No. 18-351

IN THE

Supreme Court of the United States

CITY OF PENSACOLA, *et al.*,
Petitioners,

v.

AMANDA KONDRAT'YEV, *et al.*,
Respondents.

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

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the International Municipal Lawyers Association ("IMLA") is a non-profit professional organization of more than 2,500 local government attorneys who advise towns, cities, and counties across the country. IMLA advises its members on legal challenges facing local governments and advocates for more just and effective municipal law.

This case is of particular concern to local government attorneys nationwide, as the Eleventh Circuit's decision calls into question all public memorials that can be perceived as conveying a religious meaning, and it articulates principles of Article III standing that this Court has rejected. The result below further complicates one of the most taxing, confusing, and contentious areas of law for local government attorneys. IMLA's interest is *not* the advancement of any particular religious, sectarian, political, or ideological position. Its members hold a great diversity of beliefs about religion and its role in public life as well as how the Constitution should be interpreted in an ever-changing democracy.

What unites IMLA's members is a conviction that clear and predictable rules are preferable to obscure and malleable standards that leave responsible municipal counsel at sea when advising their clients on the proper course of action when long-standing me-

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amicus curiae* made any monetary contribution toward the preparation and submission of this brief. *Amicus curiae* states that counsel for all parties received notice eight days in advance of filing this brief and all have consented to the filing of this brief.

morials on public land are challenged by individuals who contend that they are offended when they see those displays on public land. Unfortunately, lower courts apply differing standards making "the constitutionality of displays of religious imagery on government property anyone's guess." *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 565 U.S. 994, 995 (2011) (Thomas, J., dissenting from denial of certiorari).

This case presents a compelling vehicle to resolve conflicts and confusion concerning public displays challenged under the Establishment Clause: (1) it affords the Court an opportunity to resolve a conflict about what is required under Article III to demonstrate standing to challenge a public display under the Establishment Clause, and (2) it is an ideal vehicle for the Court to bring clarity, consistency, and predictability to the standards for assessing the legality of public displays under the Establishment Clause.

BACKGROUND

Amicus adopts the background set forth in the petition for a writ of certiorari, but highlights a number of facts relevant to the Court's decision whether to grant plenary review.

1. This case arises from a dispute over a cross that has stood in a corner of Pensacola's Bayview Park for over three-quarters of a century. Pet. App. 2a.[2]

In the 1960s, the local chapter of the Junior Chamber of Commerce (Jaycees) raised private funds during the Vietnam War to replace the wooden cross

[2] Citations to the "Pet. App." are to the Petitioner's Appendix.

with the present concrete version. The Bayview Cross serves as a site for remembrance services on Veteran's Day and Memorial Day. *Id.* at 3a. Attendees lay flowers to commemorate the dead and those serving their nation overseas.

2. The cross has stood without incident for three-quarters of a century, until four individuals filed this suit. *Id.* Their case challenged the Bayview Cross under the Establishment Clause and sought its removal. To support standing, Plaintiffs complained that they "have had unwelcome contact" with the Bayview Cross and feel "offended," "affronted," and "excluded" by it. *Id.* at 118a-123a. They have not alleged that they have been subjected to unwelcome religious exercise or forced to assume special burdens to avoid such exercise. Instead, they submitted evidence that they have encountered the Bayview Cross while visiting the park for events, or while walking and biking on the park's trails. *Id.*

3. The district court reluctantly held that the Bayview Cross violated the Establishment Clause. It began by recounting this nation's long history of governmental expressions containing religious content, as well as the long and uncontroversial history of the Bayview Cross. Because it fit comfortably within this historical tradition, the district court concluded that the cross was not an "establishment of religion" under the original meaning of the Constitution. Nevertheless, it concluded that it was bound by Eleventh Circuit precedent addressing the "exact issue on virtually identical facts." *Id.* at 94a. Applying *ACLU of Georgia* v. *Rabun County Chamber of Commerce*, *Inc.*, 698 F.2d 1098 (11th Cir. 1983), the district court found that the Bayview Cross did not have a secular purpose and therefore failed the first of the three

prongs under the test created by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Pet. App. 109a.

