‘ideals’ of Texans”; and (4) the monument had stood for forty years without challenge. 545 U.S. at 701-703.

Precisely the same factors are present here. The Peace Cross “prominently acknowledges” that it was donated by the American Legion, a civic organization that honors our Nation’s veterans. Its physical setting on a highway median does not lend itself to religious activity. The monument is part of “Veterans Memorial Park,” a collection of other “monuments” and “historical markers” to the Nation’s conflicts. And the memorial stood for nearly ninety years without challenge.

If anything, the Peace Cross contains substantially more indicia of secular meaning than the monument in *Van Orden*. It has an expressly secular dedication, an inscription honoring secular values, and decades’ worth of exclusively secular usage. As Judge Niemeyer explained, “[i]t strains established judicial analysis to conclude that *Van Orden* does not allow the monument in this case to stand.” App. 105a.

2. The panel majority nonetheless concluded that this century-old war memorial is invalid, and must be “raz[ed],” have its arms “remov[ed],” or be subjected to “alternative arrangements that would not offend the Constitution.” App. 31a-32a n.19. That judgment is deeply flawed.

a. The majority’s principal rationale for invalidating the Peace Cross was the bare fact that it has the shape of a large Latin cross. App. 5a-6a. According to the panel, the Latin cross acquired its meaning as a symbol of death and remembrance from “its affiliation with the crucifixion of Jesus Christ.” App. 20a-21a. Therefore, the panel reasoned, “[e]ven in the memorial context, a Latin cross serves not simply as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ.” App. 21a.

That simply does not follow. This Court has repeatedly made clear that symbols that draw their core meaning from religion may also be used to convey a constitutionally permissible, nonsectarian message. In *Van Orden*, Justice Breyer explained that a display of the Ten Commandments—the text of which expressly “invok[es] \* \* \* the Deity” and prescribes rules of religious observance—conveyed a predominantly “secular moral message” when it appeared as part of a collection of secular monuments. 545 U.S. at 700-702. So too in *Lynch*, the Court held that a crèche sent a message of pluralism, rather than religious devotion, when it appeared among a collection of symbols honoring the winter holidays. 465 U.S. at 680-681.

The Latin cross, no less than these other symbols, can convey a nonreligious message as well as a religious one. Indeed, in *Buono*, a plurality of the

Court recognized that the cross does not serve “merely [as] a reaffirmation of Christian beliefs” when used to commemorate the fallen of World War I. 559 U.S. at 721. Rather, it sends a message of “honor and respect” for “those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.” *Id.* The erection of a cross-shaped monument to the men who died in World War I thus “evokes far more than religion”; “[i]t 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.” *Id.*

The panel majority overlooked this secular meaning—one well-known at the time of the Peace Cross’s construction—and instead “concentrated solely on the religious aspects of the cross, divorced from its background and context.” *Id.* But this Court’s precedents do not permit such categorical hostility to the use of “religious symbols in the public realm.” *Id.* at 718 (citing *Lee*, 505 U.S. at 598). The court should have examined the display as a whole, in light of its background and history, to determine whether the “nonreligious aspects” of its message “predominate” over its religious associations. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring). Here, they plainly do: If even a bare, unadorned cross in the desert could convey a nonreligious message of remembrance, *see Buono*, 559 U.S. at 715-716, 721, then a monument that contains multiple express declarations of its secular purpose, supported by nearly a century of practice, surely does so, as well. *See id.* at 747 n.7 (Stevens, J., dissenting) (stating that, when

used as part of a “more elaborate monument,” a cross can “convey a primarily nonreligious message”).

b. The panel compounded its error by discounting many of the monument’s “[a]dmittedly \*\*\* secular elements.” App. 24a. By the panel’s logic, a “reasonable observer” might not notice the cross’s plaque, inscription, and surroundings because the cross is “located in a high-traffic area” where one cannot “easily park”; the plaque is “weathered”; the base of the monument was at one time “obscured” by bushes; and some of the other memorials are up to a “half-mile” away. App. 24a-27a. The panel thought that “passers-by” might therefore fail to “read the plaque” or accurately ascertain the monument’s secular context. App. 25a.

