No. 17-____

IN THE
Supreme Court of the United States

THE AMERICAN LEGION, *ET AL.*,

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *ET AL.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the decision below, the Fourth Circuit held that a 93-year-old memorial to the fallen of World War I is an unconstitutional establishment of religion, merely because it is shaped like a cross. The Fourth Circuit reached this conclusion even though the memorial was designed to be a war memorial, has only ever been a war memorial, has only ever been regarded by the community as a war memorial, and is on public land only because of traffic safety concerns that arose 40 years after the memorial was built. The questions presented are:

1. Whether a 93-year-old memorial to the fallen of World War I is unconstitutional merely because it is shaped like a cross.

2. Whether the constitutionality of a passive display incorporating religious symbolism should be assessed under the tests articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Van Orden v. Perry*, 545 U.S. 677 (2005), *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), or some other test.

3. Whether, if the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), applies, the expenditure of funds for routine upkeep and maintenance of a cross-shaped war memorial, without more, amounts to an excessive entanglement with religion in violation of the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners are The American Legion, The American Legion Department of Maryland, and The American Legion Colmar Manor Post 131. Respondents are the American Humanist Association, Steven Lowe, Fred Edwords, and Bishop McNeill, who were plaintiffs in the District Court, as well as the Maryland-National Capital Park and Planning Commission, which was a defendant in the District Court.

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The Fourth Circuit panel's decision appears at 874 F.3d 195 and is reproduced at Pet. App. 1a. The Fourth Circuit's unreported order denying rehearing *en banc* is reproduced at Pet. App. 82a. The District Court's decision appears at 147 F. Supp. 3d 373 and is reproduced at Pet. App. 50a.

JURISDICTION

The Fourth Circuit's order granting summary judgment to Respondents American Humanist Association, Lowe, Edwords, and McNeill was entered on October 18, 2017. Pet. App. 1a. Petitioners filed a timely petition for rehearing *en banc*, which was denied on March 1, 2018. Pet. App. 82a-84a. The Chief Justice extended the time for filing this petition to June 29, 2018. *See* No. 17A1201. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., amend. 1.

INTRODUCTION

In the decision below, the Fourth Circuit held that a 93-year-old memorial to the 49 men of Prince George's County, Maryland, who died in World War I ("WWI") was unconstitutional, merely because the Memorial's private builders chose, decades before any government became involved, to commemorate their loved ones with a cross. According to the Fourth Circuit, because crosses are "the hallmark symbol of Christianity," with "many years of accrued religious symbolism," the "inherent religious meaning" of a cross mandates that no matter how admittedly secular the government's motives and the display's history may be, "any reasonable observer [would conclude] that the [government] either places Christianity above other faiths, views being American and Christian as one in the same, or both." Pet. App. 18a-19a, 28a (panel opinion), 89a (Wynn, J., concurring in denial of *en banc* rehearing). A sharply divided Fourth Circuit denied *en banc* review by a vote of 8-6.

The Fourth Circuit's decision is wrong in the extreme and conflicts with decisions of this Court and other Courts of Appeals. No other Court of Appeals has held that a longstanding veterans memorial, created to be a veterans memorial, and consistently used and regarded by the community as a veterans memorial, violates the Establishment Clause. And for good reason: The Establishment Clause "does not oblige government to avoid any public acknowledgement of religion's role in society," nor does it "require eradication of all religious symbols in the public realm." *Salazar v. Buono*, 559 U.S. 700, 718-19 (2010) (plurality opinion).

The decision below flouts the "benevolent neutrality" called for by the Establishment Clause, *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970). It instead mandates a "'brooding and pervasive'" discrimination against "all that in any way partakes of the religious," singling out symbols with religious significance for condemnation even when used to pursue plainly secular purposes. *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J.) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)). Not surprisingly, the Fourth Circuit's decision directly conflicts with decisions from the Second, Fifth, and Tenth Circuits, which have recognized that, notwithstanding a cross's obvious religious significance, a government may use a cross to reflect secular, historical events with which a cross has become associated.

Left undisturbed, the decision below will have enormous consequences. Most immediately, it will require the state government to destroy or disfigure the Memorial itself—during oral argument, the author of the panel opinion twice suggested cutting off the arms of the cross to remedy the perceived violation.[1] But it will also render unconstitutional the two principal WWI memorials in Arlington National Cemetery, which likewise are freestanding crosses residing in the Fourth Circuit. Further, the decision casts doubt on hundreds of similar monuments using crosses to commemorate lives lost in war, and the

[1] *See* Oral Argument at 11:00-11:15, 22:00-22:17, *Am. Humanist Assoc. v. M-NCPPC*, No. 15-2597, http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments (Dec. 7, 2016).

many other ways crosses have been used to solemnize or commemorate secular events throughout our Nation's history.

The decision below, however, is not simply a result of the Fourth Circuit's misunderstanding of the law, but is a product of the confused state of this Court's Establishment Clause jurisprudence. As most Justices of this Court have observed, and as the District Court here recognized, "Establishment Clause jurisprudence is a law professor's dream, and a trial judge's nightmare." Pet. App. 63a. Indeed, the Court's failure to provide clear standards has led to disagreement among the circuits about such basic matters as what test to apply, whether displays should be evaluated from the perspective of a passing motorist or a historically-informed observer, and whether merely owning and maintaining a display constitutes an "excessive entanglement" with religion.

Nonetheless, there is no doubt that this Monument would survive any test adopted by this Court—whether based on *Van Orden*, the *Lemon*/endorsement/reasonable observer test, or *Town of Greece*. The common thread uniting these decisions provides the appropriate rule of decision here: A government's use of religious imagery in a way consistent with the Nation's historical traditions will not run afoul of the Establishment Clause absent a showing that the government was exploiting the tradition to coerce religious belief or observance by nonadherents. No such circumstances are present here.

This Court should grant certiorari to clarify that a longstanding war memorial commemorating a

secular, historical event does not violate the Establishment Clause merely because it uses a cross.