4. A panel of the Eleventh Circuit felt "constrained to affirm" under *Rabun*. *Id.* at 2a. First, the panel held that one plaintiff had Article III standing under *Rabun*, because he claimed "to have suffered 'metaphysical'—or as the *Rabun* panel called it, 'spiritual'—injury." *Id.* at 7a. He stated that the Bayview Cross offends him and makes him feel excluded, so he satisfied *Rabun*'s standing requirement. Second, the panel noted that the Bayview Cross had a number of similarities to the cross at issue in *Rabun*, including having been historically accepted within the community. *Id.* at 8a. But because *Rabun* had held that "historical acceptance without more does not provide a rational basis for ignoring the command of the Establishment Clause that a state pursue a course of neutrality toward religion," *id.* (quoting 698 F.2d at 1111 (internal quotation marks and citation omitted)), the panel held that the display violated the Establishment Clause. While it agreed with Petitioners that the *Lemon* analysis applied by *Rabun* had been "weakened" by "contemporary jurisprudence," the panel could not overrule *Rabun* in the absence of this Court's having overruled *Lemon*. *Id.* at 9a (citing *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2013); *Van Orden* v. *Perry*, 545 U.S. 677 (2005)).

Two judges on the panel expressed their disagreement with the governing law in separate concurring opinions. Pet. App. 10a (Newsom, J., concurring in the judgment); *Id.* at 27a (Royal, J., concurring in the judgment). Judge Newsom concluded that "*Rabun* was wrong the day it was decided." *Id.* at 13a. That case's conclusion that a "spiritual" or "metaphysical" harm sufficed for standing was directly at odds, he argued, with this Court's "then-hot-off-the-presses

decision" rejecting "psychological" harm as a basis for standing in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Pet. App. 13a. On the merits, Judge Newsom explained that *Rabun*'s minimization of history as a factor in analyzing public-religious-display cases could not be squared with the Supreme Court's recent jurisprudence explicitly mandating historical analysis within the Establishment Clause context. *Id.* at 16a-19a (citing *Van Orden* and *Town of Greece*).

SUMMARY OF ARGUMENT

The Court should grant the petition because the Eleventh Circuit's decision presents two outcome-determinative issues of federal law that have generated conflicts among the federal courts of appeals concerning questions of surpassing importance. *Amicus* supports review of those issues because its members have a strong interest in clear, uniform, and predictable standards for assessing whether plaintiffs have standing to challenge a public display, and, if so, whether a challenged display violates the Establishment Clause of the First Amendment.

I. This case squarely presents the question of how a plaintiff may demonstrate standing to challenge a public display under the Establishment Clause. The Eleventh Circuit held that a passing bystander offended by a public display sufficiently states a cognizable injury in fact. That standard is irreconcilable with decisions of this Court and conflicts with the Seventh Circuit's more demanding standard for establishing standing under Article III. Indeed, the Fourth, Ninth, and Tenth Circuits each have acknowledged that the Seventh Circuit's test conflicts with their standards. This case presents a

particularly suitable vehicle for resolving that conflict because, under the Seventh Circuit's test, plaintiffs would have lacked standing because there is no allegation that they altered their conduct in an effort to avoid seeing the Bayview Cross. As a result, plaintiffs here are no different than "offended bystanders" who lack standing to challenge government action that they contend violates the law.

