No. 18-351

In the Supreme Court of the United States

CITY OF PENSACOLA, FLORIDA, 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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents write as if this Court hadn't already granted review in *American Legion*. But since it has, the only question is whether this case should be held pending *American Legion* or instead heard in tandem with it.

The cases should be heard in tandem for two reasons. First, this case provides a superior vehicle for addressing standing—which is both logically prior to the merits and the subject of lower-court conflict. Given this Court's independent obligation to determine whether subject-matter jurisdiction exists, standing is necessarily at issue in *American Legion*. But it was never fully briefed or considered there. Here, by contrast, it was vigorously contested and analyzed by the court below—making this case a better vehicle.

Second, on the merits, this case presents the Establishment Clause issue on a more representative set of facts, with full development of the historical context contemplated by this Court in *Town of Greece*. This will enable the Court to provide more useful guidance to the lower courts.

Respondents don't seriously dispute either point. On standing, they claim that "[t]here is no conflict" and therefore no need for review. Opp. 8-9. But as a jurisdictional issue, standing must be addressed; Respondents cannot simply wish it away. This case, not *American Legion*, has fully vetted the standing issue. Better to grant this case than deal with standing in the dark.

Nor do Respondents disagree that this case offers a fuller historical record and more representative facts than *American Legion*. Instead, they say this case differs because it involves *Lemon*'s "purpose requirement," while *American Legion* involves *Lemon*'s "effect and entanglement prongs." Opp. 41-42. But lower courts and municipalities facing scores of these lawsuits need guidance on the practical question of how to deal with historic religious displays. It does not help to play doctrinal bait and switch between interrelated prongs of the same flawed test.

Finally, Respondents halfheartedly claim that there is a vehicle problem, because the Eleventh Circuit has not yet ruled on a rehearing petition. But this Court has repeatedly granted certiorari while a rehearing petition was pending, and Respondents offer no authority to the contrary.

This case is an ideal companion to *American Legion* and should be set for plenary review with it. To that end, Petitioners are willing to file their opening brief simultaneously with petitioners in *American Legion* (December 17).

ARGUMENT

I. The Court should review this case in tandem with *American Legion*.

This case should be heard in tandem with *American Legion* because it will allow the Court to address standing in a case where the issue has been fully aired, and because it offers more representative facts and a well-developed historical record.

A. This case enables the Court to address standing with the benefit of adversarial briefing and a full record.

1. This Court rejected "offended observer" standing in *Valley Forge*, concluding that the mere "psychological consequence" of observing government "conduct with which one disagrees" does not confer standing. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). Yet the Court has reached the merits of five cases involving passive religious displays without ever addressing standing. *Van Orden* v. *Perry*, 545 U.S. 677 (2005); *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844 (2005); *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984); *Stone* v. *Graham*, 449 U.S. 39 (1980).

Consequently, lower courts have issued a series of "offended observer" decisions that conflict with each other, this Court's precedent, and the purposes of Article III. This Court granted certiorari in *Salazar* v. *Buono* to address the issue but was unable to reach it. 559 U.S. 700, 711-12 (2010).

The question is squarely presented here. The four plaintiffs have alleged no injury other than feeling "offended" at seeing the cross; yet the panel found standing based solely on this "metaphysical" harm. Pet. App. 7a. That result, as two of the three panelists found, is "utterly irreconcilable" with *Valley Forge*. Pet. App. 13a-14a (Newsom, J., concurring), 64a (Royal, J., concurring). It is also irreconcilable with this Court's cases under the Equal Protection Clause, which hold that mere feelings of offense are

insufficient to confer standing. *Allen* v. *Wright*, 468 U.S. 737, 755 (1984). And it is irreconcilable with Seventh Circuit law, which holds that Establishment Clause plaintiffs must either "alter[] their conduct" to avoid a display or be effectively unable to do so. *FFRF, Inc.* v. *Obama*, 641 F.3d 803, 808 (7th Cir. 2011).