STATEMENT OF THE CASE

A. History Of The Memorial

The Bladensburg WWI Memorial is a Celtic-styled Latin cross standing on a large pedestal. Pet. App. 97a. The American Legion's symbol is displayed at the intersection of the cross's horizontal and vertical arms, and the words "VALOR," "ENDURANCE," "COURAGE," and "DEVOTION" are inscribed at its base. Pet. App. 52a. On the pedestal is a large plaque which declares the monument "DEDICATED TO THE HEROES/OF PRINCE GEORGE'S COUNTY, MARYLAND WHO LOST THEIR LIVES IN/THE GREAT WAR FOR THE LIBERTY OF THE WORLD." *Id.* The plaque lists the 49 local men who died in WWI, gives the dates of American involvement in the war, and concludes with a quote from President Wilson's address to Congress requesting a declaration of war. *Id.*

The Memorial was constructed between 1919 and 1925 by the American Legion and a committee of mothers whose sons died in WWI. Pet. App. 52a-56a. The Committee chose to design the Memorial in the shape of a cross to mirror the cross-shaped gravemarkers under which their sons and comrades were buried in American overseas cemeteries. Pet. App. 74a. Because a significant number of American casualties were buried overseas, this type of "surrogate gravesite[]" became common following WWI. CA JA1911. As the mother of one of the men honored explained in a letter to a U.S. Senator, "[T]he chief reason I feel so deeply in this matter, my son,

Wm. F. Redman, lost his life in France and because of that I feel that our memorial cross is, in a way, his grave stone." Pet. App. 102a.

The Committee's decision to use a cross-shape reflects the fact that, in the aftermath of WWI, crosses became a strong cultural image of the fallen. *See Buono*, 559 U.S. at 721 (plurality opinion) (noting a WWI memorial cross "evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles"). In fact, even Respondents' expert has acknowledged that during and immediately after WWI, crosses "developed into a central symbol of the American overseas cemetery," Pet. App. 74a (quoting G. Kurt Piehler, REMEMBERING WAR THE AMERICAN WAY 101 (2004)), and "quickly emerged as a cultural image of the battlefield," G. Kurt Piehler, *The American Memory of War*, THE AMERICAN EXPERIENCE OF WAR 232 (2010). As Congress observed when replacing the temporary wooden cross gravemarkers with permanent cross and Star of David headstones, the markers had become "symbols . . . emblematic of the great sacrifices which [the] war entailed," "peculiarly and inseparably associated" with the fallen due to widespread imagery in art and poetry. H.R. Res. 15, 68th Cong. at 1 (1924); *see also* Pet. App. 74a.

The Memorial was originally built at the end of the National Defense Highway (another WWI memorial). Pet. App. 52a-53a. However, as the roads grew busier and expanded in the following decades, the Memorial ended up in the median of an intersection. Pet. App. 56a-57a, 69a. After the State determined that it was unsafe for the Legion to continue owning the median, the Legion agreed in

1961 to deed the land to the Maryland-National Capital Park and Planning Commission. Pet. App. 56a-57a, 77a. Since then, the Commission has owned the Memorial and provided routine groundskeeping, illumination, and occasional repairs. Pet. App. 59a-60a.

For over 90 years, the Bladensburg community has used the Memorial exclusively for commemorative purposes. For example, the American Legion hosts annual Veterans Day and Memorial Day events at and around the Memorial. Pet. App. 58a-59a. In stark contrast, the record mentions only one religious event ever planned to occur at the Memorial: A 1931 Washington Post article notes an out-of-town preacher planned to hold a series of three "Sunday services" at the Memorial. *See* Pet. App. 38a (citing CA JA347). Nothing in the record indicates these services actually occurred, nor that any member of the Bladensburg community has used the Memorial for anything other than commemorative purposes. The record also indicates no religious use of the Memorial in the 50-plus years the Commission has owned it.

Similarly, during these 90 years, the Bladensburg community has responded to the Memorial by surrounding it with additional monuments to those lost in the Nation's conflicts. Pet. App. 57a-58a. Again, in stark contrast, the record contains no mention of any religious monuments added near the Memorial, or any indication the community interpreted the Memorial's message to be religious rather than commemorative.

Thus, the Memorial now stands in an area known as "Veterans Memorial Park," surrounded by: (1) a World War II Honor Scroll; (2) a Pearl Harbor

Memorial; (3) a Korea-Vietnam Veterans Memorial; (4) a September 11 Memorial Garden; (5) a Battle of Bladensburg Memorial; and (6) two 38-foot-tall soldier statues, one British and one American, facing each other across a bridge. *Id.*; Pet. App. 105a-107a, 108a-109a (map of area). These monuments vary in size; some are as tall as the 32-foot Memorial, others are shorter but broader, and some are smaller than the Memorial. *Id.* But all express the same message: commemoration of the fallen of the Nation's conflicts.

B. Procedural History

In 2012, the American Humanist Association lodged the first and only known complaint against the memorial, alleging that its presence on public land violates the Establishment Clause. Pet. App. 38a, 98a-99a. After the AHA commenced this lawsuit in 2014, the District Court ruled the memorial was constitutional, granting summary judgment to the American Legion and the Commission. Pet. App. 81a. Explaining that "Establishment Clause jurisprudence is a law professor's dream, and a trial judge's nightmare," the District Court found the Memorial survives constitutional scrutiny under "both the *Lemon* test and . . . *Van Orden*." Pet. App. 63a, 79a.

In a 2-1 decision, the Fourth Circuit reversed. The majority acknowledged the government had articulated "legitimate secular purposes for displaying and maintaining the [Memorial]," which contained "secular elements." Pet. App. 16a, 21a. However, explaining that "[t]he Latin cross is the 'preeminent symbol of Christianity,'" and that the court "simply cannot ignore the fact that for thousands of years the Latin cross has represented Christianity," the majority held that crosses possess

an "inherent religious meaning" that "easily overwhelm[ed]" the government's secular purposes and the Memorial's history. Pet. App. 17a-22a. The majority also held that the government had excessively entangled itself with religion by spending funds to maintain the Memorial. Pet. App. 27a-28a.