II. Certiorari should be granted because the decision below squarely presents a conflict over the proper standard for assessing whether a public display violates the Establishment Clause. The federal courts of appeals are in disarray regarding the substantive standard that should apply. The court below applied an outdated *Lemon* analysis that conflicts with this Court's more recent, historically grounded decisions in *Van Orden* and *Town of Greece*. This case provides this Court with an appropriate vehicle to provide a uniform and predictable standard for assessing challenges to public displays under the Establishment Clause. In particular, it provides an ideal opportunity to address public displays that have a rich tradition in this nation's history, and how courts should consider history when addressing the constitutionality of such displays. Clear standards will allow government lawyers to provide intelligible advice concerning new displays that have been and may be proposed, and to assess how and whether to defend challenges to existing displays.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S "SPIRITUAL AND METAPHYSICAL IMPACT" TEST IS CONTRARY TO THIS COURT'S ARTICLE III STANDING DECISIONS AND PRESENTS A CONFLICT AMONG THE CIRCUIT COURTS.

A. Article III Requires A Plaintiff To Demonstrate More Than The "Psychological Consequence" Of Observing An Alleged Violation Of Federal Law.

Under Article III, "[t]he judicial Power shall extend to all Cases" and "Controversies arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." U.S. Const. art. III, § 2. As a result, federal courts must assure themselves that a plaintiff has standing before they can address the claims. To have standing, a plaintiff must establish (1) an injury in fact, (2) a causal connection between the injury and the complained-of conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. See *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); see also *Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (plurality opinion). These core requirements ensure that "the decision to seek review" is not "placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) (quoting *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973)). Rather, a plaintiff must have "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Horne* v. *Flores*, 557 U.S. 433, 445 (2009) (emphasis omitted).

1. The Eleventh Circuit below, following its binding precedent, held that one plaintiff had sufficient standing based on the "metaphysical" or "spiritual" injuries he suffered from being offended and feeling excluded by the Bayview Cross. Pet App. at 7a. This plaintiff had "unwelcome contact" with the cross "numerous times" while visiting the park and did "not wish to encounter it in the future." *Id.* at 119a. Under *Rabun*, then, he had standing to bring an Establishment Clause claim.

Rabun discussed this Court's *Valley Forge* decision, which held that a "psychological consequence" resulting from "observation of conduct with which one disagrees" was insufficient to create standing. 454 U.S. at 486. The Eleventh Circuit in *Rabun*—where the plaintiffs sought to remove a cross on public parklands—distinguished *Valley Forge* because the plaintiffs were "unwilling[] to camp in the park because of the cross" *and* had "evidence of the physical and metaphysical impact of the cross." 698 F.2d at 1107-08.

2. That ruling is incorrect. The "spiritual and metaphysical impact" standard is irreconcilable with this Court's requirement that plaintiffs invoke more than the "psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485. The decision in *Valley Forge* reconciled this Court's prior rulings setting the requirements for Establishment Clause standing. On the one hand, in *Doremus* v. *Board of Education*, 342 U.S. 429, 432 (1952), this Court held that plaintiffs lacked standing to challenge a statute that required the reading of Old Testament verses at the opening of each school day. On the other hand, in *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 224 (1963), this Court held that the plaintiffs had standing to challenge a similar policy.

The plaintiffs in *Doremus* were the parents of children who had already graduated by the time the appeal was taken to the Supreme Court, whereas the plaintiffs in *Schempp* included both currently enrolled schoolchildren and their parents. *Doremus*, 342 U.S. at 432-33; *Schempp*, 374 U.S. at 224 n.9.

The *Valley Forge* Court explained the line that separated *Schempp* from *Doremus*. Responding to the plaintiffs' argument that under *Schempp* "any person asserting an Establishment Clause violation possesses a 'spiritual stake' sufficient to confer standing," the *Valley Forge* Court ruled that this proposed test was foreclosed by *Doremus* where plaintiffs lacked standing because their children already had graduated. See *Valley Forge*, 454 U.S. at 486 n.22. In contrast, in *Schempp*, plaintiffs had standing because they had suffered injury either because "[1] impressionable schoolchildren were subjected to unwelcome religious exercises or [2] were forced to assume special burdens to avoid them." *Id.* Plaintiffs lacked standing in *Valley Forge* because they met neither criteria. They were residents of Maryland and Virginia and a nonprofit in the District of Columbia who objected to a transfer of Pennsylvania land between the federal government and a religious order—a transfer that they learned about in a press release. *Id.* at 487. Because they were neither subjected to a religious exercise nor forced to assume a special burden to avoid such an exercise, they lacked standing to challenge the transfer of property.

