No. _____

In the Supreme Court of the United States

CITY OF PENSACOLA, FLORIDA, ET AL.
Petitioners,

v.

AMANDA KONDRAT'YEV, ET AL.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL W. MCCONNELL
559 Nathan Abbott Way
Stanford, CA 94305

JAMES NIXON DANIEL
TERRIE LEE DIDIER
Beggs & Lane, RLLP
501 Commendencia St.
Pensacola, FL 32502

LUKE W. GOODRICH
Counsel of Record
LORI H. WINDHAM
JOSEPH C. DAVIS
The Becket Fund for Religious Liberty
1200 New Hampshire Ave., N.W., Ste. 700
Washington, DC 20036
(202) 955-0095
lgoodrich@becketlaw.org

Counsel for Petitioner

QUESTIONS PRESENTED

Relying on the "*Lemon* test," a panel of the Eleventh Circuit held that a city violated the Establishment Clause by allowing the display of a cross that has been an uncontroversial part of community life for over 75 years. The questions presented are:

1. Whether plaintiffs have standing to sue under the Establishment Clause when their only alleged injury consists of the feelings of "offense" produced by observing a passive religious display.

2. Whether, under *Town of Greece* v. *Galloway*, 134 S. Ct. 1811 (2014), passive religious displays with a long historical pedigree must be torn down because of claims that they have the purpose or effect of endorsing religion.

PARTIES TO THE PROCEEDING

Petitioners are the City of Pensacola, Florida; Ashton Hayward, Mayor of the City of Pensacola; and Brian Cooper, Director of the City of Pensacola Parks and Recreation Department.

Respondents are Amanda Kondrat'yev, Andreiy Kondrat'yev, Andre Ryland, and David Suhor.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

OPINIONS BELOW

The Eleventh Circuit's decision (App. 1a-82a) is not yet published but is available at 2018 WL 4278667. The district court's order granting summary judgment to Respondents (App. 83a-112a) is unpublished but available at 2017 WL 4334248.

JURISDICTION

The Eleventh Circuit entered judgment on September 7, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Establishment Clause of the First Amendment of the Constitution provides: "Congress shall make no law respecting an establishment of religion."

INTRODUCTION

"This Court's Establishment Clause jurisprudence is in disarray." *Rowan County* v. *Lund*, 138 S. Ct. 2564 (2018) (Thomas, J., dissenting from denial of certiorari). This case offers an ideal vehicle to fix it.

In the decision below, the Eleventh Circuit held that the City of Pensacola violated the Establishment Clause by declining to remove a cross that has stood in a city park without controversy for over 75 years. According to the Eleventh Circuit, because Respondents felt "offended" when they saw the cross, they suffered "metaphysical" injury sufficient to confer standing. App. 5a-7a. And because the cross is an overtly religious symbol, Pensacola lacked a "secular purpose" under the *Lemon* test. App. 7a-9a. Two of the three judges issued concurring opinions calling the result "wrong" and deeming this Court's Establishment

Clause jurisprudence a "hot mess." App. 11a, 19a, 31a, 64a. But they agreed that their "hands are tied," because *Lemon* has not been "directly overruled." App. 9a.

The panel's decision is not just "wrong," it conflicts with decisions of this Court and other circuits. First, regarding standing, this Court has long held that plaintiffs lack Article III standing if their only injury is "the psychological consequence" produced by "observation of conduct with which one disagrees." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). Yet the court below found standing based upon just such "metaphysical" harm. App. 7a. As Judge Newsom said, this conclusion is "utterly irreconcilable" with *Valley Forge*. App. 13a. It also conflicts with standing rulings from another circuit.

Second, on the merits, the Eleventh Circuit held that it must apply the "*Lemon* test" and that Pensacola lacked a "secular purpose" for allowing the cross to remain—notwithstanding the community's "historical acceptance" of the cross for over 75 years. App. 8a-9a (internal quotation marks omitted). But that ruling conflicts with *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014), which declined to apply *Lemon*, and with *Van Orden* v. *Perry*, 545 U.S. 677, 702 (2005) (Breyer, J., concurring), which held that historical acceptance of a monument was "determinative." The ruling also exacerbates circuit splits over the appropriate Establishment Clause test for passive religious displays generally and cross displays specifically.

Left undisturbed, the Eleventh Circuit's decision will have far-reaching consequences. The court's "sweeping standing rule" requires "court[s] to rule on

important constitutional issues in the abstract" and "threatens the structural principles that underlie Article III's case-or-controversy requirement." App. 15a (Newsom, J., concurring). And the court's merits ruling exacerbates a circuit split on issues of profound practical importance to state and local governments, threatening hundreds of similar religious symbols across the country. Review is urgently needed to resolve the split and bring order to this Court's Establishment Clause jurisprudence.

STATEMENT

A. Factual Background

1. Pensacola has a rich history. It was founded by Spanish explorers in 1559—well before Jamestown (1607) or St. Augustine (1565)—making it arguably the oldest city in the United States. Pensacolians celebrate this history in many ways, including in the city's parks.

Pensacola maintains 93 parks, which host over 170 expressive displays highlighting the city's history. App. 127a-185a. Some displays commemorate individuals—like Plaza de Luna, which features a bronze statue of the city's founder. App. 170a. Others commemorate historical events—like Fort George Park, which contains the ruins of a fort used during the Revolutionary War. App. 151a. Still others recognize less famous groups and individuals—like Seville Square, which includes a plaque honoring the woman who inspired Pensacola's historic-preservation movement. App. 176a-177a. Pensacola's parks also host scores of private events each year, C.A. R.E. Tab 31-16, at 45-47, and are available for religious gatherings, as is

constitutionally required. See *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

2. This case involves a challenge to a cross in Bayview Park. The 28-acre park includes dog parks, tennis courts, boat ramps, walking trails, and picnic areas. App. 124a. It also has various memorials and plaques—such as a plaque recognizing the founder of the dog beach, a monument commemorating the establishment of the tennis courts, and a monument to a young man who died in a nearby water-skiing accident. App. 136a-137a.