Chief Judge Gregory dissented, observing that the majority had essentially adopted a "per se finding[] that all large crosses are unconstitutional despite any amount of secular history and context, in contravention of Establishment Clause jurisprudence." Pet. App. 43a. According to Chief Judge Gregory, the panel had "subordinate[d] the Memorial's secular history and elements while focusing on the obviously religious nature of Latin crosses themselves" and "construct[ed] a reasonable observer who ignores certain elements of the Memorial" because they are not immediately obvious to a passing motorist. Pet. App. 40a. Finally, he observed that excessive entanglement requires some engagement with religious institutions or promotion of doctrine, not "merely maintaining a monument within a state park and a median in between intersecting highways that must be well lit for public safety reasons." Pet. App. 48a-49a.

The Fourth Circuit denied *en banc* review by an 8-6 vote, over dissents by Chief Judge Gregory, Judge Wilkinson, and Judge Niemeyer. Pet. App. 83a-84a. Judge Niemeyer noted that the panel's decision "puts at risk hundreds, and perhaps thousands, of similar monuments," including "similarly sized monuments incorporating crosses in the Arlington National Cemetery." Pet. App. 99a-101a. And he observed that "[i]t strains established judicial analysis to conclude

that *Van Orden* does not allow the monument in this case to stand as a secular memorial to the lives of soldiers lost during war in service of the Nation." Pet. App. 101a.

Judge Wynn, a member of the panel, wrote separately to defend the panel's opinion and its *per se* rule prohibiting crosses on public land. For Judge Wynn, because "the Latin cross has for centuries been widely recognized as the pre-eminent symbol of Christianity," no amount of secular context or history could overcome crosses' "many years of accrued religious symbolism." Pet. App. 85a, 89a (internal quotation marks omitted). Thus, for Judge Wynn, because "[n]othing in the First Amendment empowers the judiciary to conclude that the freestanding Latin cross has been divested of [its] predominantly sectarian meaning" in global history, the panel was right to conclude that the Memorial was unconstitutional. Pet. App. 85a-86a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH PRECEDENT OF THIS COURT AND DECISIONS FROM OTHER COURTS OF APPEALS

In the decision below, the Fourth Circuit held that a 93-year-old memorial to the fallen of WWI violates the Establishment Clause, merely because the Memorial's private builders chose to use a cross to mirror the battlefield graves where their comrades and sons were buried. This decision conflicts with this Court's precedent and decisions from three other Circuits, which have recognized that a government may use a cross when commemorating a secular, historical event. Unless this Court intervenes, the Fourth Circuit's decision threatens hundreds of longstanding memorials across the country, including the two principal WWI memorials at Arlington National Cemetery, within the Fourth Circuit's jurisdiction.

A. The Fourth Circuit's Decision Conflicts With This Court's Precedents

It is undisputed that the original builders of the Memorial created it to honor their sons and comrades who died in WWI; that when the Memorial was built, crosses were "peculiarly and inseparably associated" with the dead of WWI due to widespread imagery in art and poetry; that the private builders chose to use a cross specifically to mirror the soldiers' battlefield graves; that the Commission had no involvement with the Memorial until, decades after it was built, the Commission acquired it due to traffic safety concerns; that for nearly 100 years, the community has

consistently used the Memorial only for events honoring veterans; that the community has responded to the Memorial by surrounding it only with secular, commemorative symbols; and that the Memorial has always included secular elements, such as a plaque explaining the commemorative message it was meant to convey. Indeed, the Fourth Circuit acknowledged that the Commission has "legitimate secular purposes" for owning and maintaining the Memorial—namely, traffic safety, honoring veterans, and preserving a historically significant war memorial. Pet. App. 16a.

Yet, despite the Memorial's clear secular history and purpose, the Fourth Circuit held that the Memorial was unconstitutional because Latin crosses have an "inherent religious meaning" that "overshadows" the secular, commemorative message the Memorial was meant to convey. Pet. App. 17a-18a, 22a. As Chief Judge Gregory explained in his panel dissent, by focusing on the religious meaning of crosses, and ignoring the Memorial's secular origins, context, and content, the majority effectively adopted a "per se finding[] that all large crosses are unconstitutional despite any amount of secular history and context, in contravention of Establishment Clause jurisprudence." Pet. App. 43a.

No other court has gone so far as to hold that a longstanding, historical war memorial that was built to be a war memorial and has only ever been a war memorial was unconstitutional merely because its private builders chose to use a cross to honor their fallen loved ones. And for good reason—the decision below simply cannot be reconciled with the Establishment Clause or this Court's precedents.

This Court has been clear that the Establishment Clause "does not oblige government to avoid any public acknowledgement of religion's role in society," nor "require eradication of all religious symbols in the public realm." *Buono*, 559 U.S. at 718-19. The Clause has been implemented not through "a regime of total separation" "between Church and State," *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973), but through a policy of "benevolent neutrality" that recognizes a wide range of "permissible state accommodation" of religion, *Walz*, 397 U.S. at 673. Indeed, "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

The panel's decision blatantly violates these principles. It singles out and condemns the Memorial merely because the Memorial's private builders chose to use a symbol that can have religious symbolism, decades before the government became involved. It focuses on the religious meaning of crosses generally rather than the clear secular purpose, history, and content of the Memorial itself. And it mandates discriminatory treatment for symbols with religious significance, expressing the very type of hostility to religion the Constitution seeks to avoid. Nothing in the Establishment Clause or this Court's precedents mandates that war memorials incorporating religious symbols should be treated worse than war memorials that do not include such symbols.

Quite the contrary—this Court has made clear that "the Establishment Clause of the First Amendment *allows* the display" of longstanding

monuments incorporating religious symbolism to convey a secular meaning. *Van Orden*, 545 U.S. at 681 (plurality opinion) (emphasis added). Indeed, as the plurality observed in *Buono*, "a Latin cross is not merely a reaffirmation of Christian beliefs," but "is a symbol 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." *Buono*, 559 U.S. at 721. A cross 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 Fourth Circuit's decision to condemn the Memorial "based primarily on the religious nature of [a cross] . . . exhibit[s] a hostility toward religion that has no place in our Establishment Clause traditions, . . . encourage[s] disputes concerning the removal of longstanding [memorials] across the Nation, . . . [a]nd . . . create[s] the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 at 704 (Breyer, J., concurring in judgment).