But that is simply not the way the “reasonable observer” test works. The “reasonable observer” is not a “casual passerby” with partial knowledge of the challenged display. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O’Connor, J., concurring). She is a “personification of the community ideal of reasonable behavior,” one who is acquainted with all of the relevant facts, history, and circumstances. *Id.* at 779-780; see *Buono*, 559 U.S. at 720-721. The “reasonable observer” accordingly would not be concerned with such minutiae as the availability of parking and the height of the bushes. She would fairly assess all indicia of the monument’s meaning, even those not easily visible at a moment’s glance—all of which powerfully attest to the monument’s secular meaning.

c. Finally, the panel erred by declining to place any weight on the monument’s nine decades of exclusive-

ly secular history.<sup>1</sup> It rejected as “too simplistic” the notion that this history weighed in favor of the monument’s constitutionality, opining that it could just as easily be said that “the longer a violation persists, the greater the affront to those offended.” App. 23a-24a. This Court, however, has previously said the opposite: In *Van Orden*, Justice Breyer’s controlling concurrence deemed it “determinative” that the monument at issue had stood for four decades without challenge. 545 U.S. at 702. Likewise, in *Buono*, the plurality explained that “[t]ime \*\*\* ha[d] played its role” in shaping the meaning of the memorial at Sunrise Rock, giving it a “historical meaning” as a place in which the public came to “pay \*\*\* respects” and “honor[.]” the war dead. 559 U.S. at 716; see also *Lynch*, 465 U.S. at 684. The panel could not simply ignore these holdings, and treat the monument’s history as a reason for subjecting it to *greater* scrutiny. App. 23a-24a.<sup>2</sup>

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<sup>1</sup> The panel’s suggestion that the monument’s history is only “semisecular” was unfounded. App. 23a. The panel said that “the Cross has been the scene of Christian activities” because of a single newspaper advertisement regarding one religious event 87 years ago. *Id.* And the panel wrongly characterized the “invocations and benedictions” at annual Veterans Day and Memorial Day ceremonies as illicit “group prayer[s].” *Id.*; cf. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818-19 (2014).

<sup>2</sup> The panel’s holding (at App. 30a) that the Peace Cross entails “entanglement between government and religion” cannot sustain any weight. The panel rested that holding entirely on the erroneous premise that the memorial “embodies promotion of a religious doctrine.” App. 30a-31a & n.18. And even on that premise, the panel’s conclusion was wrong; the de minimis expenditure of funds to maintain a monument does not entail the sort of “pervasive monitoring by public authorities \*\*\* of

In the end, the panel’s holding would invite the very “kind of social conflict the Establishment Clause seeks to avoid.” *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring). Its decision would compel the removal or destruction of a monument that has served as a source of civic unity for 93 years, stripping Bladensburg of a site of remembrance and mourning, and “conveying disrespect for those the cross [is] seen as honoring.” *Buono*, 559 U.S. at 716. Furthermore, its decision will inevitably “encourage disputes concerning the removal” of other cross-shaped war memorials throughout the Fourth Circuit. *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring); *see infra* pp. 33-35. That sort of divisiveness and destruction toward our Nation’s historical landmarks “has no place in our Establishment Clause traditions.” *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring). The Court should grant the writ and correct the Fourth Circuit’s serious error.

## **II. THE FOURTH CIRCUIT’S DECISION DEEPENS MULTIPLE CIRCUIT SPLITS**

Certiorari is also warranted because the Fourth Circuit’s decision continues a worrying trend in the lower courts. Multiple circuits, including the Ninth, the Tenth, and now the Fourth, have adopted what amounts to a virtual *per se* prohibition on the use of crosses as symbols of commemoration. That rule sharply divides from the approach taken by other courts, including the Second and Fifth Circuits,

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religious matter” or “religious thought” required to implicate entanglement concerns. *Aguilar v. Felton*, 473 U.S. 402, 413 (1985).

which have upheld cross-shaped displays where context and history make clear that they are intended to serve as secular symbols of commemoration. And it rests on multiple erroneous understandings of this Court's Establishment Clause precedents that other circuits have properly rejected.

