Nos. 17-1717 and 18-18

IN THE

Supreme Court of the United States

THE AMERICAN LEGION, ET AL., *Petitioners,*

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *Petitioner,*

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.

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

BRIEF OF MUSLIM ADVOCATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[*]

Muslim Advocates is a national civil rights organization that advocates for freedom and equality for Americans of all faiths. Muslim Advocates also serves as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life.

The issues presented in this case directly affect individuals and communities that Muslim Advocates fights for throughout the United States. In recent years, religious minorities in this country—including, but not limited to American Muslim communities—have experienced discrimination because of their faith at the hands of a range of individual and government actors. Muslim Advocates thus has a strong interest in ensuring that both the Free Exercise and Establishment Clauses are interpreted and applied in a manner that is fully consistent with this nation's longstanding commitments to religious freedom, equal rights, and equal dignity for all without regard to faith or belief.

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[*] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

> "Religion and Government will both exist in greater purity, the less they are mixed together."
>
> —James Madison[1]

From the time of the founding, the Establishment Clause has protected religious freedom for Americans by ensuring that private religious conscience can flourish without the influence of government endorsement of a particular faith. This Court's jurisprudence should continue to reflect such an interpretation. A jurisprudential framework that recognizes, fosters, and protects a rich, pluralist society—just as the Framers envisioned—is critical to religious minorities in America.

Preserving neutrality between faiths is the most important role of the Establishment Clause. It serves as a crucial check against religious persecution and a critical safeguard of religious conscience. The Framers enacted the Establishment Clause to end the cycles of brutal religious intolerance that characterized earlier eras.

The Framers' concerns were well founded because a direct line connects religious endorsement and religious persecution. There is simply no support in this Court's jurisprudence for an Establishment Clause that only protects against government actions that actively coerce citizens into participating in a particular state religion. "Coercion" has never been required to establish an Establishment Clause

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[1] Letter from James Madison to Edward Livingston (July 10, 1822), https://bit.ly/2Sg2hu2.

violation. And the Establishment Clause has never been interpreted to permit the government to display religious symbols whenever and wherever it pleases, without regard to the messages of endorsement they convey.

This Court has long recognized that the most important question in determining whether there has been a violation of the Establishment Clause is whether an objective observer would regard a government act as endorsing a particular religious faith. This Court has consistently held that objective observers see religious symbols and messages like the Latin cross as express endorsement of a religion. The Court should continue to use the endorsement test to consider the propriety of the State of Maryland's sponsorship and maintenance of a 40-foot high Latin cross at the center of a major road intersection. And under that analysis, the cross violates the Establishment Clause.

ARGUMENT

I. The Establishment Clause Has Long Provided Critical Protection for Religious Minorities

Despite significant strides, religious minorities continue to be vulnerable to faith-based discrimination and exclusion, and the country still fails to live up to the Framers' ideals of equal treatment for all, under the law, regardless of their religion or nonbelief. Muslims are a particularly favored target of government actors' pernicious rhetoric. Karsten Müller & Carlo Schwarz, *Making America Hate Again? Twitter and Hate Crime Under Trump* (May 14, 2018) (unpublished manuscript), https://ssrn.com/abstract=3149103 (data analytics showing rise in anti-Muslim hate crimes linked to the President's social media messages referencing Is-

lam-related topics). Any interpretation of the Establishment Clause that permits governments to more strongly endorse majority faiths will inevitably increase "religious hostility" and exclusion by government against religious minorities.

Governmental efforts to institute anti-Muslim policies into law have become more common. For example, multiple states have tried to enshrine anti-Islamic "shar'iah law bans" into their state constitutions. *See* Wajahat Ali et al., Center for American Progress, *Fear, Inc. The Roots of the Islamaphobia Network in America* 38 (August 2010), https://bit.ly/2CRiSe5. In *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012), a Muslim plaintiff alleged that a proposed amendment to the Oklahoma Constitution preventing Oklahoma state courts from "considering or using" shar'iah law in state court violated his First Amendment rights. The Court held that the amendment amounted to condemnation of the plaintiff's Islamic faith, recognizing that "[t]he harm alleged by Mr. Awad stems from a constitutional directive of exclusion and disfavored treatment of a particular religious . . . tradition." *Id*. at 1123.