As in *Valley Forge*, plaintiffs in this case base standing on the "psychological consequence" of seeing what they argue is a constitutional violation. *Id.* at 485. They do not contend that the Bayview Cross subjects them to unwanted religious exercise. Indeed, they are in no sense comparable to the schoolchildren

who were a captive audience in *Schempp*. Nor are they "forced to assume special burdens to avoid" the Bayview Cross. *Id.* at 486 n.22. The individuals who challenge the cross assert instead that they can seek destruction or removal of the structure because they have seen it while walking or biking through the park and want no further contact with it. Pet. App. 119a, 122a. Indeed, none of them describes taking any steps to avoid it in any way.

B. The Eleventh Circuit's "Spiritual And Metaphysical Impact" Standard Presents A Conflict Among The Circuits On What Is Required To Establish Standing.

In the lower courts, the standing criteria—especially the requirement that there be an injury-in-fact—have proved "particularly elusive." *Saladin* v. *City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987). As a result, the circuits have adopted conflicting standards for assessing standing to present Establishment Clause challenges to public displays.

1. In a similar case presently pending before this Court, the Fourth Circuit found that an offended bystander who had "direct contact" with a public display had standing. See *Am. Humanist Ass'n* v. *Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195 (4th Cir. 2017) (applying *Suhre* v. *Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997)), *pets. for cert. filed*, Nos. 17-1717, 18-18 (U.S. June 25, 2018; June 29, 2018). Indeed, in *Suhre*, the Fourth Circuit relied on *Rabun* in finding that "'the spiritual, value-laden beliefs of [Establishment Clause] plaintiffs' are often most directly affected by an alleged establishment of religion." 131 F.3d at 1086 (quoting *Rabun*, 698 F.2d at 1102). In adopting its test, the *Suhre* Court rejected the Seventh Circuit's competing test, which requires that a plaintiff must "actually chang[e] his be-

havior in response to the display." *Id.* at 1087. Thus, in both the Eleventh and the Fourth Circuits, observation of a display to which an individual objects is sufficient to show injury-in-fact. Because the Fourth Circuit's test explicitly relied on the Eleventh Circuit's precedent at issue here, the Court should consider taking the cases together.

Several circuits share the Eleventh and Fourth Circuits' view that one need only have "direct contact" with the display to have standing. *E.g.*, *Freedom From Religion Found., Inc.* v. *New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 478-79 (3d Cir. 2016) ("[A] community member . . . may establish standing by showing direct, unwelcome contact with the allegedly offending object or event."); *Jewish People for the Betterment of Westhampton Beach* v. *Vill. of Westhampton Beach*, 778 F.3d 390, 394 (2d Cir. 2015) (per curiam) ("We have found standing in the Establishment Clause context for a plaintiff who alleged that he 'was made uncomfortable by direct contact with religious displays.'") (quoting *Cooper* v. *U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009)); *ACLU Neb. Found.* v. *City of Plattsmouth*, 358 F.3d 1020, 1029 (8th Cir. 2004) (requiring "only direct and unwelcome personal contact with the alleged establishment of religion"), *vacated en banc*, 419 F.3d 772, 775 n.4 (2005) (vacating the panel's merits ruling but explicitly approving of its standing analysis); *Newdow* v. *Lefevre*, 598 F.3d 638, 642-43 (9th Cir. 2010) (describing the standing threshold as "unwelcome direct contact"). These circuits recognize that *Valley Forge* requires that the class of potential plaintiffs not be infinite, but then adopt an arbitrary restriction, divorced from any theory of cognizable injury in fact. To draw that line, these circuits distinguish *Valley Forge* because the plaintiffs there learned of the transfer of property in

a press release and never saw the land parcel at issue. *E.g., City of Plattsmouth*, 358 F.3d at 1029.