**A. The Circuits Are Divided On Whether The Cross May Ever Serve As A Secular Symbol Of Commemoration.**

The circuits have sharply split as to the permissibility of ever using the cross as a commemorative symbol.

1. a. The Ninth Circuit began applying a virtual *per se* prohibition on cross-shaped monuments in *Separation of Church & State Committee v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (*per curiam*). There, the court considered the constitutionality of the Veterans Memorial Cross in Eugene, Oregon. That memorial was donated by the American Legion, was marked with a plaque containing a dedication to the veterans of all wars, prominently featured the words "Bravely They Died, Honored They Rest," and was used only for secular commemorative events. *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 344 (Or. 1976). In 1976, the Oregon Supreme Court had upheld this cross on the ground that its content and usage made clear that it was maintained for "the secular purpose" of honoring war veterans, and served as a nonreligious "symbol of sacrifice" akin to other "large monuments with crosses in military cemeteries." *Id.* at 346-347. In a brief *per curiam* opinion, the Ninth Circuit invalidated the memorial. Its reasoning consisted of one sentence: "There is no question that the Latin cross

is a symbol of Christianity,” it stated, and thus “its placement on public land by the City of Eugene violates the Establishment Clause. *City of Eugene*, 93 F.3d at 620.

The Ninth Circuit subsequently applied that syllogism to invalidate another cross-shaped war memorial in *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (“*Buono I*”). In that case, the memorial at issue was erected in 1934 by the Veterans of Foreign Wars, contained a plaque identifying it as a war memorial, had been used for decades as a place to commemorate veterans, and was designated by Congress as a federal memorial for World War I veterans. *Id.* at 548-549. The Ninth Circuit stated that all of this context was “of no moment.” *Id.* at 549. Its analysis, it said, was “squarely controlled” by the one-sentence holding in *City of Eugene*, because this too was a “cross \* \* \* on publicly-owned land.” *Id.* at 548.

The Ninth Circuit reapplied this holding in *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended*, 527 F.3d 758 (9th Cir. 2008) (“*Buono II*”). In the intervening four years, Congress had attempted to address the Ninth Circuit’s concerns in *Buono I* by enacting a statute transferring the monument to private land. *Id.* The Ninth Circuit, however, held that this transfer “d[id] nothing to minimize the impermissible government endorsement,” and enjoined the statute. *Id.* at 1086. This Court reversed: It explained that the Ninth Circuit had taken “insufficient account of the context” and “historical meaning” of the memorial, and noted that the underlying decision in *Buono I* “may be questionable,” as well. *Buono*, 559 U.S. at 715-718.



Undeterred, the Ninth Circuit invalidated yet another decades-old war memorial in *Trunk*. That memorial was originally erected on Mount Soledad in 1913, was “the centerpiece of a more extensive war memorial,” had been the site of regular veterans’ services for decades, and was acquired by Congress in 2006 specifically to preserve it as a memorial honoring the Nation’s veterans. 629 F.3d at 1102-05. The Ninth Circuit struck down the monument, applying what it characterized as the “straightforward” rule set forth in its precedents: the Latin cross, it said, is “sectarian in nature,” and does not “possess[] an ancillary meaning as a secular war memorial.” *Id.* at 1112. Five judges dissented from denial of rehearing en banc, summarizing the Circuit’s rule as: “a cross is a cross is a cross.” *Trunk v. City of San Diego*, 660 F.3d 1091, 1091 (9th Cir. 2011) (Bea, J., dissenting from denial of rehearing en banc).

b. The Tenth Circuit has taken a similarly categorical approach. In *Davenport*, the court considered the constitutionality of Utah’s display of Latin crosses to memorialize fallen highway patrol officers. 637 F.3d at 1111. These crosses, like the war memorials in *Buono* and *Trunk*, contained multiple secularizing details, including the biographical information of the fallen officers and the insignia of the Utah Highway Patrol. *Id.* at 1121-22. The court, however, reasoned that the cross is not a “generic symbol of death” but a “Christian symbol of death,” and thus its use as a symbol of commemoration “can[not] be divorced from its religious significance.” *Id.* at 1122. Dissenting from denial of rehearing en banc, Judge Kelly, joined by then-Judge Gorsuch, criticized this “presumption of unconstitutionality,” explaining that it led the

court to “promptly disregard” every “contextual element[.]” demonstrating the crosses’ secular effect. *Id.* at 1102-03 (Kelly, J., dissenting from denying of rehearing en banc).