Advancement of anti-Muslim policies such as legal bans and targeted enforcement has become a staple promise for many seeking elected office. Data collected by Muslim Advocates from the 2016, 2017, and 2018 election cycles indicates that candidates' anti-Muslim claims are part of "a coherent strategy developed by anti-Muslim organizations devised to: Invalidate Islam as a religion in the eyes of Americans and the Constitution, which would subsequently deny Muslims the basic religious freedoms and civil rights protections entitled to them under law[; and] fan flames of bigotry against American Muslims, thereby scaring them from exercising their constitu-

tional rights to worship, run for office, vote, and simply participate in society and American democracy." Muslim Advocates, *Running On Hate: 2018 Pre-Election Report* 6 (Oct. 22, 2018), https://bit.ly/2FXjTW3. The report identifies discriminatory language and proposals for anti-Muslim policies from the Federal to the local board and commission level. *Id*.

Anti-Muslim policies, like those identified in the report, when implemented and advocated by local leaders, have profound impact on the lives of individual citizens. In Culpeper, Virginia, for example, the zoning board refused to issue a routine sewage permit to a proposed mosque site. The board's refusal was found to violate the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), because it was based on the "religious hostility" of the local zoning board and community. *See United States v. Cty. of Culpeper*, 245 F. Supp. 3d 758, 761 (W.D. Va. 2017); *see also Bensalem Masjid, Inc. v. Bensalem Twp.*, No. CV 14-6955, 2015 WL 5611546, at *2 (E.D. Pa. Sept. 22, 2015) (Plaintiff's claim was ripe that the town zoning board "questioned Plaintiff far more rigorously about its religious practices than it has ever done to members of other faiths and investigated Muslim places of worship in other jurisdictions and states.").

The 2017 FBI crime report indicates religiously-motivated hate crimes rose for the third consecutive year in 2017. John Eligon, *Hate Crimes in U.S. Increase for the Third Year in a Row, the F.B.I. Reports*, N.Y. Times, Nov. 14, 2018, at A21, https://nyti.ms/2UYzB7k. Anti-Semitism, already a dominant motivation for hate crimes, still grows. Brian Levin & John David Reitzel, Ctr. for the Study of Hate and Extremism, Cal. State Univ., San Bernardino, *Report*

to the Nation: Hate Crimes Rise in U.S. Cities and Counties in Time of Division & Foreign Interference 8 (2018). Likewise, from 2014–2016, Muslims suffered a 99% increase in hate-crime victimization. *Id*. at 27. The dates are not a coincidence.

The upward trends began at the outset of the 2016 presidential election cycle—a cycle during which politicians, candidates, government actors, and external interests injected tribalism into civil discourse. The spike in hate crimes is demonstrably attributable, at least in part, to inflammatory speech and discriminatory policies from government actors, at the federal legislative, state legislative, state executive, and federal executive levels. *See* Stephen Rushin & Griffin Sims Edwards, *The Effect of President Trump's Election on Hate Crimes* (Jan. 18, 2018) (unpublished essay), https://papers.ssrn.com/abstract_id=3102652.

The spike in hate crimes, and the government speech that inspires it, reinforces concerns over adopting the coercion test advocated by Petitioners and various *amici.* Under such a test, the government could freely associate with one religion, without officially "establishing" the religion, and effectively "identify nonadherents as outsiders," ultimately "encroach[ing] upon the individual's decision about whether and how to worship." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 883 (2005). For instance, adherence to a government-supported faith could increase an individual's social or political status. *See Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring). When government "endorses or disapproves of religion," it violates the Establishment Clause's prohibition against "making adherence to a religion relevant . . . to a person's

standing in the political community."). By contrast, religious minority communities would suffer further loss in influence. *See id* ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."). The net effect would still amount to coercion, though likely too subtle to meet the definition proposed by the American Legion and certain *amici*.

Ultimately, minority communities would suffer implicit and explicit majoritarian affronts, such as members of the majority claiming religious superiority, slinging allegations of religious inferiority at minorities, or both. Exclusionary endorsements will meet with a ready audience if the primary requirement of neutrality is dismantled.[2] The permissive rule advanced by Petitioners would allow the Republic to evolve towards a society no longer receptive to a plurality of religious expression, or receptive only to a predefined set of expressions.