2. In contrast, the Seventh Circuit requires that plaintiffs show either that they were a captive audience or took special burdens to avoid the display. *E.g.*, *Doe* v. *Cty. of Montgomery*, 41 F.3d 1156, 1161 (7th Cir. 1994); *Freedom From Religion Found., Inc.* v. *Obama*, 641 F.3d 803, 811 (7th Cir. 2011) (Williams, J., concurring).[3] One is captive to a display when one "*must* come into direct and unwelcome contact with the sign in order to participate in their local government and fulfill their legal obligations." *Doe*, 41 F.3d at 1161 (emphasis added). Plaintiffs in the Seventh Circuit have had standing to challenge displays that stand as a barrier between citizens and their participation in local government, like a display above a local courthouse entrance or in front of a municipal building. *E.g.*, *id.* at 1158; *Books* v. *City of Elkhart*, 235 F.3d 292, 300-01 (7th Cir. 2000).

Here, plaintiffs assert only that they see the Bayview Cross while traveling through the park, and their claim would therefore be dismissed by the Seventh Circuit for lack of standing. Indeed, the Seventh Circuit did exactly that in *Freedom From Religion Foundation, Inc.* v. *Zielke*, 845 F.2d 1463 (7th Cir. 1988). There, plaintiffs challenged a Ten Commandments monument in a public park. They gave no account of avoiding the park, nor was the monument in front of a courthouse or a city building. *Id.* at 1468. The Seventh Circuit held that this sort of "psychological harm" was insufficient under *Valley Forge*. *Id.*

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[3] These requirements track the injury described in *Valley Forge, i.e.*, plaintiffs must be "*subjected* to unwelcome religious exercises or . . . *forced to assume special burdens* to avoid them." 454 U.S. at 486 n.22 (emphases added).

Under that holding, plaintiffs in this case would lack standing because they do not contend that they are in some sense a captive audience or that they must confront the Bayview Cross to conduct public business.

The Fourth, Ninth, and Tenth Circuits have acknowledged this conflict between the standards that they apply to assess Article III standing, and the more-demanding standard applied by the Seventh Circuit. In *Suhre*, the Fourth Circuit rejected the standard set forth by the Seventh Circuit in *Zielke* and *Gonzales* v. *North Township of Lake County, Ind.*, 4 F.3d 1412, 1416 (7th Cir. 1993). *Suhre*, 131 F.3d at 1087-88. Likewise, the Ninth Circuit acknowledged and rejected the Seventh Circuit's standard in *Zielke*. See *Vasquez* v. *Los Angeles Cty.*, 487 F.3d 1246, 1253 n.5 (9th Cir 2007). Finally, in *Foremaster* v. *City of St. George*, the Tenth Circuit explained that "[t]he circuit courts have interpreted *Valley Forge* in different ways." 882 F.2d 1485, 1490 (10th Cir. 1989). The Tenth Circuit then rejected the Seventh Circuit's approach and embraced the tests adopted by the Sixth and Eleventh Circuits. *Id.* at 1490-91 ("[Plaintiff's] direct personal contact with offensive municipal conduct satisfied *Valley Forge*"); *accord Am. Humanist Ass'n* v. *Douglas Cty. Sch. Dist. RE-1*, 859 F.3d 1243, 1253 (10th Cir. 2017) (rejecting Seventh Circuit's standard and holding that infrequent contacts are sufficient to establish standing because "an identifiable trifle is enough for standing to fight out a question of principle") (quoting *SCRAP*, 412 U.S. at 689 n.14); see also *City of Edmond* v. *Robinson*, 517 U.S. 1201, 1202-03 (1996) (Rehnquist, C.J., dissenting from denial of certiorari) ("Because there are serious arguments on both sides of this question, the Courts of Appeals have divided on the issue, and the issue determines the reach of federal courts' pow-

er of judicial review of state actions, I would take this opportunity to consider it.").

