No. ___

In the Supreme Court of the United States

CITY OF PENSACOLA, FLORIDA, ET AL.

Petitioners,

v.

AMANDA KONDRAT'YEV, ET AL.

Respondents.

MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI AND TO EXPEDITE CONSIDERATION OF THIS MOTION

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Petitioners the City of Pensacola, Florida, Mayor Ashton Hayward, and Brian Cooper move, in accordance with Supreme Court Rule 21, for expedited consideration of the petition for a writ of certiorari, to be filed today, to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on September 7, 2018 (Pet. App. 1a-82a).

Expedition is necessary so the Court can consider Pensacola's petition close in time to its consideration of the petitions in *American Legion* v. *American Humanist Association* (No. 17-1717) and *Maryland-National Capital Park & Planning Commission* v. *American Humanist Association* (No. 18-18) (*American Legion*), which are scheduled for the Court's conference on September 24, 2018. Although this case warrants certiorari in its own right, the questions presented in this case are closely related to those presented in *American Legion*, and there is significant value to the Court in considering them together, both at the certiorari stage and, if the Court grants certiorari, on the merits. Accordingly, Petitioners request that Respondents be directed to file their response to the petition by Monday, September 24. Petitioners waive the 14-day period in this Court's Rule 15.5 between the filing of a brief in opposition and the distribution of the petition to the Court, which will allow the petition to be considered at the Court's conference on October 12, 2018. Petitioners also move for this Court to order Respondents to respond to this motion by Wednesday, September 19, 2018, and for expedited consideration of this motion.

1. This case concerns an Establishment Clause challenge to a cross monument that has stood in a Pensacola park for over 75 years. In the decision below, a panel of

the Eleventh Circuit held that the plaintiffs, Respondents here, had Article III standing to challenge the cross when their only alleged injury consisted of the feelings of "offense" produced by observing it. It also held that Pensacola lacked a "secular purpose" under the *Lemon* test for declining to remove the cross. It therefore ordered that the cross be removed. Two of the three judges issued concurring opinions calling the result "wrong" (Pet. App. 11a, 64a), but they agreed that their "hands are tied" because *Lemon* has not been "directly overruled" (Pet. App. 9a).

2. Expedited consideration of the petition for a writ of certiorari is warranted in this case so that the Court can consider the petition alongside the petitions in *American Legion* (Nos. 17-1717 & 18-18). *American Legion*, like this case, involves a court of appeals' ruling that displaying a decades-old cross violates the Establishment Clause. Both cases present the same question about the proper Establishment Clause test to apply to religious displays. But this case is an ideal companion case to *American Legion* for three reasons.

First, this case presents the question whether Establishment Clause plaintiffs have Article III standing to challenge a religious display when their only alleged injury consists of feelings of "offense" produced by observing the display. This is an important question that, as explained in Pensacola's petition, has divided the circuits. Moreover, this Court previously found this question certworthy in *Salazar* v. *Buono*, but ultimately was unable to reach it because the petitioners there failed to preserve it for review. 559 U.S. 700, 711-12 (2010); see also Pet. for Writ of Cert., *Buono*, 559 U.S. 700 (No. 08-472), 2008 WL 4566257, at *16-18. Neither petition in *American*

Legion has raised the important issue of standing in this Court.

Second, this case has fully developed the historical record and arguments central to properly applying this Court's recent Establishment Clause precedent, *Town of Greece* v. *Galloway*, which holds that "the Establishment Clause must be interpreted by reference to historical practices and understandings." 134 S. Ct. 1811, 1819 (2014) (internal quotation marks omitted). In *American Legion*, by contrast, the Fourth Circuit's decision did not even consider *Town of Greece*, much less address how historical practices and understandings might bear on the question whether a government may constitutionally maintain a cross display.

Third, while this case presents a nearly identical merits question as *American Legion*, it raises that question on a more representative set of facts. *American Legion* involves a cross that is almost 100 years old, obviously serves as a World War I memorial, and has not been the site of private religious services. But many religious symbols across the country, including the cross in this case, are not a century old, do not serve exclusively as war memorials, and have often been the site of private religious gatherings. Thus, considering both cases together will give the Court a more representative set of facts and more substantial record for considering the important questions presented. It will also protect against the possibility that the Court might encounter vehicle problems in one or the other case that would prevent it from resolving those questions—as occurred in *Buono*.

For precisely these reasons, the Court has often granted review in two cases presenting nearly identical issues. See, *e.g.*, *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), and

Grutter v. *Bollinger*, 539 U.S. 306 (2003) (presenting similar affirmative action issues); *United States* v. *Booker*, 543 U.S. 220 (2005) (consolidated with *United States* v. *Fanfan*, 2004 WL 1723114 (2004)) (presenting similar Sixth Amendment issues). This practice is particularly common in Establishment Clause cases. See, *e.g.*, *Cty. of Allegheny* v. *Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (considering two different religious displays in two different cases); *Van Orden* v. *Perry*, 545 U.S. 677 (2005) and *McCreary County* v. *ACLU*, 545 U.S. 844 (2005) (considering two different Ten Commandments displays and rendering decision on the same day). Moreover, if this Court grants review in this case and *American Legion*, the two cases could, at the Court's direction, be briefed on the merits under a simultaneous schedule, argued on the same day, and decided during the same term.

Finally, because counsel of record for the respondents in this case are also counsel of record in *American Legion*, they are already familiar with the questions presented in Pensacola's petition and will not be prejudiced by an expedited briefing schedule.

Accordingly, Petitioners respectfully request expedited consideration of their petition. To allow for expedited consideration, Petitioners move for this Court to direct Respondents to respond to this motion by Wednesday, September 19, 2018. If the motion is granted, Petitioners request that Respondents be directed to file their response to the petition by Monday, September 24, 2018.

SEPTEMBER 17, 2018

Respectfully submitted.

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