II. The Court Should Affirm the Decision below to Reinvigorate the Establishment Clause and Reaffirm the Protections It Offers to Religious Minorities

Petitioner American Legion, and several *amici* claim that this Court should sweep away the Court's

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[2] *Compare Town of Greece, NY v. Galloway,* 572 U.S. 565, 589 (2014) (Kennedy, J.) ("In no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished."), *with Greece Police Found 3 Improvised Bombs, 23 Guns In Investigation Into Bomb Plot*, ABC News 10 (Jan. 22, 2019, 3:15 PM), https://bit.ly/2UsylZf (four people in Greece, New York, charged with anti-Muslim bombing plot).

existing Establishment Clause jurisprudence based on avoiding government endorsement of and entanglement with religion, and in its place install a permissive "coercion" test, under which the Clause would only prevent government actions that *force* citizens to "belie[ve] in, observ[e], or financial[ly] support" a particular religion. Am. Legion Br. at 12, 23, 27.

In advocating for this radical curtailing of the reach of the Establishment Clause, Petitioner American Legion and *amici* disparage the longstanding test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as unworkable and superseded, claiming that few courts in the past 25 years have applied an endorsement test. *See*, *e.g.* Am. Legion Br. at 21 & n.5. But this claim is misleading, and in some cases simply false.

The American Legion's footnote lists 10 supposedly anti-*Lemon* cases since 1993. *Id.* at 21 n.5. Nearly all of these cases, however, either explicitly employ an endorsement test or rely on cases that apply *Lemon*.

1. In *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), Justice Rehnquist found that "neutral services" provided to students on a basis that is not "skewed towards religion" do not fall afoul of the *Lemon* test as expressed in multiple prior cases. *Id*. at 10.

2. In *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), the Court ruled that a bespoke school zone for a tiny Orthodox Jewish sect was improper because it violated the "general principle that civil power must be exercised in a manner neutral to religion," *id.* at 704 (citing *Larkin v. Grendel's Den, Inc.*, 459 U.S.

116, 120-21, n.3 (1982) (relying explicitly on *Lemon*)), and noted the favored group's small size was "no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole," *id*. at 705.

3. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), Justice Kennedy stated that neutrality was concerned with "the illegitimate purpose of supporting one religion," and preventing "government speech endorsing religion, which the Establishment Clause forbids." *Id*. at 841.

4. In *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), Justice Scalia, harmonizing multiple opinions, declined to apply *any* Establishment Clause test because the speech at issue—a cross carried in public by Ku Klux Klan members with a city-issued permit—was private speech, as opposed to government speech, and thus did not trigger any requirement to "avoid[] official endorsement of Christianity, as required by the Establishment Clause." *Id*. at 761, 765.

5. In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Justice Thomas denied a school district's defense that allowing after-hours religious use of a school facility would violate the Clause because the neutral room-reservation policy was "materially indistinguishable" from cases where the Court had held that there was "no realistic danger that the community would think that [a school] district was endorsing religion." *Id.* at 113.

6. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Court upheld a statute allowing religious practice in prisons because it would be "administered neutrally among different faiths." *Id.* at 113 (citing *Kiryas Joel*, 512 U.S. at 696 (relying on *Lemon* to find that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents" (citation omitted)).

7. In *Van Orden v. Perry*, 545 U.S. 677 (2005), the plurality opinion criticized *Lemon* to some extent. But even in that case, Justice Breyer's controlling concurrence in the judgment cites *Lemon* as a "useful guidepost[]." *Id.* at 700.

8. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), neither *Lemon* or any other test was relevant to the outcome, as the Court confirmed that labor laws do not apply to hiring and firing of religious officials by religious organizations and that the government does not make hiring decisions for churches.

9. In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), Justice Roberts stated that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id*. at 2417 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982) (relying on *Lemon*)).

10. Even in *Town of Greece*, 572 U.S. 565 (2014), Justice Kennedy's decision turned on his finding that the town prayer forum

> "maintain[ed] a policy of nondiscrimination." *Id*. at 585-86.

Thus, the Petitioners' claim that *Lemon* is disused, forgotten, or diminished is simply false. Moreover, none of the above cases apply anything like the novel coercion-only test that the American Legion advocates. Of all the cases erroneously cited by Petitioners as dispensing with *Lemon*, only *Van Orden v. Perry* offers even mild support.

The *Lemon* test is a frequent punching bag, not because its straightforward concern with neutrality is difficult to understand or apply, but because application of the *Lemon* test rightly finds unconstitutional the types of government endorsements of religion that Petitioners would like to preserve.