As a result of this conflict, the threshold requirement for invoking the judicial power of federal courts to challenge public displays under the Establishment Clause currently depends on the happenstance of geography. An inconsistent standing threshold—particularly one that is at odds with this Court's most recent standing cases, see Pet. App. 13a—uniquely burdens IMLA, an organization of 2,500 local government attorneys who regularly confront the question whether plaintiffs who disagree with a public display will be able to challenge that display in federal court. IMLA therefore respectfully submits that review is warranted to resolve the circuit split and provide doctrinal clarity.

II. THE DECISION BELOW IS CONTRARY TO THIS COURT'S MOST RECENT PRECEDENT AND PRESENTS A CIRCUIT CONFLICT ON THE STANDARDS FOR ASSESSING PUBLIC DISPLAYS UNDER THE ESTABLISHMENT CLAUSE.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. In *Van Orden* v. *Perry*, this Court upheld a public display of the Ten Commandments in front of the Texas state capitol notwithstanding its unquestioned "religious significance." 545 U.S. at 690 (plurality opinion); *id.* at 704 (Breyer, J., concurring in judgment). In doing so, it declined to apply the three-part *Lemon* test. See *id.* at 686 (plurality opinion); *id.* at 703-04 (Breyer, J., concurring in judgment). Instead, the Court highlighted that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way

partakes of the religious," *id.* at 699 (Breyer, J., concurring in judgment), and that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause," *id.* at 690 (plurality opinion).

A. The Opinion Below Ignored History Under Its Establishment Clause Analysis, Which Cannot Be Squared With *Town Of Greece*.

More recently, the Court explained "that the Establishment Clause *must* be interpreted 'by reference to historical practices and understandings.'" *Town of Greece*, 134 S. Ct. at 1819 (emphasis added) (quoting *Cty. of Alleghany v. ACLU*, 492 U.S. 573, 670 (Kennedy, J., concurring in judgment in part and dissenting in part)). "*Any*" Establishment Clause "test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.* (emphasis added). After examining the historical basis for the practice of legislative prayer at issue there, the Court turned to whether the practice was unduly coercive. See *id.* at 1825-26 (plurality opinion) ("[O]ffense . . . does not equate to coercion."); *id.* at 1837 (Thomas, J., concurring in part and concurring in the judgment) ("[T]o the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not . . . 'subtle coercive pressures.'").[4]

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[4] *Town of Greece* does not mention *Lemon*, so some judges have read it to signal "a major doctrinal shift" in the Court's Establishment Clause jurisprudence. *E.g.*, *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 602 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result); *see also New Doe Child #1 v. United States*, 901 F.3d 1015, 1020 (8th Cir. 2018); *Felix v. City of Bloomfield*, 847 F.3d 1214, 1219 (10th

In the decision below, however, the Eleventh Circuit ruled that historical practice was not relevant. Further, it did not assess the coercive effect of the Bayview Cross. Instead, it adhered to circuit precedent applying *Lemon*, and struck down a public display that was privately funded and has stood for over 75 years without incident.

This Court should review the result below because the Eleventh Circuit's rejection of any historical analysis cannot "be squared" with this Court's recent Establishment Clause jurisprudence. Pet. App. 16a (Newsom, J., concurring in the judgment). In addition, the Eleventh Circuit's analysis is in conflict with at least two other circuits' treatment of *Town of Greece*.

B. The Lower Courts Are Split Over How To Apply *Town of Greece* and *Van Orden*.

This Court should also grant review to establish a nation-wide, uniform standard in place of the divergent tests being used by lower courts to evaluate the constitutionality of religious displays on public land.