c. In the decision below, the Fourth Circuit expressly aligned itself with the views of the Ninth and Tenth Circuits. Invoking *Buono*, *Trunk*, and *Davenport*, it asserted that the Latin Cross is “‘the preeminent symbol of Christianity,’” not “a generic symbol of death,” and that its sectarian meaning “overshadows [the Peace Cross’s] secular elements.” App. 20a-21a, 26a (citation omitted). Applying that principle, the Court then invalidated the Peace Cross—a monument laden with as many indicia of secular meaning as could reasonably be imagined. As Chief Judge Gregory explained, the Circuit’s newfound rule will thus lead—as it has done in the Ninth Circuit—“to per se findings that all large crosses are unconstitutional despite any amount of secular history and context.” App. 45a.

2. In contrast, the Second Circuit and the Fifth Circuit (and, as noted above, the Oregon Supreme Court), have upheld the use of crosses where context and history make clear that they are intended as secular symbols of commemoration.

In *American Atheists, Inc. v. Port Authority of New York and New Jersey*, 760 F.3d 227 (2d Cir. 2014), the Second Circuit upheld the display of a cross-shaped memorial at the September 11 Museum. That memorial, which consisted of two girders welded in the shape of a Latin cross, had been recovered from the ruins of the World Trade Center, and was treated by some rescue workers as a devotional object. *Id.* at 233-234. The Second Circuit explained

that a reasonable observer “would be familiar not only with the religious symbolism of a Latin cross and the devotional use made of The Cross at Ground Zero,” but also the secular context in which it appeared at the Museum. *Id.* at 241. That context included a plaque indicating that the cross was displayed to provide “an accurate historical account of events relating to September 11,” the absence of any nearby “Christian iconography,” the fact that the Ground Zero cross was widely understood as “an inclusive symbol for any persons seeking hope and comfort,” and the surrounding exhibits displaying “various means that people employed to come to terms with the attacks’ devastation.” *Id.* at 241-244. Together, the court held, this context made clear that the cross’s purpose was “not [a] divisive one of promoting religion over nonreligion.” *Id.* at 244.

The Fifth Circuit has also upheld the display of crosses used as symbols of historical commemoration. In *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991), the court upheld the display of a Latin cross in the town seal of Austin, Texas. *Id.* at 149. The court acknowledged that the symbol was “a Christian cross,” and that it had been adapted from Stephen Austin’s coat of arms, where it had the religious purpose of commemorating Austin’s ancestor’s participation in a crusade. *Id.* at 150-151. But the court found it dispositive that the town itself had no “improper purpose in adopting the insignia,” that the seal enjoyed a “long and unchallenged use,” that it had a “non-proselytizing effect,” and that removing the cross would “arguably evince[] not neutrality, but instead hostility, to religion.” *Id.* at 158. Similarly, in *Briggs v. Mississippi*, 331 F.3d 499 (5th Cir. 2003), the Fifth Circuit upheld the use of the St.

Andrew's Cross in the Mississippi state flag. Although St. Andrew—one of the twelve apostles—was a religious figure, the court explained, the flag's "objective meaning in the community" was nonreligious, and any religious endorsement it entailed was "at most indirect, remote and incidental." *Id.* at 507.

**B. The Circuits' Division Rests On Several Basic Disagreements As To The Meaning Of This Court's Establishment Clause Precedents.**

The circuits' division on this important question proceeds from at least three fundamental disagreements on the meaning of this Court's Establishment Clause precedents. The Ninth, Tenth, and Fourth Circuits have all taken outlier views on the nature of the endorsement inquiry: These courts have held that the commemorative use of the cross is inseparable from its religious meaning; that the reasonable observer is akin to a selectively informed "passerby"; and that a monument's longstanding history without challenge is irrelevant—or even detrimental—to its constitutionality under the Establishment Clause. Other circuits have properly declined to adopt those views.