In reality, *Lemon* is a remarkably stable test that has been in near-unanimous use in the past 25 years, and indeed throughout the 47 years since *Lemon* was decided. As the Court found in 1992 in *Lee v. Weisman*, "Since 1971, the Court has decided 31 Establishment Clause cases. In only one instance . . . has the Court not rested its decision on the basic principles described in *Lemon*." 505 U.S. 577, 603 n.4 (1992). Forty-seven years of near-unanimous use of the basic non-endorsement test stated in *Lemon* and its progeny proves that the *Lemon* test is not fatally flawed. It simply requires careful consideration of the circumstances.

A coercion test excluding only government action that forces "belief in, observance of, or financial support for religion" may be easier to apply, but only because it would forbid almost nothing and would open the floodgates for government endorsement of religion previously unthinkable.

A. Government Neutrality Towards Religion, Not Prevention of Coercion, Is the Touchstone of the Establishment Clause

A coercion-only test for the Establishment Clause as proposed by the Petitioners is new—and radical. In none of the cases they cite most often, including *Town of Greece* and *Van Orden*, does the Court employ such a test. In fact, as discussed above, the vast majority of the cases decided by this Court regarding the Establishment Clause have affirmed the principle of government neutrality towards religion. While coercive acts undeniably violate neutrality, they are far from the only acts that do. The real opposite of neutrality is endorsement, as has long been recognized by Establishment Clause jurisprudence.

Government officials as citizens of course have a First Amendment right to practice or believe whatever they choose and to discuss their personal beliefs in the public square. Petitioner American Legion confuses expressions of religious faith by individuals, which have never been prohibited by the Constitution, with government actions endorsing a particular religion with the voice, not of *individuals*, but of the *government itself*. The former is an inevitable consequence of the broad participation of Americans in religions of all kinds. The latter is what concerns the Court in this case. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009) ("Permanent monuments displayed on public property typically represent government speech.")

The American Legion, citing *Town of Greece*, states in support of this theory that "there is no principled basis for concluding that one form of government speech—prayer—is constitutional unless it is coercive while subjecting another form of govern-

ment speech—passive displays—to a different standard." Am. Legion Br. at 13.

As an initial matter, *Town of Greece* did not rule that prayer "is constitutional unless it is coercive." Rather, Justice Kennedy found, in response to plaintiff's contention, that the town had neither coerced prayer nor intentionally excluded any faith from the opportunity to offer prayer. In any case, *Town of Greece* contains no holding that all non-coercive prayer sponsored by government is constitutional.

More fundamentally, Justice Kennedy's opinion in *Town of Greece* provides a clear distinction between the fact pattern presented there and a passive public display like the 40-foot high cross presented here. Justice Kennedy based his decision in large part upon the requirement that the government respect the freedom of conscience of those religious citizens the town invited to participate in public events, and the community the town government serves. Justice Kennedy found that it was the majority Christian makeup of the community that produced the result that nearly all of the prayers were Christian, not any exclusionary act of the town. *Town of Greece*, 572 U.S. at 585. In the context of a hosted prayer, he ruled, the government was obligated to safeguard the freedom of conscience of the individual citizens it allowed to speak, and could not manufacture a false non-sectarian "consensus" of its own invention because "[o]nce it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates." *Id.* at 582.

The open-to-all character of the opening invocation was central to Justice Kennedy's decision: "The town at no point excluded or denied an opportunity

to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation." *Id.* at 571. In support of this point, Justice Kennedy cited the religious observances opening sessions of Congress, including prayers by Buddhists, Hindus, and Muslims, noting that Congress "acknowledges [America's] growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds." *Id*. at 579.

Justice Kennedy stated the same principle even more plainly in *Rosenberger*, in which this Court found that an activity fund was intended as a neutral source of funding for all student viewpoints: "The program respects the critical difference 'between *government speech endorsing religion, which the Establishment Clause forbids*, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Id*. at 841 (emphasis added) (citing *Bd. of Ed. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (applying *Lemon* test)).

Even in the context of the alternative coercion claim in *Town of Greece*, Justice Kennedy drew a careful distinction between a forum hosted by the government where all views were welcome, and any context where only a single perspective was allowed:

> an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, *especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions*.