2. Respondents' rejoinders fail. First, citing *Valley Forge* and *Abington School District* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963), they say this Court has approved of standing based on "*direct* unwelcome contact" with a religious display. Opp. 9. Not so. *Valley Forge* expressly *rejected* standing. And *Schempp* found standing because a captive audience of public-school children were forced to *participate* in "unwelcome religious exercises"—*i.e.*, group Bible reading and prayer—"or were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 486 n.22. Forced participation in religious exercise is different than merely seeing a passive symbol. *Ibid.*

Second, Respondents say that this Court has resolved the question of offended-observer standing in their favor by reaching the merits in other "display cases." Opp. 9. But the Court never addressed jurisdiction in any of these cases, and "drive-by jurisdictional rulings of this sort" have "no precedential effect." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998); *ACSTO* v. *Winn*, 563 U.S. 125, 144-45 (2011).

Third, Respondents say a "different injury-in-fact analys[i]s" should apply to Establishment Clause claims than to Equal Protection Clause claims. Opp. 9 (quoting *Moore* v. *Bryant*, 853 F.3d 245, 250 (5th

Cir. 2017)). But this Court has repeatedly said that "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 576 (1992); see also *Valley Forge*, 454 U.S. at 484 (no "'sliding scale' of standing" depending on the constitutional provision). Nor does such a distinction make any sense. Why should an atheist be able to challenge a state flag that he finds religiously offensive, when an African American can't challenge *the same flag* he finds racially offensive? Compare *Briggs* v. *Mississippi*, 331 F.3d 499, 503-08 (5th Cir. 2003) with *Moore*, 853 F.3d at 249. Respondents offer no good reason, because there is none.

Finally, Respondents argue that there is no disagreement among the circuits, because the Seventh Circuit has "disowned the 'altered behavior' test." Opp. 10 (quoting *ACLU Neb. Found.* v. *City of Plattsmouth*, 358 F.3d 1020, 1029 n.7 (8th Cir. 2004)). But the Seventh Circuit just recently reaffirmed that test, rejecting standing where plaintiffs "have not altered their conduct one whit or incurred any cost in time or money." *FFRF,* 641 F.3d at 808. The circuit split persists.

3. Now that the Court has granted review in *American Legion*, the question of standing is unavoidable. The parties in *American Legion*, however, have not raised standing in this Court and never briefed it below, mentioning it only in a footnote. Resp. Br. at 46 n.12, *AHA* v. *Maryland-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195 (4th Cir. 2017) (No. 15-2597). The district court never addressed it, and the Fourth Circuit applied existing

circuit precedent without any meaningful analysis. *AHA*, 874 F.3d at 203-04.

Here, by contrast, the record contains declarations detailing the alleged basis of plaintiffs' standing. The issue was vigorously contested in the briefs below and thoroughly analyzed in the panel opinion and two concurrences. Pet. App. 5a-7a, 11a-15a (Newsom, J., concurring), 63a-76a (Royal, J., concurring). Thus, granting review in this case will enable the Court to address the question with a full record and adversarial briefing.

4. Restoring reasonable limits on standing will also reduce "the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring). Most religious displays generate little controversy unless a lawsuit is threatened—almost always by out-of-state actors with an axe to grind. Then, lax standing rules turn every display into a liability risk. Many municipalities, or their insurers, simply cave—roiling their communities and throwing out irreplaceable history because they (reasonably) fear they won't get protection from the courts and do not wish to bear the costs of litigation. Others resist—resulting in a lawsuit generating more divisiveness than the underlying display ever did. A ruling upholding the display is taken as a message of endorsement of religion, while a ruling eliminating the display communicates a message of hostility. This dynamic will continue until the Court corrects the lax standing rules that encourage it.

B. This case enables the Court to provide more useful guidance to lower courts.

This case is also an ideal companion to *American Legion* on the merits.

1. First, this case has fully developed the historical record and arguments central to applying *Town of Greece*. Although one of the *American Legion* petitioners has invoked the historical approach adopted in *Town of Greece*, see Pet. 17-1717 at 32-33, neither the district court nor the Fourth Circuit addressed that argument below. Nor did those courts consider any evidence of historical practices at the founding.