*1. The circuits disagree on whether a commemorative cross necessarily conveys a religious message.*

First, the circuits' division stems from a fundamental disagreement as to whether the Latin cross itself can ever convey a meaning that is not predominantly religious.

The Ninth, Tenth, and Fourth Circuits have each held that the commemorative meaning of the Latin

cross is inherently and overwhelmingly sectarian. In *Trunk*, the Ninth Circuit flatly stated that while “[t]he Latin cross can \*\*\* serve as a powerful symbol of death and memorialization,” it necessarily “remains a sectarian, Christian symbol.” 629 F.3d at 1116. Likewise, the Tenth Circuit held in *Davenport* that secular details on a cross cannot “nullif[y] [its] religious sectarian content because a memorial cross is not a *generic* symbol of death; it is a Christian symbol of death.” 637 F.3d at 1122.<sup>3</sup> The Fourth Circuit applied nearly identical language in the decision below: “Even in the memorial context,” it stated, “a Latin cross serves not simply as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ.” App. 21a.

In contrast, the Second and Fifth Circuits—like the plurality in *Buono*—have rejected this rigid view of the cross’s meaning. In *American Atheists*, the Second Circuit held that the commemorative use of the Latin cross does not necessarily “derive[] from its religious symbolism and devotional use”; rather, the court explained, the cross may be used to convey a meaning that is “historical rather than theological.” 760 F.3d at 239-240. Similarly, the Fifth Circuit has

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<sup>3</sup> The Tenth Circuit distinguished its earlier decision in *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), in which the court held that the City of Las Cruces could use a cross in its seal because the seal’s “symbolism [wa]s not religious *at all*,” and instead served simply as a “pictograph \*\*\* for a city named ‘The Crosses.’” *Id.* at 1033, 1035 (emphasis added). In contrast, *Davenport* reasoned, the use of the cross as a “symbol of death” necessarily conveys a meaning that “can[not] be divorced from its religious significance.” 637 F.3d at 1122.

held that a “Christian cross” need not “demonstrate[] a preference for Christianity,” but may simply serve to commemorate a municipality’s “unique role and history.” *Murray*, 947 F.2d at 150, 155.

2. *The circuits disagree on what knowledge to attribute to the “reasonable observer.”*

The circuits have also reached divergent results because they fundamentally disagree on what knowledge to attribute to the “reasonable observer.”

Both the Tenth and the Fourth Circuits understand the reasonable observer as an ordinary “passerby” who may fail to notice secularizing details that are not plainly visible. In *Davenport*, the Tenth Circuit held that a reasonable observer would not take account of the nonreligious details on a roadside cross because “a motorist driving by one of the memorial crosses at 55-plus miles per hour may not notice, and certainly would not focus on,” such information. 637 F.3d at 1121; see *Green v. Haskell Cty. Bd. of Comm’rs*, 568 F.3d 784, 802 (10th Cir. 2009) (stating that a reasonable observer may have a “mistaken impression” about a monument’s context). Similarly, in the decision below, the Fourth Circuit held that a reasonable observer would not “read the plaque” on the Peace Cross or view the surrounding monuments because the memorial is “located in a high-traffic area,” it is difficult to “park,” and the plaque is too “small” and “weathered.” App. 24a-26a (citing *Davenport*, 637 F.3d at 1121).

Other circuits have rejected this cramped notion of the reasonable observer. The Third Circuit, for instance, has stated that the reasonable observer is a person who is “presumed to have an understanding

of the general history of the display and the community in which it is displayed,” and who is “*more knowledgeable than the uninformed passerby.*” *Freethought Soc’y, of Greater Phila. v. Chester Cty.*, 334 F.3d 247, 259 (3d Cir. 2003) (emphasis added). The Sixth Circuit has likewise “reject[ed] the definition of the reasonable observer” as a person who “ha[s] no knowledge beyond what appears upon seeing” a display, or who fails to “*come close enough to \* \* \* read [a] sign.*” *Ams. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1549-50 (6th Cir. 1992) (en banc) (emphasis added). Similarly, the Eleventh Circuit has rejected reliance on the “perceptions of [an] ill-informed” or “first-time visitor” when determining what the reasonable observer would conclude. *Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1390 n.11 (11th Cir. 1993).