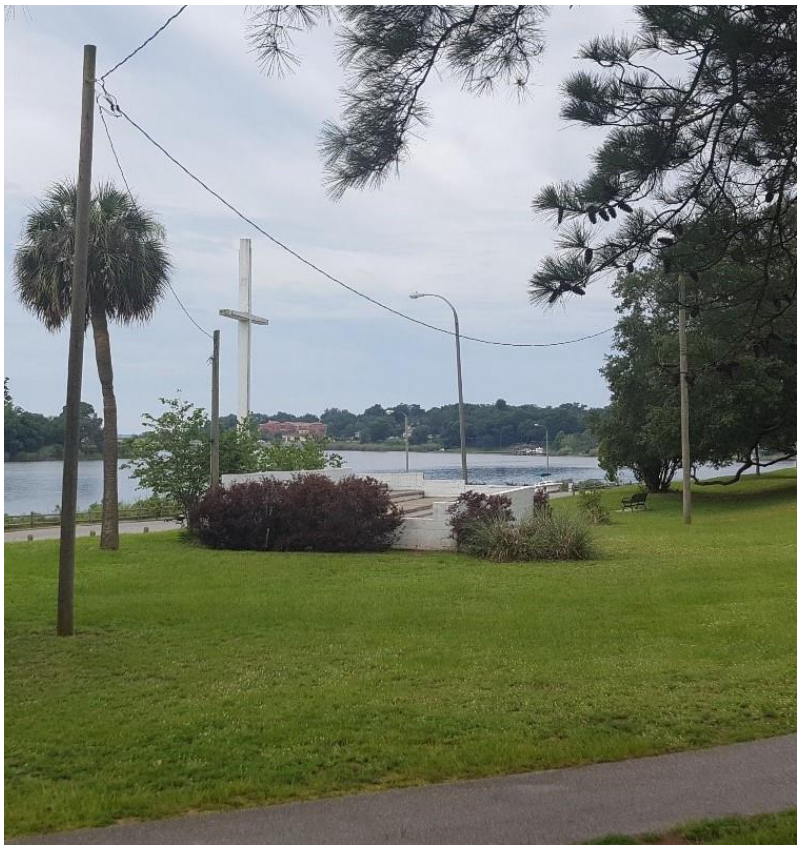
A cross was first erected in the park in 1941. That year, the local Junior Chamber of Commerce, or Jaycees, organized a "communitywide, nondenominational" Easter service. C.A. R.E. Tabs 30-7, 31-2. With war raging across the globe and American involvement increasingly likely, the service was designed to unite the community and give servicemembers a place to celebrate the holiday while stationed away from home. *Id.* Tab 31-10. A wooden cross was placed in the northeast corner of the park. *Id.* Tab 30-4.

The Jaycees' service was widely attended and became an annual tradition. Throughout World War II, the event offered a time for the community to pray for "the divine guidance of our [nation's] leaders" and be reminded that "through faith" they could "see through" to the end of the war. C.A. R.E. Tabs 31-3, at 9; 31-5, at 2. Attendees brought flowers "in commemoration of those who are away from home and those who have gone," and the flowers were distributed to patients in military hospitals. *Id.* Tab 31-4, at 5.

In 1949, the Jaycees built a small bandstand in front of the cross. C.A. R.E. Tabs 30-1, at 50-51; 31-8,

at 2-3. The project was led by a Jaycee named Frasier Phelps, who died of leukemia soon after. The Jaycees rededicated the site to Phelps in 1951, placing a plaque on the bandstand in front of the cross, stating that it was "Dedicated" to Phelps and "Sponsored" and "Donated" by the "Junior Chamber of Commerce":

In 1969, at the height of the Vietnam War, the Jaycees organized another Easter event and used private donations to replace the wooden cross with the current version. That version is pictured below:



The Jaycees organized annual Easter events until the chapter's dissolution in 2011. C.A. R.E. Tab 30-2 ¶ 13. They also used the area around the cross for other events, such as Veterans Day and Memorial Day remembrances, and a memorial service for President Roosevelt. *Id.* Tabs 30-2 ¶¶ 20-22; 30-7, at 5. Other groups have also used the area around the cross for various events—from outdoor movie nights, to weddings, to boat festivals, to fundraising walks. *Id.* Tab 31-18, at 14-16. The city allows all of these events equally under viewpoint neutral policies. *Id.* Tab 30-2 ¶¶ 20-22.

B. Procedural History

1. In May 2016, Respondents Amanda and Andreiy Kondrat'yev, Andre Ryland, and David Suhor filed this lawsuit, alleging a violation of the Establishment Clause.

The Kondrat'yevs are former area residents who say they are offended by the cross. After filing suit, they moved to Canada. App. 85a n.1. They have not alleged any further contact with the cross.

Ryland is an atheist who resides in Escambia County, Florida, outside of Pensacola. Ryland alleges that he first saw the cross in 2010—six years before filing suit—and is "affronted" by it. App. 119a. He "visit[s] Bayview Park many times throughout the year" and "often" encounters the cross by "walk[ing] the trail around the park." *Ibid.*

Suhor first saw the cross in 1993—23 years before filing suit. App. 122a. He alleges he is "offended" by it. *Ibid.* He "visit[s] Bayview Park regularly" and "encounter[s]" the cross, riding his bicycle past the cross "as often as twice a week." *Ibid.*

Suhor has also used the cross for his own ideological purposes. In February 2016, Suhor "tried to reserve the site of the cross for Easter Sunday." C.A. R.E. Tab 30-2 ¶ 15. A church had already reserved the site, but "the church graciously agreed to move to another area in the park." *Ibid.* Suhor then used the cross for "satanic purposes." *Id.* Tab TR, at 43:9-17. Less than two months later, Suhor and the other Respondents filed suit.

2. In April 2017, Pensacola moved for summary judgment, invoking *Van Orden* and *Town of Greece*,

and arguing that Pensacola may keep the cross as a recognition of the city's history and culture. Respondents cross-moved for summary judgment, relying on *Lemon* and arguing that Pensacola had an impermissible "religious purpose" because the cross is "patently religious." D. Ct. Doc. 31, at 16 (Apr. 21, 2017) (internal quotation marks omitted).

The district court granted summary judgment to Respondents. The court acknowledged that Pensacola's actions would be "certainly constitutional" if the court considered "what the Founding Fathers intended." App. 94a. The court also acknowledged that Pensacola's actions "might well pass constitutional muster" under *Van Orden*. App. 106a.

Nonetheless, the court felt bound to apply the "widely criticized (and sometimes savaged)" *Lemon* test and strike down the cross. App. 95a, 109a. According to the court, *Lemon* has not been clearly "overrule[d]." App. 101a. And under *Lemon*, "it has been recognized that the Latin cross is unmistakably a universal symbol of Christianity" and "has never had any secular purpose." App. 92a (internal quotation marks omitted). The court stayed its decision, noting that this Court's Establishment Clause jurisprudence "is historically unmoored, confusing, inconsistent, and almost universally criticized," and inviting this Court "to revisit and reconsider" it. App. 114-115a.

3. Pensacola appealed. It argued that because the plaintiffs' only alleged injury was offense, they lacked standing. And it argued that the *Lemon* test had been replaced by a historical approach in *Van Orden* and *Town of Greece*, under which the city's actions were constitutional. Pet. C.A. Br. 36-45.