Here, by contrast, *Town of Greece* was the primary argument pressed by Petitioners; the opinions below analyzed *Town of Greece* at length; and Judge Newsom extensively surveyed the "history underlying the practice of placing and maintaining crosses on public land," Pet. App. 20a-25a. Thus, this case offers the better vehicle for considering the application of *Town of Greece*.

2. This case also arises on a more representative set of facts. The monument in *American Legion* is nearly a century old, has never been used in religious services, and is obviously a war memorial—making it an "easy case." Pet. 18-18 at 12. But the same is not true of many religious displays across the Nation, including many crosses. Pet. 33-34. Granting this case together with *American Legion* would enable the Court to provide more useful guidance to the lower courts.

That guidance is particularly important in Establishment Clause cases, where lower courts, long ac-

customed to the malleable endorsement test, have repeatedly confined this Court's decisions to their facts. For instance, despite this Court's admonition in *Town of Greece* v. *Galloway* that it was not "carving out an exception" for legislative prayer, 572 U.S. 565, 575 (2014), several lower courts have already characterized *Town of Greece* as just that—a narrow "exception" for "legislative prayer." *E.g.*, *Dumont* v. *Lyon*, No. 17-13080, 2018 WL 4385667, at *14-15 (E.D. Mich. Sept. 14, 2018); see also App. 18a (Newsom, J.) (view was "squarely rejected" in *Town of Greece* but "nonetheless seems to persist in many quarters"). Others have sliced still more finely, distinguishing the guest-chaplain-led prayers in *Town of Greece* from lawmaker-led prayers, *Lund* v. *Rowan County*, 863 F.3d 268, 275 (4th Cir. 2017) (en banc), and school-board prayers, *FFRF, Inc.* v. *Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1137 (9th Cir. 2018).

Similarly, lower courts have repeatedly confined *Van Orden* to its facts. In this case, the district court held that *Van Orden* applies only "to 'borderline' dual purpose" monuments that have both a religious and secular meaning, "and arguably only [to] Ten Commandment[] cases." Pet. App. 108a. The Ninth Circuit likewise treats *Van Orden* as a "limited exception to the *Lemon* test" applying only to religious displays that are "closely analogous to that found in *Van Orden*." *Card* v. *Everett*, 520 F.3d 1009, 1021 (9th Cir. 2008); see also *Utah Highway Patrol Ass'n* v. *American Atheists, Inc.*, 132 S. Ct. 12, 16 (2011) (Thomas, J., dissenting from denial of certiorari) ("application of one Establishment Clause standard to the 'Ten Commandments' realm' and another

standard to displays of other religious imagery speaks volumes about the superficiality and irrationality of [Establishment Clause] jurisprudence") (citation omitted).

Deciding *American Legion* without this case risks inviting lower courts to create yet another subcategory of Establishment Clause cases—century-old war memorials—confining *American Legion* to its facts. By contrast, hearing the cases in tandem would give more meaningful guidance to "[g]overnment officials," who "cannot afford to guess" at the breadth of the Court's decisions. *Id.* at 22-23.

3. Respondents argue the two cases should be kept separate because "Establishment Clause cases are inherently 'fact-sensitive,'" and "[e]ach display" must be "judged in its unique circumstances." Opp. 41. But that approach condemns the Court to "decid[ing] a long series of" display cases under their particular facts, and provides no help to lower courts or municipalities struggling with this issue. *Allegheny*, 492 U.S. at 675 (Kennedy, J., concurring in part and dissenting in part).

Next, Respondents say this case is different from *American Legion* because it turns on *Lemon*'s "secular purpose requirement," rather than the "effect and entanglement prongs." Opp. 41-42. But that is the game of "hide the pea." Purpose arguments and effect arguments can be repackaged at will. In almost every case, government actors intend the effects of their actions, and effectuate their purposes. These should not be different inquiries. Cities care about what to do with historic monuments, not doctrinal niceties.

