No. 18-351

In the
Supreme Court of the United States

CITY OF PENSACOLA, FLORIDA, ET AL.,

Petitioners,
v.

AMANDA KONRAT'YEV, ET AL.,

Respondents.

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

BRIEF OF ALABAMA AND 12 ADDITIONAL STATES AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This amicus brief addresses the following question:

Whether the Establishment Clause requires a city to tear down a historically and culturally significant Latin cross that has stood in a public park for over 75 years without any coercive effect?

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INTEREST OF *AMICI CURIAE*[1] AND SUMMARY OF THE ARGUMENT

States, counties, and municipalities have historically included, or allowed private parties to include, religious texts and symbols on monuments and other displays on public property, including in the form of a Latin cross. The amici States have an interest in maintaining that practice, consistent with a proper understanding of the Establishment Clause.

Whether it grants certiorari in this case or the similar case of *The American Legion v. American Humanist Association* (17-1717), the Court badly needs to provide clarity in this area. Judge Newsom's concurrence below bluntly referred to this Court's Establishment Clause doctrines as a "mess" and a "wreck." *Kondrat'yev v. City of Pensacola, Florida*, --- F.3d ----, 2018 WL 4278667 at *7, *10 (2018). And it is true that this Court's precedents sometimes require the States and lower courts to make seemingly random, ad hoc determinations—allowing a monument in one location, but declaring the same monument unconstitutional when it is moved down the street. *See Utah Highway Patrol Assoc. v. Amer. Atheist, Inc.*, 132 S.Ct. 12 (2011) (Thomas, J., dissenting from denial of cert.).

But whatever this Court's precedents mean, they cannot justify the court of appeals' decision below. Based on a long-defunct lower court precedent, the court of appeals held that Latin crosses are

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[1] The States have the right to file this brief under this Court's Rules. Counsel for *amici* gave all parties more than ten days notice of their intent to file this brief.

essentially per se unconstitutional on public land. The court of appeals expressly held that the history and contest of a passive monument are irrelevant to the Establishment Clause question. Although the court of appeals purported to apply the "Lemon test" from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), that test is a context-sensitive doctrine that weighs the history of the challenged practice and the degree of any direct or indirect coercion involved. The Court should grant certiorari and reverse.

ARGUMENT

The court of appeals erroneously held that a Latin cross cannot be displayed on public land, no matter the cross's historical significance or the tradition surrounding it. Instead of evaluating the unique context and history of the Pensacola cross at issue in this case, the court of appeals' decision comes down to a simple—and erroneous—syllogism: because a Latin cross is an inherently religious symbol, it serves no secular purpose. That is so, the court of appeals maintained, regardless of the cross's location, historical pedigree, cultural significance, or the absence of coercive effect from its placement. Although the court of appeals recognized that this "Court's contemporary jurisprudence" has "substantially weakened" its reasoning, the court of appeals nonetheless followed a prior precedent's context-less, seemingly bright-line approach. *See Kondrat'yev*, 2018 WL 4278667 at *3

The court of appeals erred under any reasonable reading of this Court's precedents. Although this Court's Establishment Clause precedents may be a "mess," those precedents nonetheless establish some

important markers. First, the Court has recognized that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952). For that reason, "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment). Second, the Court has emphasized the importance of history and tradition in evaluating whether a particular monument or display unconstitutionally establishes a religion. The passage of time, in particular, suggests that a passive religious monument reflects a "broader moral and historical message reflective of a cultural heritage." *Id.* at 703 (Breyer, J., concurring in the judgment).

I. A Latin cross may serve a secular purpose, especially over time.

Although this Court's Establishment Clause precedents are no model of clarity, they are clear on one thing: the secular purpose of a religious symbol must be judged based on the historical and other context in which it is displayed. *See Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("In each case, the inquiry calls for line-drawing; no fixed, per se rule can be framed."). "[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment). *Accord McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 874 (2005) ("Nor do we have

occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history.") This means that there are no bright-line rules. Some displays will pass constitutional muster and others, involving identical symbols, will potentially fail.

A Latin cross is no different. A Latin cross "is unequivocally a symbol of the Christian faith." *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1035 (10th Cir. 2008). But, as Justice Kennedy recognized in his plurality opinion in *Salazar v. Buono*, the Latin cross also "has complex meaning beyond the expression of religious views." *Salazar v. Buono*, 559 U.S. 700, 717 (2010) (plurality opinion). A "Latin cross is not merely a reaffirmation of Christian beliefs" but is "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." *Id.* at 721. For this reason, courts have held the display of a Latin cross to serve a secular purpose in certain circumstances and to have a solely religious purpose in others. *Compare Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (Latin cross on side of interstate unconstitutional) *with Weinbaum*, 541 F.3d at 1035 (rejecting per se rule that Latin cross is unconstitutional). *See also Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1107 (10th Cir. 2010) (Gorsuch, J., dissenting) (discussing the proper application of Establishment Clause to displays of the Latin cross).

The court of appeals' decision here, however, adopts a practically per se rule against the display of a Latin cross on public land. Indeed, the lower

court's decision closely tracks Justice Stevens' dissenting opinion in *Salazar*, which concluded that, because a "solitary cross conveys an inescapably sectarian message," a "plain unadorned Latin cross" may not be maintained on public land no matter its broader significance. 559 U.S. at 747 (Stevens, J., dissenting). Echoing Justice Stevens, the court of appeals held here that "historical acceptance without more" cannot provide a "rational basis" or "secular purpose" for a passive monument. *Kondrat'yev*, 2018 WL 4278667 at *3 (quoting *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983)).