The Eleventh Circuit issued a 10-page, per curiam opinion stating it was "constrained to affirm." App. 2a. According to the panel, the decision in *ACLU of Georgia* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983)—which struck down another cross under the *Lemon* test—controlled. Although the panel acknowledged that this Court has "substantially weakened *Lemon*—and thus, by extension, *Rabun*"—it said that *Lemon* has not been "directly overruled." App. 9a (internal quotation marks omitted). Thus, the panel was constrained to find standing based upon Ryland's "metaphysical" injury. App. 7a. And it was constrained to apply the *Lemon* test and strike down the cross. App. 8a-9a (internal quotation marks omitted).

Two panelists filed over seventy pages of concurrences, explaining that the Eleventh Circuit's precedent is "wrong," incapable of being "squared with a faithful application of Supreme Court precedent," and "needs to be reversed." App. 10a-11a (Newsom, J., concurring), 28a (Royal, J., concurring).

Judge Newsom explained that the panel's decision on standing is "utterly irreconcilable" with *Valley Forge*. While *Valley Forge* "clearly holds" that "'psychological' harm is *not* sufficient to establish Article III injury," the panel held precisely the opposite—that the "metaphysical" harm of feeling "offense" was enough. App. 13a. On the merits, Judge Newsom noted that the Eleventh Circuit "effectively dismissed history as a reliable guide for Establishment Clause cases," App. 16a, even though this Court in *Town of Greece* held that "[t]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" App. 16a-20a (quoting *Town of Greece*, 134 S.

Ct. at 1819). Surveying the "history underlying the practice of placing and maintaining crosses on public land," Judge Newsom concluded that Pensacola's actions are permissible under *Town of Greece*. App. 20a-25a.

Judge Royal, too, concluded that plaintiffs' allegations of "feeling offended and excluded" were merely "the psychological consequence of seeing a cross they don't like—the kind of injury that the Supreme Court said in *Valley Forge* would not create standing." App. 69a. And on the merits, he argued that the touchstone of an Establishment Clause violation is coercion; but the cross "stands mute and motionless," "oppresses no one," "requires nothing of anyone," and "commands nothing." App. 59a.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's standing rule conflicts with decisions of this Court and other circuits.

The panel concluded that Respondent Ryland has standing because he "uses Bayview Park 'many times throughout the year' and is 'offended and feel[s] excluded by'" the cross. App. 7a. The panel found this "'metaphysical' or 'spiritual' injury" sufficient for standing. *Ibid.* (quoting *Rabun*, 698 F.3d at 1108). But as two of the three judges acknowledged, this "sweeping standing rule" is "utterly irreconcilable" with this Court's precedent. App. 13a-15a (Newsom, J., concurring in the judgment), 64a (Royal, J., concurring in the judgment). It also perpetuates a circuit split.

A. The Eleventh Circuit's standing ruling conflicts with this Court's precedents.

1. To establish Article III standing, plaintiffs must prove they have suffered (1) an "injury-in-fact" that (2) is caused by the defendant and (3) is redressable by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury-in-fact must be "particularized"—meaning it must affect the plaintiff in "a personal and individual way." *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016). And the injury must be "concrete"—meaning it "must actually exist" and be "real" rather than "abstract." *Ibid.*

The leading cases on injury under the Establishment Clause are *Valley Forge* and *Schempp*. In *Valley Forge*, plaintiffs challenged the transfer of federal property to a religious college. 454 U.S. at 468. The plaintiffs had never visited the property but heard about the transfer through a news release. *Id.* at 487. This Court concluded that plaintiffs lacked standing, because "the psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under Art. III." *Id.* at 485.

In *School Dist. of Abington Twp.* v. *Schempp*, the Court found standing where public-school children were required to participate in Bible reading and prayer or else leave the classroom. The Court found standing because plaintiffs were "directly affected by the laws and practices against which their complaints are directed." 374 U.S. 203, 224 n.9 (1963). Or, as *Valley Forge* put it, plaintiffs "were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." 454 U.S. at 486 n.22. Ra-

ther than basing standing on feelings, the Court focused on the objective legal effect of the government's conduct—subjecting a captive audience to government-controlled religious exercises.

Here, the panel acknowledged that Respondents were not a captive audience and were not subjected to any government-controlled religious exercises. Nevertheless, the panel held that Respondents have standing because they suffered a "metaphysical" injury when they felt "offended" at the cross. App. 7a.

That ruling cannot be reconciled with *Valley Forge*. Indeed, as two of the three panelists admitted, basing standing on this kind of "squishy 'psychological' injury" is "utterly irreconcilable" with *Valley Forge*. App. 13a-14a, 64a; see also *Hein* v. *Freedom From Religion Found., Inc.,* 551 U.S. 587, 626 (2007) (Scalia, J., concurring in the judgment) (*Valley Forge* was "a resounding rejection of the very concept of Psychic Injury"); *ACLU-NJ* v. *Township of Wall*, 246 F.3d 258, 265 (3d Cir. 2001) (Alito, J.) ("resentment" upon seeing a religious display is arguably "tantamount to the 'psychological consequence[s]'" that were "insufficient to establish standing" in *Valley Forge*).[1]

---

[1] This Court has resolved several cases involving religious displays without considering standing. See, *e.g.*, *Van Orden* v. *Perry*, 545 U.S. 677 (2005); *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844 (2005); *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch* v. *Donnelly*, 465 U.S. 668, 671 (2002); *Stone* v. *Graham*, 449 U.S. 39 (1980). But "drive-by jurisdictional rulings of this sort" have "no precedential effect." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998); see also *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 144-45 (2011) ("[T]his Court is not bound by a prior exercise of

2. The Eleventh Circuit's standing ruling also conflicts with this Court's cases under the Equal Protection Clause. Under the Equal Protection Clause, this Court has repeatedly held that mere feelings of offense are insufficient to demonstrate standing. Instead, plaintiffs must show that they were "personally denied equal treatment by the challenged discriminatory conduct." *Allen* v. *Wright*, 468 U.S. 737, 755 (1984).

In *Allen*, parents of African-American public school children sued the IRS, claiming it should have denied tax-exempt status to racially discriminatory private schools. According to the parents, they and their children suffered "stigmatic injury, or denigration," based on their race. *Id.* at 754. But this Court held that plaintiffs lacked standing because they failed to allege that they had been "personally denied equal treatment" by the IRS. *Id.* at 755. As the Court explained, the stigma caused by racial discrimination "is one of the most serious consequences of discriminatory government action"; but "such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Ibid.* (quoting *Heckler* v. *Mathews*, 465 U.S. 728, 739-740 (1984)).