Town of Greece, 572 U.S. at 589 (emphasis added). Of course, this holding implies that where no counter-

point opinion was possible, a religious minority or non-believer's "sense of affront" may well give rise to an Establishment Clause violation.

The Bladensburg road exchange is not a public forum. Here, the State of Maryland is not *hosting* citizen speech—*it is speaking*. The message of the monument is a message from the government. *See Pleasant Grove City,* 555 U.S. at 470 ("Permanent monuments displayed on public property typically represent government speech."). The Association of Religion Data Archives' 2010 U.S. Religious Census states that nearly 8,000 Muslims live in Prince George's County, as well as thousands of Hindu, Buddhist, Jewish, Baha'i and other non-Christians. County Membership Report, Association of Religion Data Archives, 2010 U.S. Religion Census: Religious Congregations & Membership Study, https://bit.ly/2B5auHK. A member of one of these communities using this busy connecting road cannot drive by at a different time to avoid the sight of a 40-foot symbol of Christianity paid for with public money, lit by public electricity. The Bladensburg Cross exists in a completely different context than the forum at issue in *Town of Greece*.

Town of Greece also reaffirms that this Court's Establishment Clause jurisprudence reflects a specific concern for religious minorities. Rather than rule that any government practice with a long history is permitted, Justice Kennedy explained that the Establishment Clause requires an understanding of the history of a practice and a close analysis into whether the practice was designed to either exclude a minority faith or embrace a majority one. The town was wise, he held, to avoid the "entanglement" with religion that crafting a false pluralism would have required. *Town of Greece*, 572 U.S. at 586.

If these terms sound familiar, they should: the *Town of Greece* analysis is a version of the *Lemon/Allegheny* endorsement test, which has also recognized that while the content of the prayers need not be neutral, the opportunity for prayer must be. *See Lemon v. Kurtzman,* 403 U.S. 602, 613 (holding that government acts must not foster "an excessive government entanglement with religion."); *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 576 (1989) ("The requirement of neutrality [is] inherent in the [*Lemon*] formulation.").

Despite assertions by Petitioner American Legion and *amici* to the contrary, the endorsement test is alive and well, and represents a stable fulcrum upon which to balance history, purpose, and effect. *Town of Greece* was not a repudiation of that test; it was an implementation of it. The underlying concern of *Town of Greece*, and the endorsement test generally, is neutrality, equality of opportunity, and a reasonable consideration of the circumstances. Regarding the Bladensburg cross, there is not even a fig leaf of universal availability or opportunity for religious minorities whose faiths are not included. Whatever else it may be, a cross is an indelible symbol of the crucifixion of Jesus Christ, and the universal symbol of endorsement of the Christian faith.

B. Requiring a Showing of Affirmative Coercion Would Gut the Establishment Clause

Under a coercion-only standard for the Establishment Clause, multiple displays ruled unconstitutional would be retroactively made constitutional. For example, under the test, the display of the Ten Commandments placed in the rotunda of the Montgomery Courthouse by Judge Roy Moore would be

vindicated, rather than rejected, as it was by the Eleventh Circuit in *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003). That display forced no one to believe, required no one to pray, and extracted no tithe. It did, however, cast an aura of Christianity over the operations of a secular court, an aura that communicated exclusion to non-Christians who had business before that court. It was the epitome of government endorsement of religion, one that robbed religious minorities and the non-religious of equal standing in the public square.

The Petitioners and many *amici* seek to blur the meaning of the Bladensburg Cross by asserting that any citizen should not feel excluded, or even affected, by use of religious symbols because those symbols have, over time, morphed into generalized symbols for everyone. *See* Comm'n Br. at 6, 24, 36 (claiming that the cross has a "significant secular meaning" to commemorate "valor"). But this is just majoritarianism run amok, whereby the minority is assumed to have assimilated and accepted the symbols of the majority. As articulated by the Respondent in this matter, "[u]sing a Latin cross as a war memorial does not make the cross secular; it makes the war memorial Christian." Resp. Br. at 37-48. Any test that permits the government to endorse the majority religion increases pressure on minorities to conform to the dominant faith. Affirming a coercion-only test is a direct blow against minority religious conscience and a repudiation of the Establishment Clause.