1. Lower court judges—and by extension the lawyers who practice before them—need guidance on the appropriate analytical framework that governs Establishment Clause cases. The lower courts have sought to determine and apply the appropriate tests to pending cases. *E.g.*, Pet. App. 111a (district court opinion) ("Count me among those who hope the Supreme Court will one day revisit and reconsider its Establishment Clause jurisprudence, but my duty is

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Cir. 2017) (Kelly, J., dissenting from the denial of rehearing en banc) (mem.); *Hickenlooper v. Freedom From Religion Found., Inc.*, 338 P.3d 1002, 1016 (Colo. 2014) (Hood, J., dissenting) (describing Town of Greece as a "jurisprudential migration . . . towards a framework under which coercion is the benchmark").

to enforce the law as it now stands."). Yet they have expressed concerns that they lack clear instructions on how to do so. The judges in the courts below typify the reactions, writing that governing Establishment Clause jurisprudence is "a wilderness with misdirecting sign posts and tortuous paths," Pet. App. 31a (Royal, J., concurring in the judgment), or "historically unmoored, confusing, inconsistent, and almost universally criticized by both scholars and judges alike," *id.* at 86a (district court opinion). Judge Newsom aptly summarized this dilemma: "I don't pretend to know—as I'm sitting here—exactly how the questions surrounding the constitutionality [of public displays] should be analyzed or resolved." *Id.* at 26a (describing current Establishment Clause jurisprudence as "a wreck").

But even in their attempts to apply the law, the federal circuits have fractured over the applicable standards, as petitioners ably demonstrate. This case is an ideal vehicle to provide needed guidance to aid local governments struggling to predict what test governs challenges to public displays, and will allow the Court to clarify the proper use of history and the continued viability of *Lemon* after *Van Orden* and *Town of Greece*.

2. As noted above, the Eleventh Circuit dismisses the value of history as a factor in considering a claim under the Establishment Clause. Following *Rabun*, the panel below minimized the role of history in an Establishment Clause analysis. Pet. App. 8a (applying *Rabun*, 698 F.2d at 1109 ("[H]istorical acceptance without more does not provide a rational basis for ignoring the command of the Establishment Clause that a state pursue a course of 'neutrality' toward religion." (citation and internal quotation marks omitted))). With a crabbed view of the importance of his-

torical practice, the panel concluded that the Bayview Cross, like the cross in *Rabun*, violated *Lemon*'s first prong. *Id.*

As Judge Newsom pointed out in his concurring opinion, however, this result cannot "be squared with the Supreme Court's intervening Establishment Clause precedent." Pet. App. 16a. "[L]ots of history," he concluded, informs "the practice of placing and maintaining crosses on public land" back to this nation's colonial times. *Id.* at 21a. But *Rabun* precluded the panel from adequately considering it.

3. The Eighth Circuit recently took the course charted by Judge Newsom but precluded by *Rabun*. It recognized that this Court "has adopted numerous tests to interpret the Establishment Clause, without committing to any one." *New Doe Child #1* v. *United States*, 901 F.3d 1015, 1019 (8th Cir. 2018). But it recognized that it ought to hew closely to *Town of Greece* as the Court's most recent precedent. In the Eight Circuit's view, that case implemented a "two-fold analysis." *Id.* at 1020 ("[H]istorical practices often reveal what the Establishment Clause was originally understood to permit, while attention to coercion highlights what it has long been understood to prohibit."). It treated *Town of Greece* "as 'a major doctrinal shift' in Establishment Clause jurisprudence," though one whose "precise implications . . . are not yet clear." *Id.* at 1020-21. Unlike the Eleventh Circuit, then, the Eighth Circuit applied *Town of Greece*'s two-fold analysis to the case before it.

4. The Sixth Circuit represents a middle path. See *Smith*, 788 F.3d at 587-88. It concluded that *Town of Greece* signals the importance of using history in at least *some* Establishment Clause cases, but reasoned that it did not supplant the *Lemon*/Endorsement test in the case before it. *Id.* at 588.