Under the rule in *Allen*, plaintiffs lack standing to challenge a club's racially discriminatory membership policy merely because the policy is offensive; they have standing only if they "applied for membership" and were denied. *Ibid.* (citing *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166-67 (1972)). Similarly, plaintiffs lack

---

jurisdiction" in Establishment Clause cases that "do not mention standing.").

standing to challenge race discrimination in the criminal justice system merely because it is offensive; they have standing only if "they ha[ve] been or would likely be subject to the challenged practices." *Ibid.* (citing *O'Shea* v. *Littleton*, 414 U.S. 488 (1974)). And plaintiffs lack standing to challenge the government's display of racially charged symbols merely because they are offensive; they have standing only if they were "personally denied equal treatment" by the government's "discriminatory conduct." *Moore* v. *Bryant*, 853 F.3d 245, 249 (5th Cir.), cert. denied, 138 S. Ct. 468 (2017).

The Eleventh Circuit's standing ruling cannot be reconciled with these cases. In fact, it produces an anomalous result: African-Americans who are offended by the display of a Confederate flag cannot sue under the Equal Protection Clause, because they have no cognizable injury. *Ibid.* But atheists who are offended by the cross *on the same flag* can sue under the Establishment Clause. See *Briggs* v. *Mississippi*, 331 F.3d 499, 503-08 (5th Cir. 2003) (entertaining such a claim on the merits). This is not only absurd, it contradicts this Court's repeated admonition that "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576; see also *Valley Forge*, 454 U.S. at 484 (no "'sliding scale' of standing" depending on the constitutional provision).

B. The Eleventh Circuit's standing ruling perpetuates a circuit split.

1. The decision below also contributes to a circuit split. Nine circuits, including the Eleventh, hold that

mere "direct, unwelcome contact" with a religious display is sufficient to establish standing.[2] According to these circuits, the plaintiffs in *Valley Forge* lacked standing because "they had absolutely no personal contact with the alleged establishment of religion." *Suhre*, 131 F.3d at 1086. But when a plaintiff has "contact" with an offensive display, it "create[s] a larger psychological wound"—which is "a personal injury distinct from and in addition to each citizen's general grievance against unconstitutional government conduct." *Id.* at 1086-87 (quoting *Washegesic* v. *Bloomingdale Pub. Schs.*, 33 F.3d 679, 683 (6th Cir. 1994)).

2. The Seventh Circuit, by contrast, holds that merely being "deeply offended" by direct contact with a display is not enough. *ACLU of Ill.* v. *City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986) (Posner, J.). Instead, plaintiffs must either "alter their behavior" to avoid the display, *ibid.*; or be unable to do so, *Freedom From Religion Found., Inc.* v. *Obama*, 641 F.3d 803, 807 (7th Cir. 2011).

---

[2] *Freedom From Religion Found., Inc.* v. *New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 477 (3d Cir. 2016); see also *Cooper* v. *U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009) ("direct contact"); *Suhre* v. *Haywood County*, 131 F.3d 1083, 1085-88 (4th Cir. 1997) ("direct contact"); *Murray* v. *City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991) ("direct, personal contact"); *ACLU of Ohio Found., Inc.* v. *Ashbrook*, 375 F.3d 484, 490 (6th Cir. 2004) ("direct, unwelcome contact"); *Red River Freethinkers* v. *City of Fargo*, 679 F.3d 1015, 1023 (8th Cir. 2012) ("direct and unwelcome personal contact"); *Vasquez* v. *Los Angeles County*, 487 F.3d 1246, 1251 (9th Cir. 2007) ("unwelcome direct contact"); *Foremaster* v. *City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989) ("direct, personal contact").

In *Freedom From Religion Foundation, Inc.* v. *Zielke*, for example, plaintiffs challenged a Ten Commandments monument, alleging that "the display is a rebuke to their religious beliefs." 845 F.2d 1463, 1467 (7th Cir. 1988). But they "admit[ted] that they ha[d] not altered their behavior as a result of the monument." *Ibid.* The Seventh Circuit held that plaintiffs' feelings of offense were "exactly the type of psychological harm that" this Court in *Valley Forge* "held cannot confer standing." *Id.* at 1468.

In the years following *Zielke*, the Seventh Circuit occasionally suggested that it might adopt the "direct and unwelcome contact" standard of other circuits. See *Books* v. *City of Elkhart*, 235 F.3d 292, 300 (7th Cir. 2000). But the court recently reaffirmed its altered-conduct standard in *Obama*. There, plaintiffs alleged injury "because they fe[lt] excluded, or made unwelcome," when the President proclaimed a National Day of Prayer. 641 F.3d at 806-07. But under "the rule of *Valley Forge* and *St. Charles*," Judge Easterbrook explained, "offense at the behavior of the government" doesn't provide standing; instead, plaintiffs must show that they "altered their conduct." *Id.* at 807-08. Because plaintiffs had "not altered their conduct one whit," they lacked standing. *Id.* at 808.

Zielke and *Obama* cannot be reconciled with the decision below. Here, it is undisputed that Respondents did not "take any affirmative steps to avoid the cross." App. 11a. Thus, this case would have been dismissed for lack of standing in the Seventh Circuit.

3. This Court has already granted certiorari to resolve this split once before. See Pet. for Writ of Cert., *Salazar* v. *Buono*, 559 U.S. 700 (2010) (No. 08-472), 2008 WL 4566257, at *16-18 (*Buono* Cert. Pet.) (citing

"a fundamental disagreement among the courts of appeals on the correct interpretation of *Valley Forge*"). But in *Buono*, the government failed to properly appeal the Ninth Circuit's standing ruling, so that ruling "became final and unreviewable" in this Court. 559 U.S. at 711-12. Here, by contrast, the Eleventh Circuit's decision has been immediately appealed, so there is no barrier to review. This Court should grant review and clarify that mere "offense" at encountering a religious display is not a cognizable injury under *Valley Forge*. See also *City of Edmond* v. *Robinson*, 517 U.S. 1202-03 (1996) (Rehnquist, J., dissenting from denial of certiorari) (Court should resolve "disagreement among the Courts of Appeals about whether *Valley Forge* allow[s] standing to a plaintiff alleging direct injury by being exposed to a state symbol that offends his beliefs"); see also *Ashbrook*, 375 F.3d at 496-97 (Batchelder, J., dissenting) (lamenting how lower courts "have long attempted to redefine" *Valley Forge*); *Doe* v. *Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 500 (5th Cir. 2007) (DeMoss, J., concurring) (arguing that the "double standard" on Establishment Clause standing "must be corrected").

Such a decision would not only resolve a longstanding circuit split, but also reduce the religion-based divisiveness occasioned by this Court's decisions. This Court has sometimes said that the government should be "neutral" toward religion, communicating a message of neither endorsement nor disapproval of religion. *County of Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring). But in litigation over a religious display, a court's decision often sends a more powerful message than the display itself. A decision allowing the display is perceived as endorsement; a decision requiring removal of the display is perceived as hostility.