B. The Fourth Circuit's Decision Conflicts With Decisions From The Second, Fifth, And Tenth Circuits

The Fourth Circuit's conclusion that the "inherently religious nature" of crosses mandates a *per se* prohibition against crosses on public land directly conflicts with the decisions of three other Circuits, which have held that a government's use of a cross to reflect a secular, historical event does not violate the Establishment Clause.

In *American Atheists, Inc. v. Port Authority*, for example, the Second Circuit concluded that including "The Cross at Ground Zero" in the National September 11 Museum had the effect of "ensuring historical completeness, not promoting religion." 760 F.3d 227, 243 (2d Cir. 2014). Two days after the September 11 terrorist attacks, a rescue worker at Ground Zero discovered "a large column and cross-beam, which gave him the impression of a Latin cross." *Id.* at 234. In the aftermath of the attacks, the cross became a gathering point for "persons of different faiths or of none at all," and it "came to be viewed not simply as a Christian symbol, but also as a symbol of hope and healing for all persons." *Id.* The cross undeniably had "religious significance to many" and had been used in religious rituals before being placed in the museum. *Id.* at 243-44. Yet the Second Circuit explained the reasonable observer would understand these "as historical facts significant to illustrating how human beings, notably Ground Zero rescue workers and the relatives of survivors, could find some source of hope and comfort even when confronting the extraordinary death toll and destruction of September 11." *Id.* at 243.

Similarly, the Fifth Circuit held in *Murray v. City of Austin* that the inclusion of "a Christian cross" in the insignia of the City of Austin did not violate the Establishment Clause because the design simply "incorporated . . . the family coat of arms of Stephen F. Austin, the 'Father of Texas' and the person after whom the City is named." 947 F.2d 147, 149 (5th Cir. 1991). The use of the coat of arms had "a long-standing unique history," and there was "absolutely no evidence of an intent to proselytize, or advance, any

religion." *Id.* at 155. In this context, the court concluded that "requiring the City to remove all displays of the insignia, arguably evinces not neutrality, but instead hostility, to religion." *Id.* at 158.

And in *Weinbaum v. City of Las Cruces*, the Tenth Circuit rejected an Establishment Clause challenge to the official seal of the City of Las Cruces, New Mexico, which "consists of three interlocking crosses surrounded by a sun symbol." 541 F.3d 1017, 1025 (10th Cir. 2008). Las Cruces was founded in 1849 near a makeshift cemetery where a virtual forest of wooden crosses marked the graves of "the victims of a series of massacres in the area." *Id.* at 1024. Thus the city was named *El Pueblo del Jardin de Las Cruces*, meaning "the City of the Garden of the Crosses"—which is "a Spanish euphemism for a cemetery." *Id.* at 1024-25. This "unique history" provided "compelling evidence" that the use of three crosses in the seal was "not religious at all," but "simply reflects the name of the City which, in turn, reflects a series of secular events that occurred near the site of the City." *Id.* at 1035.

The Fourth Circuit's decision cannot be reconciled with these decisions. As in *Port Authority*, where the Ground Zero Cross conveyed a historical message about how people responded to the tragedy of September 11 in its immediate aftermath, the Bladensburg Memorial conveys how people responded to the tragedy of the lives lost in WWI in that war's immediate aftermath. Similarly, as in *Murray*, the Commission's decision not to tear down the Memorial when it acquired the land reflected the Memorial's "unique history" and shows "absolutely no evidence of

an intent to proselytize, or advance, any religion." *Murray*, 947 F.2d at 155. And, as in *Weinbaum*, where the crosses on the City seal were meant to reflect the cross-shaped gravemarkers and the historical event that precipitated them, the Bladensburg Memorial here has the shape it does specifically to reflect the cross-shaped gravemarkers under which many of the fallen of WWI were buried.

None of these courts denied that a cross has a religious meaning to many people. But rather than concluding, as the Fourth Circuit did, that crosses are so "inherently religious" that the government must purge them from government land, these courts reached the sensible conclusion that the government's use of a cross for historical, secular reasons did not amount to a violation of the Establishment Clause.

C. The Fourth Circuit's Focus On The "Inherent Religious Nature" Of Crosses Puts At Risk Hundreds Of Monuments

Most immediately, the Fourth Circuit's decision will likely lead to the destruction or disfigurement of the Memorial itself, a cherished landmark in the community that has stood for nearly 100 years in honor of the men of Prince George's County who gave their lives in WWI. Indeed, during oral argument, the author of the panel decision twice suggested cutting off the arms of the cross to remedy the violation. *See* Oral Argument at 11:00-11:15, 22:00-22:17, *Am. Humanist Assoc. v. M-NCPPC*, No. 15-2597, http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments (Dec. 7, 2016).

The Fourth Circuit's decision, however, also directly calls into question the constitutionality of the

two principal WWI memorials in Arlington National Cemetery, which is also within the Fourth Circuit. Pet. App. 97a (Niemeyer, J., dissenting from denial of rehearing en banc). In particular, the Canadian Cross of Sacrifice is a 24-foot granite cross donated by the Canadian government to honor Americans who fell in WWI. *Canadian Cross of Sacrifice*, Arlington National Cemetery, http://goo.gl/R0wVIJ. And the Argonne Cross is a 13-foot-tall Latin cross of white marble commemorating American servicemembers who died fighting in France during WWI. *Argonne Cross*, Arlington National Cemetery, http://goo.gl/t3Rvra.

The Fourth Circuit gave little reason to believe that these monuments will survive its analysis. It suggested only that the Arlington memorials might be distinguishable because they are smaller and because Arlington National Cemetery contains *more* religious symbols than Veterans Memorial Park. Pet. App. 26a-27a. But this makes little sense. Surely, the eight-foot difference in height between the 32-foot Memorial and the 24-foot Canadian Cross of Sacrifice carries no constitutional significance. And the fact that the memorials in Arlington are surrounded by other "religious symbols," while the Bladensburg Memorial is surrounded only by other war memorials suggests, if anything, that the Arlington monuments are *more* likely sending a religious message. There is no persuasive reason to distinguish the cross-shaped WWI memorials in Arlington, as the Fourth Circuit tacitly acknowledged when it went out of its way to preserve a challenge to them. *See* Pet. App. 26a, n.16 (noting that the panel was "not deciding or passing

judgment on the constitutionality of Arlington National Cemetery's display of Latin crosses").