C. The Establishment Clause Was Conceived as More Than a Prohibition against a National Church and Does Not Imply a Coercion Test

Petitioners argue that the Establishment Clause merely "preserves the negative right not to be com-

pelled or coerced into financially supporting, practicing, or professing what one does not believe." Am. Legion Br. at 25. But this is an unfounded interpretation of the Establishment Clause. Instead, the Establishment Clause is an absolute prohibition against Government action: "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Petitioners wish the Court to read the Clause as meaning only that Congress shall make no law establishing and enforcing support of a state religion. Am. Legion Br. at 27 ("Simply put, 'establishments,' whether in the Colonies or in England, compelled or coerced nonadherents to profess belief in, participate in, or financially support a particular religion."). Petitioners then derive an analogous rule that only acts that compel observance of such a national faith are forbidden. *See* Am. Legion Br. at 26 n.8 ("[C]oercion is the standard because coercive laws were the historical hallmark of an establishment.").

But such a reading ignores the actual progress of the Clause through the hands of the drafters. An early draft of the Clause proposed by James Madison that barred only the establishment of a coercive state religion was specifically rejected by the Framers. Madison's draft stated: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Annals of Congress* 451 (Joseph Gales ed., 1834).

That draft was *considered* and *rejected* by the First Congress. In the final version, the Framers elected not to limit the application of the Establishment Clause to only a concern for a national religion. Instead, the Clause broadly rejects any governmental action "respecting an establishment of religion."

Petitioners' argument that a coercion test proceeds naturally from a limited meaning of the Clause is misdirected.[3] The process of drafting the Establishment Clause, however divided and contentious, produced a flat prohibition against government action in support of religion. The phrase "no law respecting an establishment of religion" simply means "no law regarding religion"—an appropriate meaning given the Framers' hope for a government led by an executive with "no particle of spiritual jurisdiction." James Madison, *A Memorial and Remonstrance against Religious Assessments*, *in Selected Writings of James Madison* 23 (Ralph Ketcham ed., 2006). As Justice Souter stated in his concurrence in *Lee v. Weisman*:

> [U]nlike the earliest House drafts or the final Senate proposal, the prevailing language [of the Establishment Clause] is not limited to laws respecting an establishment of 'a religion,' 'a national religion,' 'one religious sect,' or specific 'articles of faith.' The Framers re-

[3] The Petitioners also go astray when they cite the debate over Patrick Henry's proposed Assessment Bill permitting the government to gather tithes, and Madison's impassioned attack on the bill as unlawful coercion by the State. Am. Legion Br. at 31-33. Petitioners claim that this example shows that Madison was concerned only with brute coercion, but they ignore what Madison was fighting against—the collection of public funds to support religion. At the time the Assessment Act was proposed, neither the nation, nor the Commonwealth of Virginia, collected any income tax. But Maryland, and the federal Government, surely collect such a tax today, and the dollars collected by this tax—the nugatory "three pence" that Madison warned against in his attack on the Assessment Act—are used today to patch, support, and illuminate a 40-foot high Christian cross on a public roadway in Prince George's County.

> peatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for 'religion' in general.

Lee v. Weisman, 505 U.S. at 614-15 (Souter, J., concurring). To think that the Framers missed this nuance, Justice Souter noted, "'requires a premise that the Framers were extraordinarily bad drafters—that they believed one thing but adopted language that said something substantially different, and that they did so after repeatedly attending to the choice of language.'" *Id*. (quoting Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 882-83 (1986)).

III. The Purpose and Effect of a Government-Sponsored Passive Display Is the Crux of Determining Non-Endorsement

For more than fifty years, and through a half-dozen different tests for Establishment Clause violations, purpose and effect have been the two consistent lodestars by which the Court has determined whether government action is truly secular—that is, does not endorse a particular religion. *See Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985); *McCreary Cty. v. ACLU ofKy.*, 545 U.S. 844, 862 (2005) (strongly re-endorsing the appropriateness of the purpose and effect elements of the *Lemon* test); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308–309 (2000); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam) (holding that the purpose of posting ten commandments in classrooms was "plainly religious"); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (making purpose and effect central to the test for Establishment Clause violations); *Church of the Lukumi Babalu Aye,*

Inc. v. City of Hialeah, 508 U.S. 520, 532-34 (1993). Over and over again, dating back at least as far as *Everson v. Board of Education* in 1947, the Court has held that State action violates the Establishment Clause where it lacks a credible secular purpose or where its effect is to advance or inhibit religion. 330 U.S. 1, 15-16 (1947) (explaining that States may not, among other things, "pass laws which aid one religion, aid all religions, or prefer one religion over another" nor "openly or secretly, participate in the affairs of any religious organizations or groups").