The litigation itself becomes the occasion of ill-will across religious lines, with each side caring more about the court's decision than the challenged symbol. By affirming the common-sense standing limit in *Valley Forge*, this Court will go a long way toward reducing "the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring).

II. The Eleventh Circuit's application of *Lemon* conflicts with decisions of this Court and other circuits.

The panel's ruling on the merits also warrants this Court's review. The panel held that it was bound to apply *Lemon* because it has not been "directly overruled." App. 9a (internal quotation marks omitted). It then concluded that the city's actions violated *Lemon* because they lacked a "secular purpose." App. 8a-9a. This ruling conflicts with decisions of this Court and exacerbates a circuit split.

A. The Eleventh Circuit's reliance on *Lemon* conflicts with this Court's decisions in *Van Orden* and *Town of Greece*.

1. This Court's earliest decisions interpreted the Establishment Clause based on historical practices and understandings, not the *Lemon* test. In *Everson* v. *Board of Education*, 330 U.S. 1 (1947), the Court's first modern Establishment Clause case, the majority said the Clause must be interpreted "in the light of its history." *Id.* at 14. The dissent agreed that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment." *Id.* at 33 (Rutledge, J., dissenting). For the next 24 years, the Court followed a

historical approach, basing its decisions on the history of disputed practices. See, *e.g.*, *McGowan* v. *Maryland*, 366 U.S. 420, 437 (1961) ("an investigation of what historical position Sunday Closing Laws have occupied with reference to the First Amendment should be undertaken") (citing *Everson*, 330 U.S. at 14); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 680 (1970) (upholding church tax exemptions because they were supported by "more than a century of our history and uninterrupted practice").

The Court departed from its historical approach in *Lemon* v. *Kurtzman*, which involved government funding for religious schools. 403 U.S. 602 (1971). Noting that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," the Court "gleaned" the now-familiar *Lemon* test—which requires that government action (1) have a secular purpose, (2) have the primary effect of neither advancing (or, as later cases said, "endorsing") nor inhibiting religion, and (3) not excessively entangle the government in religion. *Id.* at 612.

The *Lemon* test is one of the most harshly criticized doctrines in all of constitutional law. Scholars have called it "a conceptual disaster," Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 Cal. L. Rev. 5, 6 (1987), that is "possibly the most maligned constitutional standard the Court has ever produced," Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. Ill. L. Rev. 463, 468. Lower courts have criticized it as "hopelessly open-ended." *Doe ex rel. Doe* v. *Elmbrook Sch. Dist.*,

687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, J., dissenting). Justices of this Court have criticized it repeatedly.[3]

In several important contexts, such as legislative accommodation of religion and school funding, the Court no longer adverts to *Lemon* at all, but has instead substituted more precise tests. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005) (not applying *Lemon*); *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 662–63 (2002) (same). In the context of religious symbols, the Court has likewise taken important steps away from *Lemon*, but without the decisive break needed to obviate the lower courts' confusion.

In *Van Orden*, for example, which involved a challenge to a Ten Commandments display, a four-Justice plurality said that the *Lemon* test was "not useful in dealing with the sort of passive monument" at issue, and that the analysis must instead be "driven both by the nature of the monument and by our Nation's history." *Van Orden*, 545 U.S. at 686. Justice Breyer, in his concurrence, also declined to apply *Lemon*, stating

---

[3] See *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-400 (1993) (Scalia, J., concurring) (collecting criticism from Scalia, Thomas, Kennedy, O'Connor, White, JJ., and Rehnquist, C.J); *Committee for Pub. Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting); see also *Utah Highway Patrol Ass'n* v. *American Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari) (collecting criticism by Kennedy, Alito, Thomas, and Scalia, JJ., and Roberts, C.J.); *Green* v. *Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1245 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc) (continuing to apply *Lemon* "leave[s] the state of the law 'in Establishment Clause purgatory'" (citation omitted)).

that there is "no test-related substitute for the exercise of legal judgment." *Id.* at 700.

Similarly, in *Salazar* v. *Buono*, in which the Court declined to strike down a land-transfer statute protecting a cross, a three-Justice plurality went out of its way to criticize "the so-called *Lemon* test," suggesting that it is no longer "the appropriate framework" to apply. 559 U.S. 700, 708, 720-21 (2010) (Kennedy, J., joined by Roberts, C.J., Alito, J.) (citing *County of Allegheny*, 492 U.S. at 668; *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 763-68 (1995)); *id.* at 728 (Alito, J., concurring) (questioning whether "it is appropriate to apply the so-called 'endorsement test'"). Justices Scalia and Thomas did not reach the merits, but gave no indication that they had abandoned their longstanding criticism of *Lemon*. *Id.* at 729. Only a three-Justice dissent advocated for applying *Lemon*. *Id.* at 742 (Stevens, J., dissenting).

Most recently, in *Town of Greece*, which involved a town's practice of legislative prayer, a majority of the Court made a sharp break with *Lemon*. The Second Circuit had struck down the town's prayers under the *Lemon* test. 134 S. Ct. at 1818. But this Court reversed and refused to apply *Lemon*. Instead, in an opinion by Justice Kennedy, the Court said that "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers." *Id.* at 1819. Citing his own criticism of the *Lemon* test, Justice Kennedy held that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* at 1819 (quoting *County of Allegheny*, 492 U.S. at 670).

2. The Eleventh Circuit's opinion cannot be reconciled with these cases. Under *Town of Greece*, the key question is whether Pensacola's actions are consistent

with "historical practices and understandings" under the Establishment Clause. 134 S. Ct. at 1819. There is no question that they are. As the plurality recognized in *Van Orden*, there is an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." 545 U.S. at 686. This history dates back to the founding, when, for example, "[t]he First Congress instituted the practice of beginning its legislative sessions with a prayer," *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting); George Washington added "the concluding words 'so help me God'" to the Presidential oath, *ibid.*; and "[t]he first federal monument" described the dates of "fallen sailors as 'the year of our Lord, 1804.'" *Van Orden*, 545 U.S. at 689 n.9 (plurality). Under the historical approach, Pensacola's actions are constitutional so long as they pose "no greater potential for an establishment of religion" than these timeworn practices. *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part). The cross in this case—which "[n]o one was compelled to observe," and which everyone is "free to ignore"—comfortably passes that test. *Id.* at 664.