Smith involved a local school board engaging a private, Christian school to run a shuttered alternative school. *Id.* at 582. The panel understood that history might have been valuable for assessing legislative prayer in *Town of Greece*, but ruled that it was not relevant to addressing a question about public schooling. *Id.* at 588-89. Thus, it continued its analysis by applying a modified *Lemon* test—whether the activity had "the effect of advancing religion" and whether it "foster[ed] an excessive entanglement of government and religion[.]" *Id.* at 588; but see *id.* at 596 (Batchelder, J., concurring in part and concurring in the result) ("I disagree with the lead opinion's characterization of *Town of Greece* as applying only to a subset of Establishment Clause claims such as legislative-prayer cases.").

Thus, whereas the Eighth Circuit and the concurring judges in the opinion below read *Town of Greece* as adopting a new, two-fold test, the Sixth Circuit read it as simply an *ad hoc* exception to the existing *Lemon* framework.

5. This case implicates a conflict among the circuits about passive public displays. On the one hand, several circuits apply a modified version of the *Lemon* test that takes into account other tests articulated by this Court, including *Van Orden*, *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005), and *Lynch* v. *Donnelly*, 465 U.S. 668 (1984). See, *e.g.*, *Am. Humanists Ass'n*, 874 F.3d at 206; *Am. Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227 (2d Cir. 2014) (applying *Lemon* to "The Cross at Ground Zero"); *ACLU of Ky.* v. *Grayson Cty.*, 591 F.3d 837 (6th Cir. 2010) (applying *Lemon* to analyze a Ten Commandments Display). On the other hand, some courts have followed *Van Orden*'s instruction that *Lemon* is "not useful in dealing with [this] sort of passive monu-

ment" and, instead follow the *Van Orden* plurality's historical analysis or evaluate the displays under the "legal judgment" approach announced in Justice Breyer's concurring opinion. See, *e.g.*, A*CLU Neb. Found.* v. *City of Plattsmouth*, 419 F.3d 772, 776 (8th Cir. 2005) (en banc) (upholding the constitutionality of a Ten Commandments monument based on its history).

Accordingly, whether to correct the specific application of *Van Orden* or to address the general doctrinal shift recognized by some, the Court should grant review and address the conflict and confusion among the lower courts.

C. Review Should Be Granted Because The Decision Below Calls Into Question The Legality Of Numerous Memorials Throughout The Nation.

Publically displayed religious symbols appear throughout the nation. Religious expressions in parks are, in particular, deeply rooted in the nation's history and traditions. The National Park Service, for example, hosts numerous sites that bear religious symbols, such as the Cape Henry Memorial Cross in Virginia, churches in the historical colony of Jamestown, and multiple old Spanish missions in Texas's San Antonio Missions national historical park. See Nat'l Park Serv., *Find A Park*, https://www.nps.gov/index.htm (last visited Oct. 12, 2018).

As the Court has explained, "[t]he meaning conveyed by a monument is generally not a simple one," and a monument may be "interpreted by different observers, in a variety of ways." *Pleasant Grove Cty.* v. *Summum*, 555 U.S. 460, 474 (2009). This is true of the cross at issue here, as well as in the parallel

Fourth Circuit cases. Although the cross certainly has a religious meaning, it also bears a symbolic meaning "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." *Salazar* v. *Buono*, 559 U.S. 700, 721 (2010) (plurality opinion). Similar civic meanings can be found, for example, in the Ground Zero Cross, see *Am. Atheists*, 760 F.3d at 234, or the memorial celebrating the First Amendment and bearing a cross that sits outside a courthouse in the Nation's capital, see *Trylon of Freedom at the U.S. Courthouse in Washington, D.C.*, D.C. Mem'ls, http://www. dcmemorials.com/index_indiv 0000342.htm (last visited Oct. 12, 2018).

Under the opinion below, however, courts need not take into account the historical meanings of such displays. If allowed to stand, memorials and displays throughout the Eleventh Circuit—if not the nation—will be subject to being dismantled for offending someone. That result is inconsistent with *Van Orden* and *Town of Greece* and is in conflict with decisions of the other circuits. It should therefore be reviewed by this Court.

CONCLUSION

For these reasons, and those set forth in the petition, the Court should grant the petition for a writ of certiorari.

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