More generally, the Fourth Circuit's reasoning, if adopted by other Circuits, effectively spells the doom of hundreds of war memorials that use crosses to commemorate the fallen. *See, e.g., Trunk v. City of San Diego*, 660 F.3d 1091, 1100 (9th Cir. 2011) (Bea, J., dissenting) (noting that at least 114 Civil War monuments include a cross). Indeed, the decision extends beyond war memorials, calling into doubt many other ways in which governments have historically used crosses to solemnize and commemorate secular events. These include, among many others, the National Fallen Firefighters Memorial (a national memorial honoring fallen firefighters topped by a Maltese Cross, the traditional symbol of the fire service), *see* National Fallen Firefighter Foundation, http://goo.gl/1HbqAW; the Cape Henry Memorial Cross (a tribute to the English colonists who landed in 1607 and erected a wooden cross "in prayer for a safe arrival to this new land"), *see Cape Henry Memorial Cross*, National Parks Service, https://goo.gl/pBrYnJ; and numerous medals of valor that take the form of a cross, *see* 10 U.S.C. § 3742 (Distinguished Service Cross); 10 U.S.C. § 6242 (Navy Cross); 10 U.S.C. § 6245 (Distinguished Flying Cross). Indeed, under the decision's logic, a large Star of David monument, such as a memorial in Columbia, South Carolina, remembering the liberators and victims of Holocaust concentration camps, is almost surely forbidden. *See Memorial Park*, http://www.columbiasouthcarolina.com/memorialpark.html.

II. THE COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE IS CAUSING CONFUSION AND INCONSISTENT RESULTS IN LOWER COURTS

A. Courts And Commentators Have Recognized That Establishment Clause Jurisprudence Is In "Shambles"

As Justice Thomas has noted, the Court's Establishment Clause jurisprudence "has confounded the lower courts and rendered the constitutionality of displays of religious imagery on government property anyone's guess." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting). At least eight other current and recent members of this Court have also called for clarification in this area of law.[2] And lower courts and

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[2] *See Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (calling attempts "to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon v. Kurtzman*" a "sisyphean task"); *Wallace v. Jaffree*, 472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting) ("[T]he *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests."); *id.* at 90–91 (White, J., dissenting); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring in judgment) ("[T]his action once again illustrates certain difficulties inherent in the Court's use of the test articulated in *Lemon v. Kurtzman*."); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter,* 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice."); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) ("[A] majority of the Justices on the current Court . . . have, in separate opinions, repudiated the brain-spun '*Lemon* test'"); *Am. Atheists, Inc. v. Davenport*,

commentators across the country agree. As the Sixth Circuit noted when trying to apply this Court's Establishment Clause jurisprudence, "[o]ften it is not entirely clear precisely what test the Court applies, or how the Court's approach should be characterized." *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 599 (6th Cir. 2015). The list goes on.[3] Perhaps the only thing that is clear about the Court's Establishment Clause jurisprudence is that it needs clarification.

B. This Confusion Has Led To Many Disagreements Among The Circuits

Given the state of this Court's Establishment Clause jurisprudence, it is no surprise that circuit splits abound as courts attempt to make some sense of this confusion. Even beyond the question of

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637 F.3d 1095, 1110 (10th Cir. 2010) (Gorsuch, J. dissenting from denial of rehearing en banc) ("[W]hether even the true reasonable observer/endorsement test remains appropriate for assessing Establishment Clause challenges is far from clear."); *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2535 (2012) (Alito, J., concurring in denial of certiorari) ("This Court's Establishment Clause jurisprudence is undoubtedly in need of clarity[.]").

[3] *See Freethought Soc. of Greater Phila. v. Chester County*, 334 F.3d 247, 256 (3d Cir. 2003) (process for determining which test applies is "somewhat murky"); *Bauchman v. W. High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) (struggling to glean "an appropriate standard" from the Supreme Court's "muddled Establishment Clause precedent"); Emily Fitch, *An Inconsistent Truth: The Various Establishment Clause Tests As Applied in the Context of Public Displays of (Allegedly) "Religious" Symbols and Their Applicability Today*, 34 N. Ill. U. L. Rev. 431, 444-45 (2014) ("The test, though well intended, has been applied arbitrarily, which has created confusion within the court system.").

whether the Establishment Clause permits governments to display cross-shaped war memorials, this case implicates several distinct splits among the circuits on other key issues including, for example, the appropriate test for evaluating passive displays, the scope of this Court's decision in *Van Orden*, how to apply the reasonable observer standard, and whether the mere ownership and maintenance of a passive display can impermissibly entangle the government with religion.

1. The Circuits Are Split About What Test To Apply To Passive Displays

At the most fundamental level, the courts of appeals disagree even over what test to apply to passive displays that include religious symbols. The court below and the Second, Sixth, and Tenth Circuits continue to apply a test variously called the *Lemon* test, the endorsement test, and the reasonable observer test ("the *Lemon*/endorsement/reasonable observer test"). In so doing, these courts analyze religious displays under the three prongs articulated in *Lemon*: secular purpose, primary effect, and excessive entanglement, even though "the *Lemon* test has been much criticized." *Port Auth.*, 760 F.3d at 238 & n.12; *see also ACLU of Ky. v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005); *Felix v. City of Bloomfield*, 841 F.3d 848, 856 (10th Cir. 2016); Pet. App. 13a.

Courts in the Eighth and Ninth Circuits, however, read *Van Orden* to either modify or carve out an exception to *Lemon* for passive displays, and have thus applied this Court's *Van Orden* framework. *See Red River Freethinkers v. City of Fargo*, 764 F.3d 948, 949 (8th Cir. 2014) ("A passive display of the Ten

Commandments on public land is evaluated by the standard in *Van Orden v. Perry*, which found *Lemon v. Kurtzman* 'not useful in dealing with [a] passive monument.'") (citations omitted). In fact, the Ninth Circuit has explicitly developed a "limited exception to the *Lemon* test" for religious displays "closely analogous to that found in *Van Orden*." *Card v. City of Everett*, 520 F.3d 1009, 1021 (9th Cir. 2008). *See generally Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (recognizing that "*Van Orden* expressly establishes an 'exception' to the *Lemon* test in certain borderline cases" but nonetheless applying both *Lemon* and *Van Orden* due to the lingering uncertainty surrounding this Court's Establishment Clause jurisprudence). Accordingly, courts in these circuits look primarily to the factors outlined in *Van Orden*—including the monument's history, setting, and purpose—when assessing the constitutionality of a passive display.