Evaluating religious purpose and effect is essential to assessing any non-endorsement requirement because, as the Court has held, the touchstone of endorsement is whether a reasonable objective observer would believe that the government has acted with a purpose to promote or inhibit religion. *McCreary Cnty.*, 545 U.S. at 862. Thus, even actions that appear secular on their face can violate the Establishment or Free Exercise Clauses. *See Wallace*, 472 U.S. at 40; *Stone*, 449 U.S. at 41; *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532-34. When a State action has either the purpose or effect of advancing a religion, a reasonable observer is justified in interpreting that action as endorsing that religion. This Court has long recognized that explicitly sectarian symbols and images like the Latin Cross almost always violate the endorsement test because they almost always have either the purpose or effect of promoting a particular religion or belief system over others, and government officials cannot credibly claim to be unaware of that fact. *See Stone*, 449 U.S. at 41 (holding that requiring the display of the Ten Commandments on the walls of public school classrooms was "plainly religious").

To be sure, context can show that the display of a religious symbol is not endorsement. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court upheld a city's display of the Nativity scene in the face of an Establishment Clause challenge because the Court determined that the Nativity scene had neither the purpose nor the effect of promoting Christianity at the expense of any other faith or non-faith. *See id.* at 683 (analogizing the nativity display to "religious paintings in governmentally supported museums"). But especially important to the Court's conclusion in *Lynch* was the fact that *any* acknowledgement of Christmas necessarily comes with some acknowledgement of its "religious implications." *Id.* at 685. The city's self-evident purpose, however, was to celebrate the secular aspects of the holiday, not its religious underpinnings. *See id.* at 680-81. Thus, in addition to a nativity scene, the display included "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that read 'SEASONS GREETINGS.'" *Id.* at 671.

The same cannot be said in this case. There is no necessity that a World War I memorial take the form of a Christian cross. Nor is there any evidence to its viewers that its purpose is to memorialize soldiers' lives lost in that war. Few who see this particular cross know its particular history or even know it is a memorial. Am. Humanist Ass'n Br. at 8-10. To those who see it, the cross promotes the Christian faith. *See id.* at 16. As one of the most powerful and widely-recognized religious symbols in the world, any reasonable observer would believe that such an impos-

ing Latin cross, standing unadorned and all alone, was erected to favor and promote Christianity. *Id.*

This case differs from others involving harmless uses of religious symbols, texts, and images precisely because the memorial's Christian character overwhelms its commemorative character. When crosses appear on the graves at Arlington cemetery, they do so in a context that makes their non-endorsement clear. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2255 (2015) (Alito J., dissenting) (no one would think "Rather Be Golfing" on a vanity license plate reflects the official views of the State of Texas). That the crosses on graves at Arlington are personal and memorial in nature is self-evident from their context. The cemetery includes a variety of religious symbols, including Islamic, Jewish, Buddhist, and Wiccan symbols that highlight that these symbols are not reflective of a government position on religion but rather reflect the individual faith of soldiers. *See* Amicus Br. of Dellinger and Lederman at 26.

But in this case, the cross' size, the absence of other context clues pointing to its character as a memorial, and the fact that most of those who interact with it do so from a vantage that gives them no opportunity to appreciate it as a memorial, all coalesce to create the effect of endorsing the Christian faith at the expense of all others. As Justice Breyer, the crucial fifth vote in *Van Orden v. Perry*, explained, in upholding a Ten Commandments display against an Establishment Clause challenge, *both* the long history of the monument *and* the physical setting situating it among other non-religious displays came together to show that the display did not endorse the Christian faith. *Van Orden,* 545 U.S.

at 700-702 (2005) (Breyer, J., concurring in the judgment).

That same nuanced analysis leads to the opposite conclusion in this case. While historical factors can and should be considered in determining whether a display has a religious purpose or effect, a decision that places exclusive weight on such factors risks disregarding the animating purpose of the Establishment Clause—not to exclude religious culture from the public square, but to prevent such culture from taking on the voice of the State.

CONCLUSION

Amicus curiae respectfully urges that the Court affirm the decision below.

Respectfully submitted,

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