Although the court of appeals recognized that the Pensacola cross is part of the city's cultural history, the court of appeals held that this historical context was more-or-less irrelevant. As the court of appeals concedes, the City maintains over 170 monuments and memorials in its city parks. *Kondrat'yev*, 2018 WL 4278667 at *1. The cross has been one of those monuments for approximately 75 years. *Id. See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 477 (2009) ("The 'message' conveyed by a monument may change over time."). That 75 years have "passed in which the monument's presence, legally speaking, went unchallenged . . . suggest[s] that the public" appreciates the cross's "broader moral and historical message reflective of a cultural heritage." *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in the judgment). But the court of appeals expressly refused to consider the historical significance of the monument or its broader cultural relevance to the City of Pensacola as part of its inquiry under the Establishment Clause. *Kondrat'yev*, 2018 WL 4278667 at *3 (quoting *American Civil Liberties*

Union of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983)). The court of appeals also found it irrelevant that a civic group, not a religious group or the City, provided funding to build the cross in the first place. *See Pleasant Grove,* 555 U.S. at 476-77 ("By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument."). Ultimately, the courts of appeals' analysis rests entirely on its conclusion that "historical acceptance" can never "provide a rational basis" for maintaining a religious symbol on public land. *See Kondrat'yev*, 2018 WL 4278667 at *3

There is no dispute here that a Latin cross is a religious symbol. But that fact is the beginning, not the end, of the analysis. This Court's decisions addressing crèches prove the point. *See Lynch*, 465 U.S. at 670 (upholding a crèche displayed in a public park). *Lynch* did not hold that statutes of Mary, Joseph, and Jesus had somehow morphed into secular symbols without any religious symbolism or meaning. *Id.* at 687. Instead, the Court held that these religious symbols did not violate the Establishment Clause because, regardless of their obvious and admitted religious connotations, they also served a secular purpose. *Id.* at 685; *see also id.* at 692 (O'Connor, J., concurring) (applying the endorsement test to conclude that, despite the "religious and indeed sectarian significance of the crèche," the display did not endorse religion).

The court of appeals should have looked beyond the cross's obvious religious significance and, instead, considered the cross's place in the history

and culture of the City. For example, in *Freedom From Religion Foundation v. Weber*, 628 Fed. Appx. 952 (9th Cir. Aug. 31, 2015), the Ninth Circuit held that the federal government's "continued authorization of a [Jesus] statue on federal land does not violate the Establishment Clause." There, as here, the monument was obviously religious in nature: it was a twelve-foot tall statue of Jesus Christ. But the Ninth Circuit explained "[t]hat the statue is of a religious figure, and that some of the initial impetus for the statue's placement was religiously motivated, does not end the matter." *Id.* Instead, the government identified secular rationales for "its continued authorization includ[ing] the statue's cultural and historical significance." *Id.* at 954. The Pensacola cross, which has hosted tens of thousands of people, and has stood on public property for 75 years clearly exists for similar secular purposes.

II. Coercion is the touchstone of the Establishment Clause.

Not only did the court of appeals ignore the history and cultural significance of the cross, it also ignored the complete absence of any express or implicit coercion. "It is an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise." T*own of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (quotation and citation omitted). But, "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal." *Cty. of Allegheny v. Am. Civil Liberties Union Greater*

Pittsburgh Chapter, 492 U.S. 573, 659, 109 S. Ct. 3086, 3136, 106 L. Ed. 2d 472 (1989) (Kennedy J., concurring in part and dissenting in part). Passive monuments have the potential to violate the Establishment Clause only to the extent such "[s]ymbolic recognition . . . place[s] the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.*

Even if history and tradition were not controlling, it should be dispositive under the Establishment Clause that there is no coercion here. The monument is located in an out-of-the-way corner of a city park. No one has been compelled to observe or participate in any religious ceremony at the park. And it is undisputed that those who attend worship services in the park may continue to do so even if the cross is removed. Unlike cases in which this Court has held religious symbols and prayers unconstitutional, there is no potential for indirect coercion here. "The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care." *See Van Orden*, 545 U.S. at 703 (Breyer, J., concurring). *See also Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("[P]rayer exercises in public schools carry a particular risk of indirect coercion."); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) ("[T]he indirect coercive pressure upon religious minorities to conform" to prayers "is plain."). Nor is the cross in a courthouse or other government building where one would go to transact business. *See Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 664, (1989) (crèche unconstitutionally located in the Grand Staircase of the Allegheny County

Courthouse, which is the "main," "most beautiful," and "most public" part of the courthouse).

Although, again, not a model of clarity, the Court's Establishment Clause jurisprudence already places the issue of coercion front and center. Lower courts have recognized that, although "it is not entirely clear how the coercion inquiry interacts with the *Lemon* test," coercion must be part of the "analysis of the effects" of the challenged government action. *Bown v. Gwinnett Cty. Sch. Dist.*, 112 F.3d 1464, 1473 (11th Cir. 1997). Whether because of its purpose or its effect, the result under any reasonable reading of this Court's precedents is the same: the cross simply does not raise the kind of concerns that have led the Court to require the removal of a passive monument or display.

* * *

The court of appeals' decision cannot stand consistent with any reasonable reading of this Court's precedents. Many state parks, squares, and government buildings boast memorials that contain religious imagery, including crosses, citations to scripture, and the like. Similarly, many a state highway is marked by a makeshift memorial in the form of a Latin cross, which "need not be taken as a statement of governmental support for sectarian beliefs." *Salazar,* 559 U.S. at 1818. The mere fact that these monuments consist of crosses and other religious symbols does not negate their secular purpose or their historical and cultural significance.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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