2. The Circuits Disagree Over How To Apply The Reasonable Observer Standard

Even among those courts that apply the reasonable observer standard, there is significant disagreement over what the hypothetical reasonable observer should know. In some cases, this so-called "'objective observer' is presumed to know far more than most actual members of a given community." *Weinbaum*, 541 F.3d at 1031 n.16; *see also Americans United For Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1550 n.7 (6th Cir. 1992) (en banc) ("[T]he reasonable observer used in the resolution of these cases must be an observer in possession of all of the relevant facts.").

In other cases, however, this observer appears to be anything but informed, objective, and reasonable. Rather, for many courts, the reasonable observer possesses only the knowledge of an average passer-by who takes a quick glance at the display and immediately draws conclusions. *See, e.g.*, *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1121 (10th Cir. 2010) (roadside cross memorials evaluated from the perspective of a passing motorist). This is the approach taken below. *See* Pet. App. 24a (evaluating the Memorial from the perspective of "passers-by"). As courts have observed, the lack of clarity on this question renders the *Lemon*/reasonable observer/endorsement test unworkable and opens the door to manipulation through "selectivity of the knowledge of the plaintiffs' reasonable observer." *Grand Rapids*, 980 F.2d at 1550 n.7. *See also Davenport*, 637 F.3d at 1108 (Gorsuch, J., dissenting from denial of rehearing en banc) ("[O]ur observer continues to be biased, replete with foibles, and prone to mistake."); *Skoros v. City of New York*, 437 F.3d 1, 50-51 (2d Cir. 2006) (highlighting disagreement over whether the appropriate standard is a "reasonable student observer," a "reasonable parent observer," or a "hypothetical non-student 'adult' observer").

3. The Decision Below Created A Circuit Split Over Whether Expenditures For Routine Maintenance Constitute Excessive Entanglement

Finally, the Fourth Circuit's decision here created a new circuit split over whether a government's expenditure of funds for routine maintenance of a passive display that includes a religious symbol,

without more, can violate *Lemon*'s "excessive entanglement" prong. The Fourth Circuit concluded that the Commission's "own[ership] and maint[enance] [of] the Cross" constituted "excessive entanglement" because "[t]he Commission has spent at least $117,000 to maintain" the Memorial over the 55-plus years it has owned it, and because, according to the panel, "the Commission is displaying the hallmark symbol of Christianity in a manner that dominates its surroundings." Pet. App. 27a-28a.

Yet the Sixth Circuit has determined that no excessive entanglement existed from a "city's ownership and maintenance" of a public "friendship bell" that was "strongly associated with Buddhist monasteries . . . much as crosses indicate Christian churches." *Brooks v. City of Oak Ridge*, 222 F.3d 259, 265-66 (6th Cir. 2000). And the Oregon Supreme Court has similarly held that a city's ownership and maintenance of a "large cross" in a municipal park was "not alone sufficient to violate the test of 'excessive government entanglement.'" *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 347 (Or. 1976); *see also Port Auth.*, 760 F.3d at 245 (display of Ground Zero Cross did not create excessive entanglement).

III. THE MEMORIAL IS CONSTITUTIONAL UNDER ANY TEST ARTICULATED BY THIS COURT

None of the Establishment Clause tests articulated by this Court—whether *Van Orden*, *Lemon*, or *Town of Greece*—require the Commission to level or disfigure a nearly century-old war memorial acquired for traffic safety reasons, simply because the memorial uses a religious symbol. Indeed, although

the various tests articulated by this Court are framed differently, each emphasizes the role of religion in the Nation's history and looks primarily to the government's purposes for the display. This Court should grant certiorari to clarify that passive displays should be evaluated based on the Nation's historical traditions and the government's use of the symbol, not an amorphous inquiry into an "objective observer's" hypothesized reaction.

A. The Fourth Circuit's Decision Cannot Be Reconciled With *Van Orden*

In *Van Orden v. Perry*, this Court considered whether a Ten Commandments monument on the Texas State Capitol grounds violated the Establishment Clause. 545 U.S. 677 (2005). After holding that the *Lemon* test was "not useful in dealing with the sort of passive monument" at issue, a plurality of this Court looked instead to "the nature of the monument and [] our Nation's history." *Id.* at 686 (plurality opinion). The plurality found the Decalogue's "undeniable historical meaning" for the nation—highlighted by nearby monuments evoking national history—placed it in "the rich American tradition of religious acknowledgments" which do not violate the Establishment Clause. *Id.* at 690.

Justice Breyer issued an opinion concurring in the judgment, which lower courts have concluded is the "controlling opinion." *See, e.g.*, *Card*, 520 F.3d at 1017 n.10 (applying *Marks v. United States*, 430 U.S. 188 (1977)). Justice Breyer found "no test-related substitute for the exercise of legal judgment" in evaluating the monument. *Van Orden*, 545 U.S. at 700 (Breyer, J.). And he observed that although the "Commandments' text undeniably has a religious

message," "encourag[ing] disputes concerning the removal of longstanding depictions . . . from public buildings" would likely create the "religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.* at 700, 704. After examining the monument's history, context, and content, Justice Breyer concluded that the monument was constitutional. *Id.* at 703-05.

The Memorial here is materially indistinguishable from the monument in *Van Orden*.

First, as in *Van Orden*, "[t]he *circumstances surrounding* the [Commission's ownership of the Memorial] . . . suggest[s] that the State itself intended the . . . nonreligious aspects of the [Memorial's] message to predominate." *Id.* at 701 (Breyer, J.) (emphasis added). It is undisputed that the Commission's involvement with the Memorial is due only to roadway expansion plans and concerns of traffic safety. Pet. App. 56a-57a, 77a.