Even more specifically, traditional acknowledgments of religion include "the practice of placing and maintaining crosses on public land." App. 21a (Newsom, J., concurring in the judgment). As Judge Newsom noted, "the erection of crosses as memorials is a practice that dates back centuries"—from the San Buenaventura Mission Cross placed in 1782, to the Cross Mountain Cross in 1847, to numerous crosses placed around the time of the ratification of the Fourteenth Amendment in the late 1800s. App. 21a-25a. "[T]here is a robust history" of "cities, states, and even

the federal government erecting and maintaining cross monuments on public land," which remain "ubiquitous in and around this country." App. 25a-26a (Newsom, J., concurring in the judgment); see also App. 186a-223a (collecting 38 examples of memorial crosses); *Trunk* v. *City of San Diego*, 660 F.3d 1091, 1099-100 (9th Cir. 2011) (Bea, J., dissenting) (collecting additional examples); *Buono* v. *Kempthorne*, 527 F.3d 758, 765 n.6 (9th Cir. 2008) (O'Scannlain, J., dissenting from the denial of rehearing en banc) (same). Pensacola's actions in this case fall well within this tradition.

Pensacola's actions are also consistent with the historical meaning of the Establishment Clause. *Town of Greece*, 134 S. Ct. at 1819. At the time of the founding, an establishment of religion involved several elements: "(1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church." *Felix* v. *City of Bloomfield*, 847 F.3d 1214, 1216 (10th Cir. 2017) (Kelly, J., dissenting from denial of rehearing en banc) (quoting Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003)), cert. denied, 138 S. Ct. 357 (2017); see also *Town of Greece*, 134 S. Ct. at 1837 (Thomas, J., concurring) (colonial establishments "exercised government power in order to exact financial support of the church, compel religious observance, or control religious doctrine"). Here, Respondents have not alleged that a passive display embodies any of these elements,

nor could they. Accordingly, Pensacola's actions are permissible under *Town of Greece*.

3. The Eleventh Circuit's decision also conflicts with *Van Orden*, in which this Court upheld a Ten Commandments display. In his controlling opinion, Justice Breyer did not apply the *Lemon* test, noting that there is "no test-related substitute for the exercise of legal judgment." 545 U.S. at 700. Instead, he examined the monument's "text," "context," and "history" in light of the "underlying purposes" of the Religion Clauses. *Id.* at 700-03. Although the text of the Ten Commandments "undeniably has a religious message," the context of the display—including its "physical setting" among other monuments—meant that a secular historical message predominated. More importantly, Justice Breyer found it "determinative" that "40 years passed" before any legal challenge—demonstrating that "few individuals, whatever their system of beliefs, are likely to have understood the monument as" an establishment. *Ibid.* Instead, striking down such a longstanding display would "exhibit a hostility toward religion that has no place in our Establishment Clause traditions. *Id.* at 704.

Here, the text, context, and history of the monument likewise demonstrate that Pensacola has not established a religion. The only text associated with the monument is secular, stating that it was "Sponsored" by, "Donated" by, and "Dedicated" to members of a private secular group. The context of the monument is more benign than in *Van Orden*: Rather than standing at the seat of government, the monument sits in a remote corner of a recreational park and is one of over 170 displays throughout Pensacola's parks. And the monument stood for not just 40 years but over 75 years

without legal challenge. So striking down the monument here would express even more "hostility toward religion" than in *Van Orden*. 545 U.S. at 704.

B. The Eleventh Circuit's reliance on *Lemon* exacerbates a circuit split over the correct test to apply to religious displays.

The lower court's ruling also exacerbates a circuit split over the correct Establishment Clause test to apply to religious displays. One circuit applies the historical approach of *Town of Greece*. Five circuits continue to apply *Lemon*. And one circuit applies a combination of *Lemon* and *Van Orden*.

1. In *New Doe Child #1* v. *United States*, the Eighth Circuit correctly recognized that *Town of Greece* represents "a major doctrinal shift" in Establishment Clause jurisprudence—one that abandons *Lemon* in favor of a historical approach. ___ F.3d ____, 2018 WL 4088462, at *2 (8th Cir. Aug. 28, 2018) (Gruender, J.) (internal quotation marks omitted).

There, the Eighth Circuit upheld the inscription of the national motto, "In God We Trust," on currency, because the practice is consistent "with early understandings of the Establishment Clause as illuminated by" historical practices. 2018 WL 4088462, at *3. The court recognized that "[o]ver the last half century, the Supreme Court has adopted numerous" other tests to interpret the Establishment Clause. *Id.* at *2. But in *Town of Greece*, the "Court offered an unequivocal directive: '[T]he Establishment Clause *must* be interpreted by reference to historical practices and understandings.'" *Ibid.* (quoting *Town of Greece*, 134 S. Ct. at 1819; emphasis in *New Doe*). Further, *Town of Greece* "emphasi[zed] that this historical approach is

not limited to a particular factual context," and made no "reference to other tests in [its] opinion." *Ibid.* In light of *Town of Greece*, plaintiffs' *Lemon* argument that the motto was unconstitutional because it "was originally inscribed on currency" with a religious purpose "fail[ed] to state a claim under the Establishment Clause." *Id.* at *4; see also *Smith* v. *Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 602-05 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result) (agreeing that *Town of Greece* is a "major doctrinal shift" that "rejected [*Lemon*'s] endorsement test in favor of the historically grounded coercion test").

2. By contrast, five circuits (including the Eleventh here) continue to apply *Lemon* to religious displays. See, *e.g., Freedom From Religion Found., Inc.* v. *Concord Cmty. Schs.*, 885 F.3d 1038 (7th Cir. 2018) (applying *Lemon*, not *Town of Greece*, to high school choral performance); *American Humanist Ass'n* v. *Maryland-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195 (4th Cir. 2017) (applying *Lemon* without discussing *Town of Greece*), pets. for cert. filed, Nos. 17-1717, 18-18 (U.S. June 25, 2018; June 29, 2018); *Felix* v. *City of Bloomfield*, 841 F.3d 848 (10th Cir. 2016) (applying *Lemon* to a Ten Commandments display without mentioning *Town of Greece*); *American Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 238 (2d Cir. 2014) (applying "the three-prong analysis set forth in" *Lemon*); cf. *Smith*, 788 F.3d at 588-89 (*Town of Greece* was "simply an application of * * * *Marsh*," and thus does not "general[ly]" displace "the endorsement analysis").

In *Maryland-National Capital Park & Planning Commission*, for instance, the Fourth Circuit relied on

Lemon to strike down a cross memorializing World War I veterans. 874 F.3d at 205-12. The court did not discuss *Town of Greece*, nor did it ask whether maintaining a cross on public property comports with historical practices and understandings. Further, although the Fourth Circuit *did* consider the history of the cross—it had "stood unchallenged for 90 years"—the court dismissed that fact as unhelpful, reasoning that "[p]erhaps the longer a violation persists, the greater the affront to those offended." *Id.* at 205, 208. This reasoning runs directly contrary to Justice Breyer's *Van Orden* concurrence, which found the longevity of the monument "determinative." 545 U.S. 677, 702. But it mirrors the panel's holding here, which dismissed the fact that the cross stood "for nearly 75 years, essentially without incident" on the ground that "historical acceptance without more" does not satisfy the Establishment Clause. App. 3a, 8a (internal quotation marks omitted).