Both Justice Thomas and Justice Gorsuch have noted the significant disagreement between the circuits on this point. Then-Judge Gorsuch noted, in dissenting from denial of rehearing en banc in *Davenport*, that the Tenth Circuit had “*repeatedly* misapplied the ‘reasonable observer’ test” by equating the reasonable observer with a “biased, impaired, and distracted viewer,” as a result “strik[ing] down laws other courts would uphold.” 637 F.3d at 1107, 1110. Justice Thomas observed that it was “entirely unpredictable” whether “a given court’s hypothetical observer will be ‘*any* beholder (no matter how unknowledgeable), or the *average* beholder, or \* \* \* the ‘ultra-reasonable’ beholder.” *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 19-20 (2011) (Thomas, J., dissenting from denial of certiorari) (citation omitted).

3. *The circuits disagree on the relevance of a monument's longevity and history.*

Finally, the division between the circuits appears to rest on disagreement as to whether to accord any weight to the factor Justice Breyer deemed “determinative” in *Van Orden*—that is, that a display has stood for decades without facing legal challenge. 545 U.S. at 702.

The Ninth and Fourth Circuits have openly rejected this portion of Justice Breyer’s controlling concurrence. In *Trunk*, the Ninth Circuit stated, shortly after citing Justice Breyer’s statement to the contrary, that “the suggestion that the longevity and permanence of [a monument] diminishes its effect has *no traction*.” 629 F.3d at 1122 (emphasis added); see *Carpenter v. City & Cty. of San Francisco*, 93 F.3d 627, 632 (9th Cir. 1996) (similar). Similarly, in the decision below, the panel cited the relevant portion of *Van Orden* and then immediately dismissed it as “too simplistic,” contending instead that “the longer a violation persists, the *greater* the affront to those offended.” App. 23a-24a (emphasis added).

Unsurprisingly, other circuits have not dismissed this Court’s precedent so cavalierly. The Fifth Circuit has held that the fact that a display “stood without complaint” for decades “supports the notion that [it] was not objectively seen as predominantly religious.” *Staley v. Harris Cty.*, 461 F.3d 504, 513 (5th Cir. 2006), *dismissed as moot*, 485 F.3d 305 (5th Cir. 2007) (en banc); see *Murray*, 947 F.2d at 158 (relying on the cross’s “long and unchallenged use” in upholding its constitutionality). Similarly, the Eighth Circuit has upheld the constitutionality of a monument in part because “decades passed during



which the \*\*\* monument stood \*\*\* without objection.” *ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772, 778 (8th Cir. 2005).

\* \* \*

In short, the circuits disagree on whether municipalities, States, and the Federal Government may maintain cross-shaped memorials, even memorials that are laden with secular details and that have stood without controversy for decades. And they disagree on *how* to determine whether those memorials are lawful in the first place. Only this Court’s intervention can clear the confusion. The Fourth, Ninth, and Tenth Circuits have each refused to rehear the relevant decisions en banc, despite multiple vigorous dissents. *See Trunk*, 660 F.3d at 1091 (Bea, J., dissenting from denial of rehearing en banc); *Buono II*, 527 F.3d at 760 (O’Scannlain, J., dissenting from denial of rehearing en banc); *Davenport*, 637 F.3d at 1101 (Kelly, J., dissenting from denial of rehearing en banc); *id.* at 1107 (Gorsuch, J., dissenting from denial of rehearing en banc); App. 98a (Gregory, C.J., dissenting from denial of rehearing en banc); App. 99a (Wilkinson, J., dissenting from denial of rehearing en banc); App. 101a (Niemeyer, J., dissenting from denial of rehearing en banc). And this Court’s decisions in *Van Orden* and *Buono* have not caused any of these courts to reassess its views. The Court should grant certiorari and hold that, at least where a monument is as plainly secular as the Peace Cross, and has stood without controversy for decades, the mere use of a cross does not render it unconstitutional.