Second, the Memorial's "context suggests that the State intended the display's [nonreligious commemorative] message . . . to predominate." *Van Orden*, 545 U.S. at 702 (Breyer, J.). As in *Van Orden*, the seal of the Memorial's original builder—the American Legion—is prominently displayed in the center of the Memorial, and the Memorial has always contained a plaque that explains its commemorative purpose. Moreover, as in *Van Orden*, the Memorial is located near other monuments that "provide a context of history," *id.*, specifically commemoration of those who have died in the Nation's conflicts. And, as in *Van Orden*, the Memorial's location in the median of a busy traffic circle "suggests little or nothing of the

sacred," and certainly "does not readily lend itself to meditation or any other religious activity." *Id.*

Third, while 40 years passed before the *Van Orden* monument was challenged—a factor Justice Breyer found "determinative," *id.*—almost *90* years passed before the first complaint against the Memorial. "[T]hose [90] years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the [Memorial] as . . . a government effort" to endorse religion. *Id.* "[T]o reach a contrary conclusion here, based primarily on the religious nature of the [Memorial's cross-shape] would . . . lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions," and "create . . . religiously based divisiveness." *Id.*

B. The Memorial Satisfies The *Lemon*/ Endorsement/Reasonable Observer Test

The Fourth Circuit concluded that the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and modified by this Court in subsequent cases, controlled. Under *Lemon*, a challenged display must (1) "have a secular . . . purpose," (2) have a "principal or primary effect . . . that neither advances nor inhibits religion," and (3) "not foster an excessive government entanglement with religion." *Id.* at 612-13 (internal quotation marks omitted). Moreover, in *Allegheny*, the Court modified the *Lemon* test by holding that a display will fail if it has "the purpose or effect of 'endorsing' religion," adopting a test first articulated in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984). 492 U.S. at 592. Here, the Fourth Circuit wrongly held that the

Memorial failed *Lemon*'s "effect" and "entanglement" prongs.

1. The Memorial Does Not Have The Primary Effect Of Endorsing Religion

A display "endorses" religion if it sends "a message to nonadherents that they are outsiders, not full members of the political community," or makes "a person's religious beliefs relevant to his or her standing in the political community." *Allegheny*, 492 U.S at 625, 627 (O'Connor, J., concurring) (internal quotation marks omitted). However, "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring). Nor does the "endorsement" test require courts to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens." *Allegheny*, 492 U.S at 623 (O'Connor, J.).

The endorsement inquiry is instead a "collective standard to gauge the objective meaning of the government's statement in the community." *Pinette*, 515 U.S. at 779-80 (O'Connor, J.) (internal quotation marks and alterations omitted). Thus, evaluating whether a challenged display endorses religion "requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement." *Buono*, 559 U.S. at 720-21 (plurality opinion). This observer is far "more informed than the casual passerby," and is not "limited to the

information gleaned simply from viewing the challenged display," but is "aware of the history and context of the community and forum in which the religious display appears." *Pinette*, 515 U.S. at 779-80 (O'Connor, J.).

In short, the *Lemon*/endorsement/reasonable observer test asks whether, in light of the history and context of the display, a fully informed objective member of the community would conclude that the government intended to endorse religion. Here, no "reasonable observer" would reach such a conclusion.

First, and most simply, the reasonable observer would know the history of the Memorial, including that the Commission came to own the Memorial only because of traffic safety concerns, that the Commission has never expressed any religious motivation for its ownership or maintenance of the Memorial, and that the Memorial's private builders used a cross to mirror the gravemarkers under which their loved ones were buried in American battlefield cemeteries.

Second, the reasonable observer would know how the community has responded to the Memorial. He would know that in the near-century it has stood, the community has used the Memorial as a site for hundreds of events honoring veterans. By contrast, he would note only a single religious event that (may have) occurred at the Memorial in its 100-year history, hosted in 1931 by an out-of-town preacher—not a member of the community. Moreover, in the nearly 100 years it has stood, the community has responded to the Memorial by adding other secular commemorative monuments—and no religious monuments—around the memorial. Indeed, if, as this

Court has held, the central focus of the *Lemon*/endorsement/reasonable observer test is the message *the community* will take from the display, *see Pinette*, 515 U.S. at 779-80 (O'Connor, J.), there can be no more persuasive evidence than the fact that, in the nearly 100 years it has stood, the community has treated the Memorial as it would any other secular war monument.

Third, the reasonable observer would be aware of the various secular elements on the Memorial that explain its message—namely, the large plaque that identifies it as a memorial honoring 49 men who died in WWI, the military-themed words on the base, and the American Legion's symbol in the center of the cross. Thus, any reasonable observer who merely took the time to read the plaque on the Memorial would immediately understand that the Memorial was meant to convey a message of commemoration, not religious endorsement.

2. Spending Money For Grounds-keeping And Routine Maintenance Of A War Memorial Does Not "Entangle" Government With Religion

Nor is there any entanglement problem with the Commission's expenditure, over the course of six decades, of $117,000 to maintain the Memorial and grounds. As this Court has made clear, "'comprehensive, discriminating, and continuing state surveillance' [is] necessary to fall afoul of this [entanglement] standard." *Mueller v. Allen*, 463 U.S. 388, 403 (1983) (quoting *Lemon v. Kurtzman*, 403 U.S. at 619); *see also Agostini v. Felton*, 521 U.S. 203, 233-34 (1997) (program supporting parochial schools was not excessive entanglement where no "pervasive

monitoring by public authorities" of employees' religious conduct was required (citation omitted)).

Here, the Commission engaged only in routine upkeep of the Memorial, such as groundskeeping, lighting, and occasional repairs every few decades. *See* Pet. App. 59a-60a. And there is no evidence of any religious events at the Memorial since the Commission took ownership in 1961. As the District Court correctly held, this is not the stuff of entanglement.

C. The Memorial Is Constitutional Under The Test Applied In *Town of Greece*

In *Town of Greece v. Galloway*, this Court held that a town council's use of opening prayers did not violate the Establishment Clause. 134 S. Ct. 1811 (2014). Rather than apply *Lemon*, the Court applied the principles that "the Establishment Clause must be interpreted by reference to historical practices and understandings," and that so long as context shows the practice was not "exploited to proselytize or advance any one, or to disparage any other, faith or belief," the Establishment Clause is not offended. *Town of Greece*, 134 S. Ct. at 1817, 1819 (internal quotation marks omitted). Applying these principles, the Court concluded that legislative prayer was constitutional absent a "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose" to coerce religious belief or practice. *Id.* at 1824.