In *Felix*, the Tenth Circuit likewise struck down a Ten Commandments monument under *Lemon*. 841 F.3d at 856-65. But as Judge Kelly and Chief Judge Tymkovich explained in dissenting from the denial of rehearing en banc, *Lemon* was "the wrong test." 847 F.3d at 1215. Rather, *Town of Greece* requires courts to consider the "historical understanding of the First Amendment." *Id.* at 1219. Under that test, Judge Kelly argued, the panel should have concluded that "the public display of memorials with historical significance should generally not be construed as an 'establishment of religion.'" *Id.* at 1220-21.

Meanwhile, in *Concord Community Schools*, the Seventh Circuit expressly refused to apply *Town of*

Greece to a high school's use of religious music and imagery in a Christmas show. The panel majority acknowledged that "Justices Scalia and Thomas [have] expressed the view that" *Town of Greece* "rejected" the endorsement test; but the panel did not, "[f]or now," "feel free to jettison that test altogether." 885 F.3d at 1045 n.1. Accordingly, the majority applied *Lemon* in upholding the performance. *Id.* at 1045-50. Concurring in the judgment, Judge Easterbrook explained that he would have upheld the performance more straightforwardly "as a matter of history [and] constitutional text": as *Town of Greece* "show[s]," government does not "'establish[]' a religion through an artistic performance that favorably depicts one or more aspects of that religion's theology or iconography." *Id.* at 1053.

3. In contrast with these circuits, the Ninth Circuit generally applies *Lemon*, but recognizes 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). So most of the time it applies *Lemon*; but in some cases it also relies on a display's text, context, and history under *Van Orden*. See also *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (applying both *Lemon* and *Van Orden*).

4. This split is not merely academic. In this case, it was outcome determinative. Both the district court and two of the three panelists said they would have upheld Pensacola's actions based on a historical approach like that in *Town of Greece*. See App. 21a ("There is, put simply, lots of history underlying the practice of placing and maintaining crosses on public land—that practice, in *Greece*'s words, comfortably

'fits within the tradition long followed' in this country."), 59a (The cross, in light of history, "does not violate the Establishment Clause."), 89a ("[T]he historical record indicates that the Founding Fathers did not intend for the Establishment Clause to ban crosses and religious symbols from public property."). But because they were "constrained" to apply *Lemon*, they struck down the cross. App. 9a-10a.

More fundamentally, the shift from *Lemon* to a historical approach honors the First Amendment goal of neutrality toward religion. For religious displays, the proper "baseline" for assessing neutrality is not complete secularism, which would result in hostility toward religion, but the state of the public culture in the "non-government-controlled sector," which has both religious and secular elements. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 193 (1992). To the extent the government participates in public culture through symbolic displays, it should be a reflection of that culture, not an influence pushing for more or less religion. *Ibid.* Unfortunately, under *Lemon*, "[f]ew of our traditional practices recognizing the part religion plays in our society can withstand scrutiny." *County of Allegheny*, 492 U.S. at 670. So *Lemon* "sweep[s] away" what has "long been settled," ultimately producing hostility toward religion. *Town of Greece*, 134 S. Ct. at 1819. History, by contrast, offers the closest thing to a status quo baseline. By relying on history, courts can distinguish between government actions that actually "threat[en]" to establish a religion, *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring), and those that merely reflect the fact that religion is a natural part of American history and culture.

C. The Eleventh Circuit's ruling conflicts with other circuits over the application of the Establishment Clause to crosses.

1. The Eleventh Circuit's decision also widens a circuit split over the application of the Establishment Clause to crosses. The Fourth, Ninth, and Eleventh Circuits have held that crosses are so "sectarian in nature" that they are virtually per se unconstitutional. *Trunk*, 629 F.3d at 1110-12. *Rabun* is illustrative. There, the Eleventh Circuit held that the government had a "religious purpose" in permitting a cross monument, because "the latin cross is universally regarded as a symbol of Christianity." 698 F.2d at 1110-11. The panel applied the same "*Lemon*-based purpose analysis" here, striking down the cross not because Pensacola sought to use it to advance a religious purpose, but merely because the cross is "similar[]" to the "cross at issue in *Rabun*." App. 2a-3a.

Likewise, in *Separation of Church & State Committee* v. *City of Eugene*, the Ninth Circuit struck down a cross simply because "[t]here is no question that the Latin cross is a symbol of Christianity" and the memorial was "on public land." 93 F.3d 617, 620 (9th Cir. 1996) (per curiam). Since *City of Eugene*, the Ninth Circuit has repeatedly invalidated crosses, because they are "sectarian in nature" and lack any "ancillary meaning." *Trunk*, 629 F.3d at 1110-12 (citing *Rabun*); see also *Buono* v. *Norton*, 371 F.3d 543, 548 (9th Cir. 2004) (cross case "squarely controlled" by *Eugene*); *Buono* v. *Kempthorne*, 502 F.3d 1069 (9th Cir. 2008) (cross "is exclusively a Christian symbol"), rev'd, 559 U.S. 700 (2009).

Most recently, the Fourth Circuit adopted the same analysis. Invoking *Trunk* and *Rabun*, the court in

Maryland-National Capital Park & Planning Commission held that because the Latin cross is "exclusively a Christian symbol," the religious meaning of the cross "overshadow[ed the] secular elements" indicating that it was a war memorial. 874 F.3d at 206-10. As the dissent explained, the panel's reasoning could lead "to per se findings that all large crosses are unconstitutional despite any amount of secular history and context." *Id.* at 219 (Gregory, C.J., dissenting in part).

2. By contrast, the Second, Fifth, and Tenth Circuits have recognized that government display of crosses can be permissible. This is consistent with *Buono*, in which the plurality emphasized that while the Latin cross is "certainly a Christian symbol," it can also express a "historical meaning." 559 U.S. at 707, 715. In *American Atheists*, for instance, the Second Circuit upheld a display of the Ground Zero Cross—a cross-shaped artifact recovered from the debris of the World Trade Center after 9/11. 760 F.3d at 232-33. Rejecting the plaintiffs' argument that "a Latin cross is an inherently religious symbol," the Second Circuit held that crosses can also be displayed for historical purposes—and indeed, "an accurate account of human history frequently *requires* reference[s] to religion." *Id.* at 239-40 (emphasis added).

Similarly, in *Murray*, the Fifth Circuit upheld a Latin cross in the city seal of Austin, Texas. The court acknowledged that the "Latin cross is the symbol of the Christian religion." 947 F.2d at 149. Nonetheless, the court upheld it because the seal promoted "Austin's unique role and history," and because removing it would "arguably evince[] not neutrality, but instead hostility, to religion." *Id.* at 155, 158; see also *Briggs* v.