### III. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is of exceptional importance. On its own, the Fourth Circuit's invalidation of the Peace Cross would merit this Court's review. The Peace Cross has stood as a place of solemn commemoration and a source of civic unity for nearly a century. By compelling its removal, destruction or dismemberment, the panel's decision will necessitate an act of shocking disrespect for the brave souls of Prince George's County who died fighting for their country in World War I. *Buono*, 559 U.S. at 715-716. It will also deprive the community of a historic landmark that has for generations enabled residents to remember lost loved ones, engage in expressions of patriotism, and honor the Nation's veterans. "The demolition of this venerable \*\*\* monument" will inevitably be "interpreted by some as an arresting symbol of a Government \*\*\* bent on eliminating from all public places and symbols any trace of our country's religious heritage," provoking the sort of religiously-based divisiveness the Establishment Clause seeks to prevent. *Id.* at 726; see *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring).

Review is also warranted because the Fourth Circuit's decision "puts at risk hundreds of monuments with similar symbols standing on public grounds" throughout the region encompassed by the Fourth Circuit. App. 101a (Niemeyer, J., dissenting from denial of rehearing en banc). In Arlington National Cemetery, two large crosses "of comparable size"—the Argonne Cross and the Canadian Cross of Sacrifice—stand in commemoration of the veterans of

World War I. *Id.* In Towson, Maryland, the Wayside Monument honors 204 men from Baltimore County who died in World War I. D. Ct. Dkt. 83-63. In Virginia, the Cape Henry Memorial Cross records the place where the first English colonists landed.<sup>4</sup> Other such monuments are common in military graveyards, town centers, and national parks throughout the Fourth Circuit and the country more broadly. *See, e.g., Trunk*, 660 F.3d at 1099-1100 (Bea, J., dissenting from denial of rehearing en banc) (listing hundreds of additional examples); *Buono II*, 527 F.3d at 765 n.6 (O’Scannlain, J., dissenting from denial of rehearing en banc) (giving further examples). It is difficult to see how these crosses could stand if the Peace Cross—which is marked in every conceivable way with declarations of its secular purpose—cannot.

The panel majority suggested that the monuments at Arlington National Cemetery might be distinguished from the Peace Cross because they are “smaller,” appear in a “designated area for commemorating and memorializing veterans who have passed away,” and are surrounded by graves carrying religious symbols. App. 29a & n.16. These distinctions are empty. The Argonne Cross and Canadian Cross of Sacrifice are between 13 and 24 feet high, substantially “talle[r]” than the surrounding monuments. App. 24a. Veterans Memorial Park is Prince George’s County’s place for “commemorating and memorializing veterans,” no less than Arlington

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<sup>4</sup> *Cape Henry Memorial Cross*, Nat’l Park Serv., <https://www.nps.gov/come/cape-henry-memorial-cross.htm> (last visited June 28, 2018).

National Cemetery is the Nation's. And the notion that *more* religious symbolism would have saved the Cross from invalidity under the Establishment Clause is absurd. If anything, the addition of overtly sectarian monuments nearby would have indicated—contrary to fact—that the Peace Cross commemorates Christian veterans alone, sending precisely the sort of divisive message the Establishment Clause disfavors.

Finally, certiorari is warranted to bring much-needed clarity to this Court's Establishment Clause jurisprudence. See *Rowan Cty. v. Lund*, No. 17-565, 2018 WL 3148570, at \*1 (U.S. June 28, 2018) (Thomas, J., joined by Gorsuch J., dissenting from denial of certiorari). Countless displays throughout the Nation employ crosses and other religious symbols. The circuits' profound disagreements about the proper means of evaluating these displays—whether crosses are inescapably religious, whether the reasonable observer is merely a casual passerby, and whether longstanding history matters at all—have resulted in variations that defy rational explanation. See, e.g., *City of Eugene*, 93 F.3d at 620 (invalidating same war memorial previously upheld by another court); App. 24a-26a (considering factors expressly rejected by Third and Sixth Circuits); *Utah Highway Patrol*, 132 S. Ct. at 17-20 (Thomas, J., dissenting from denial of certiorari) (cataloguing other examples). The Court should not permit longstanding civic monuments in Bladensburg, Arlington, and elsewhere to be removed on the basis of such arbitrary distinctions and regional variations in approach.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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