Here, history supports the accepted use of crosses in passive war memorials to commemorate the fallen. As a plurality of this Court has observed, "a Latin cross is not merely a reaffirmation of Christian

beliefs," and "evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles . . . ." *Buono*, 559 U.S. at 721 (plurality opinion) (discussing a WWI memorial). Indeed, crosses have been a symbol of fallen soldiers in this country since at least the Civil War. *See Trunk*, 660 F.3d at 1100 (Bea, J., dissenting from denial of rehearing en banc) (noting at least 114 Civil War memorials incorporating crosses). And, as Congress observed in 1924, crosses were "peculiarly and inseparably associated" with the American lives lost in World War I. H.R. Res. 15, 68th Cong. at 1 (1924).

Moreover, the facts of this particular Memorial confirm that there is nothing coercive about the Commission's ownership and maintenance of the Memorial. To the contrary, the Fourth Circuit found that the government had "legitimate secular purposes" for maintaining the Memorial—honoring WWI veterans and preserving a historically significant war memorial. Pet. App. 16a. And it is difficult to see how a passive monument dedicated to men who died in WWI could be said to coerce religious belief or practice. "[O]ffense does not equate to coercion," *Town of Greece*, 134 S. Ct. at 1815, and, as Justice Kennedy has observed, "where the government's act of recognition or accommodation is passive and symbolic, . . . any intangible benefit to religion is unlikely to present a realistic risk of establishment." *Allegheny*, 492 U.S. at 662 (Kennedy, J.).

D. This Court Should Clarify That The Establishment Clause Is Not Offended By A Historical War Memorial Being Displayed By The Government For Secular Purposes

Any test adopted by this Court should distinguish between displays that are "a benign acknowledgment of religion's role in society," and those that instead "coerce [ ] citizens to support or participate in any religion or its exercise." *Town of Greece*, 134 S. Ct. at 1819, 1825 (internal quotation marks omitted). Unfortunately—as exemplified by the decision below—the tests articulated by the Court do a poor job of helping courts find this distinguishing line.

Nonetheless, despite their different articulations of the test, this Court's cases all emphasize the importance of historical tradition and an objective assessment of the government's reasons for putting up the display. Where a government's use of religious imagery has a historical foundation, and the challenged display reflects that tradition, this Court has tended to uphold the display. *See, e.g.*, *Van Orden*, 545 U.S. at 703 (Breyer, J.). In contrast, where the government instead uses a symbol to coerce religious belief or practice, the Court has found the display unconstitutional. *See, e.g.*, *McCreary County*, 545 U.S. at 870.

Thus, this Court should articulate a simple rule for constitutional challenges to passive displays: when a government uses religious imagery in a way that is consistent with "the rich American tradition of religious acknowledgments," *Van Orden*, 545 U.S. at 690 (plurality opinion), the display will be presumptively valid unless it is shown that the

government was not reflecting this tradition but was exploiting it to coerce or convert nonadherents.

Such a rule of decision has many things to commend it. It would fulfill the Establishment Clause's neutrality mandate by ensuring that displays are not condemned merely because the government chose to pursue secular goals with a symbol that can also have religious significance. It would also avoid "a hostility toward religion that has no place in our Establishment Clause traditions," *Van Orden*, 545 U.S. at 704 (Breyer, J.), by ensuring that monuments maintained to reflect history are not torn down out of a "brooding and pervasive devotion to the secular," *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring). And it would ensure that courts do not apply an overly broad interpretation of the Establishment Clause that would tend to mandate the type of religious discrimination prohibited by the Free Exercise Clause. *See Lee*, 505 U.S. at 598; *see also Masterpiece Cakeshop, Ltd. v. Colo. Human Rights Comm'n*, 584 U.S. ___, slip. op. at 17 (2018) (noting that "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion" (citation omitted)).

Moreover, a focus on the historical traditions of the Nation and whether a government uses a symbol to coerce nonadherents is most consistent with this Court's precedent—it explains the difference between the permissible display in *Van Orden* and the impermissible display in *McCreary*; it gives effect to the fully informed, reasonable observer called for by the Court's precedent, rather than the selectively informed, casual passer-by often employed by lower courts; and it fits comfortably within the Court's most

recent line of Establishment Clause cases, such as *Town of Greece*.

More specifically, such a test precludes false-positives—Establishment Clause "violations" caused by a misapplication of *Lemon's* "effect" prong—an error exemplified by the decision below. If, as the court below correctly found, the Memorial furthers the Commission's legitimate secular purposes of honoring veterans and preserving a historically significant war memorial, then it cannot possibly have an impermissible religious effect (unless these secular objectives are shown to be mere pretexts). Only an uninformed observer who misinterprets the message of the Memorial could wrongly attribute such a religion-advancing "effect" to the Memorial's legitimate secular history and purpose. Establishment Clause violations should not be based on the misperceptions of individuals who incorrectly see efforts at religious conversion where the government is pursuing secular objectives. The proposed analysis would foreclose such erroneous outcomes and avoid the divisive hostility toward religious symbolism that so often accompanies *Lemon*'s "effect" analysis.

The Memorial here clearly satisfies this proposed test. Religious symbols, including crosses, are a well-recognized, historically grounded method for solemnizing and commemorating those who have died, particularly in wartime (as legislative prayer in *Town of Greece* permissibly solemnized government proceedings). Thus, such a display would be presumptively constitutional, unless the plaintiffs can show that the particular display has been exploited to coerce religious belief or practice. And, applying that

test here, the objective circumstances confirm that the Commission maintains the Memorial to solemnize and honor men who died in WWI, rather than to coerce or convert nonadherents.

This Court should grant certiorari to clarify the standard for Establishment Clause challenges to passive displays, bring an end to the confused and divisive litigation that characterizes this area of law, and as Judge Wilkinson remarked, let the Memorial (and hundreds more like it, in Arlington and elsewhere) "remain and let those honored rest in peace." Pet. App. 96a.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari to the Fourth Circuit.

Respectfully submitted,

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