Mississippi, 331 F.3d 499, 506-07 (5th Cir. 2003) (citing *Murray* and upholding use of the St. Andrew's Cross on the Mississippi state flag).

Finally, in *Weinbaum* v. *City of Las Cruces*, the Tenth Circuit upheld the 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). The court recognized that the Latin cross "is unequivocally a symbol of the Christian faith." *Id.* at 1022-23. But it upheld the seal, because it "simply reflect[ed] the name of the City." *Id.* at 1035.

In short, the circuits disagree over whether the Establishment Clause renders the display of a cross presumptively unconstitutional. The Court should take this case to resolve the split and reaffirm that the First Amendment is not uniquely hostile to crosses.

III. This case is an ideal vehicle for resolving these questions.

This case presents the Court with a clean vehicle for resolving these important Establishment Clause questions. The facts are undisputed. App. 2a. There are no alternative grounds for affirmance. App. 5a-10a. And both the standing and merits questions were squarely presented and thoroughly addressed below.

This case is also an ideal companion case to *American Legion* v. *American Humanist Association* (No. 17-1717) and *Maryland-National Capital Park & Planning Commission* v. *American Humanist Association* (No. 18-18) (together, *American Legion*), for three reasons. First, it presents the important standing question that this Court deemed certworthy in *Buono* but was unable to reach. 559 U.S. at 711-12; see *Buono*

Cert. Pet., 2008 WL 4566257, at *16-18. Neither petition in *American Legion* has raised that question in this Court.

Second, this case has fully developed the historical record and arguments central to the correct application of *Town of Greece*. See App. 20a-21a (Newsom, J., concurring in the judgment) (analyzing the "history underlying the practice of placing and maintaining crosses on public land"). In *American Legion*, by contrast, the Fourth Circuit's decision did not even consider *Town of Greece*, much less address how it might apply in that case.

Third, while this case presents a nearly identical merits question as *American Legion*, it raises that question on a more representative set of facts. *American Legion* involves a cross that is almost 100 years old, obviously serves as a World War I memorial, and hasn't been used for private religious services. But many religious symbols across the country, including the cross in this case, are not a century old, don't serve exclusively as war memorials, and have been used for private religious gatherings. See, *e.g.*, Melissa Nelson Gabriel, *Experts: Pensacola Beach Cross Could Face 1st Amendment Challenges, Much Like Bayview Cross*, Pensacola News J. (July 18, 2017), goo.gl/iqE9mS (cross erected in 1959 to commemorate site of "first religious service" in "the first European settlement in what is now the United States"); Mass. Dep't of Conservation & Recreation, *Resource Management Plan: National Monument to the Forefathers, Plymouth, Massachusetts* (Sept. 2006), goo.gl/tqq7FT (statue commemorating journey of the Pilgrims to the New World); Architect of the Capitol, *Father Junipero*

Serra (Apr. 29, 2016), goo.gl/9bikm8 (statue commemorating establishment of Catholic missions in California); *Buono*, 559 U.S. at 707 (Mojave Desert Cross was "a gathering place for Easter services"); *American Atheists*, 760 F.3d at 234-35 (Ground Zero Cross was used for religious services and housed at a Catholic church); *Freedom From Religion Found., Inc.* v. *Weber*, 951 F. Supp. 2d 1123, 1128 (D. Mont. 2013) (statue of Jesus was site of church services), aff'd, 628 F. App'x 952 (9th Cir. 2015). Thus, granting both cases together will give the Court a more representative set of facts and more substantial record for considering the important questions presented. It will also protect against the possibility that the Court might encounter vehicle problems in one or the other case that would prevent it from resolving those questions—as it did in *Buono*.

For precisely these reasons, the Court has often granted review in two cases presenting nearly identical issues. See, *e.g.*, *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), and *Grutter* v. *Bollinger*, 539 U.S. 306 (2003) (presenting similar affirmative action issues); *United States* v. *Booker*, 543 U.S. 220 (2005) (consolidated with *United States* v. *Fanfan*) (presenting similar Sixth Amendment issues). This practice is particularly common in Establishment Clause cases. See, *e.g.*, *County of Allegheny*, 492 U.S. 573 (1989) (considering two different religious displays in two different cases); *Van Orden*, 545 U.S. 677 (2005), and *McCreary County*, 545 U.S. 844 (2005) (considering two different Ten Commandments displays). Moreover, if this Court grants review in this case and *American Legion*, the two cases could, at the Court's direction, be briefed on

the merits under a simultaneous schedule, argued on the same day, and decided during the same term.[4]

In short, this is an ideal vehicle for the Court to clarify that *Town of Greece* means what it says and that the Constitution is not hostile to the many longstanding religious symbols on public land across the country.

CONCLUSION

The petition should be granted.

---

[4] Petitioners filed this petition ten days after issuance of the decision below and have moved for expedited review so this Court can consider the petition alongside the petitions in *American Legion*. On September 13, 2018, the court below instructed the clerk to withhold the mandate, indicating that a poll has been requested *sua sponte* on whether to grant rehearing en banc. See 11th Cir. R. 35 & IOP 5. Petitioners also intend to petition for rehearing en banc. But the filing of an en banc petition or a grant of rehearing does not limit this Court's power to grant certiorari, which "extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency." *Forsyth* v. *City of Hammond*, 166 U.S. 506, 514 (1897); see also 28 U.S.C. § 1254(1); 17 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4036 (3d ed. 2004) ("Once a case has come to be in the court of appeals, there is power to issue certiorari without any limitation akin to the much elaborated and significantly reduced requirement of finality imposed on review of state court judgments."); see, *e.g.*, *United States* v. *Grasso*, 568 F.2d 899, 900-01 & n.1 (2d Cir. 1977) (Timbers, J., dissenting from denial of rehearing en banc) (noting that "the Solicitor General filed a petition for certiorari" while the en banc petition was pending), vacated 438 U.S. 901 (1978).

Respectfully submitted.

MICHAEL W. MCCONNELL
559 Nathan Abbott Way
Stanford, CA 94305

JAMES NIXON DANIEL
TERRIE LEE DIDIER
Beggs & Lane, RLLP
501 Commendencia St.
Pensacola, FL 32502

LUKE W. GOODRICH
Counsel of Record
LORI H. WINDHAM
JOSEPH C. DAVIS
The Becket Fund for
Religious Liberty
1200 New Hampshire
Ave., N.W., Ste. 700
Washington, DC 20036
(202) 955-0095
lgoodrich@becketlaw.org

Counsel for Petitioners

SEPTEMBER 2018