The Eleventh Circuit's purpose analysis also exacerbates a circuit split. Pensacola allows the cross to remain because it is one of over 170 displays commemorating the city's history and culture. Pet. 3; Pet. App. 127a-185a. The Eleventh Circuit cited no evidence of any contrary *government* purpose. Instead, it relied on *Rabun*, which required it to attribute a *private* Easter service to the government. Pet. App. 8a-9a (quoting *ACLU of Ga.* v. *Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1111 (11th Cir. 1983)). Other circuits, by contrast, have repeatedly held that the purpose prong turns "on the *government's* purpose, not that of a *private actor*." *American Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1118 (10th Cir. 2010) (emphasis added); see also *Green* v. *Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 800 n.10 (10th Cir. 2009) (collecting cases); *Card*, 520 F.3d at 1020. Thus, they have found *Lemon*'s purpose prong satisfied even when crosses on government property were dedicated or used in religious services. *E.g.*, *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1119 (9th Cir. 2011) ("annual Easter services"); *American Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 242 (2nd Cir. 2014) (cross used for Masses); *FFRF, Inc.* v. *Weber*, 628 F. App'x 952, 953-54 (9th Cir. 2015) (statue of Jesus used in Easter services). The Eleventh Circuit's purpose analysis cannot be reconciled with these cases. And it is wrong—as both concurring judges emphasized.

Respondents also claim there is no circuit split in cross cases, because circuits have been "remarkabl[y] uniform[]" in striking them down. Opp. 11. But the Second, Fifth, and Tenth Circuits have upheld cross

displays. Pet. 31-32. And of course this Court saw reason to grant review in *American Legion*.

Alternatively, Respondents try to muddy the facts by mischaracterizing the record on the age of the cross and Pensacola's alleged involvement in Easter services. But the record speaks for itself. Although Respondents say the Jaycees erected a "temporary" cross "prior to 1969" (Opp. 6-7)—implying the cross was erected only for Easter services—no source supports that claim. Pensacola's official records from 1969 state that the Jaycees requested permission to erect a cross in the "same location as [the] present one"—showing that in 1969 there already existed a cross. C.A. R.E. Tab 31-2, at 1. Next, Respondents say Pensacola "co-sponsor[ed]" three Easter services. Opp. 4. But the supposed "co-sponsorship" is actually Pensacola's neutral, "*quid pro quo*" policy of waiving "special event" fees for any event hosted by nonprofits that provide services to the city—a policy under which Pensacola has waived user fees for a diverse array of nonprofits on a religion- and viewpoint-neutral basis. C.A. R.E. Tab 36-1, at 2, 6-7. As both lower courts held: "The pertinent facts are undisputed." Pet. App. 2a, 85a-86a.

Finally, Respondents try to manufacture a vehicle problem by arguing that a pending en banc petition (which the court below is now holding in abeyance pending *American Legion*) renders certiorari "premature." Opp. 7. But this Court has repeatedly granted certiorari when an en banc petition was pending. *E.g.*, *Brewer* v. *Quarterman*, 549 U.S. 974 (2006); *United States* v. *Sokolow*, 486 U.S. 1042 (1988); Pet. 35 n.4. Respondents cite no case to the contrary—only a request for certiorari from a district court's or-

der, which is inapposite. *Mount Soledad Memorial Ass'n* v. *Trunk*, 134 S. Ct. 2658 (2014) (Alito, J., concurring in denial of certiorari). Respondents also complain that Pensacola added "new material" to its appellate brief. Opp. 6. But the "new material" comprised judicially noticeable government reports. So the Eleventh Circuit rightly relied on the reports (Pet. App. 3a, 33a) to shed light on the "context of the community" and "the general history of the place." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780-81 (1995) (O'Connor, J., concurring). In short, this case is a clean vehicle.

* * *

The grant of review in *American Legion* gives this Court an opportunity to correct a particularly bad example of Establishment Clause iconoclasm. But it doesn't give the Court the vehicle it needs to provide lasting guidance for lower courts and local governments. Absent this Court's intervention, lax standing rules will fell many more historic displays in the years to come, simply because most municipalities are averse to litigation. And even a favorable ruling in *American Legion* won't fix the problem because lower courts will be tempted to limit *American Legion* to its idiosyncratic facts. Granting review here ensures that the Court can provide the clear guidance so desperately needed.

CONCLUSION

The petition should be granted and the case set for argument in tandem with *American Legion*. Alternatively, the petition should be held pending resolution of that case.

Respectfully submitted.

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