Nos. 17-1717 & 18-18

In the
Supreme Court of the United States

THE AMERICAN LEGION, ET AL.,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

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

BRIEF OF MAJOR GENERAL PATRICK BRADY AND VETERANS GROUPS ERECTING AND MAINTAINING WAR MEMORIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Nearly a century ago, the Bladensburg World War I ("WWI") Memorial—like countless other monuments—was dedicated to honor and memorialize forty-nine men from Prince George's County, Maryland, who gave their lives in service to our country. Does that memorial violate the Establishment Clause of the United States Constitution merely because it is shaped like a cross?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Major General Patrick Brady (United States Army, retired), a Medal of Honor recipient and one of the most decorated soldiers in American history, and six veterans groups representing thousands of living veterans. Descriptions of all *Amici* and their particular interests in this case appear in the appendix to this brief. *Amici* are dedicated to honoring and serving veterans and their families, as well as publicly remembering those who gave their last full measure of devotion for the cause of freedom.

This case is about how this country may commemorate its fallen servicemen and women with monuments both old and new. *Amici* seek to protect existing memorials that honor the valor and sacrifice of those who have died in service to our country. In Judge Wilkinson's words, *Amici* want to ensure that "those honored [are left] to rest in peace." *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n* ("*M-NCPPC*"), 891 F.3d 117, 123 (4th Cir. 2018) (Wilkinson, J., dissenting from denial of rehearing *en banc*).

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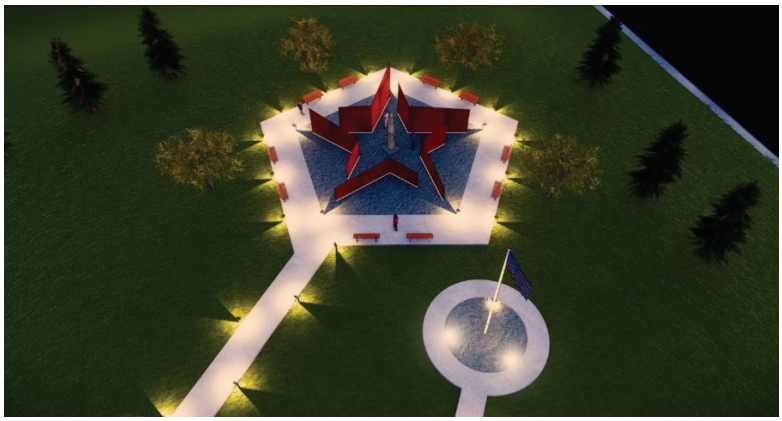
[1] All parties received timely notification of *Amici*'s intent to file this brief. Petitioners filed blanket consents to the filing of *amicus* briefs and Respondents consented to the filing of this brief. Documentation reflecting that consent is on file with the Clerk. No counsel for any party authored this brief in whole or in part and no person other than *Amici* and its counsel funded the preparation or submission of this brief.

Several *Amici*, like other veterans groups across the country, are also designing new memorials to honor servicemen and women. But, in light of the confusion and unpredictability that characterizes current Establishment Clause jurisprudence, they have no clear standard by which to predict what symbols, designs, and words are allowed.

For example, some *Amici* are finalizing the designs of two new veterans memorials: the General Hays Veterans Memorial that will be erected in Hays, Kansas and the Parkville Veterans Memorial that will be erected in Parkville, Missouri. An architectural rendering of the General Hays Veterans Memorial, which commemorates heroes from the "High Plains" of Kansas from the time of "Old Fort Hays" to the present, is pictured below. *See* Patriot Outreach, http://www.patriotoutreach.org/General_Hays_Veterans_Memorial.html.



The current design incorporates a pentagon foundation and five individual planes positioned in the shape of a star, each representing a branch of the armed forces. To honor the self-sacrifice of the fallen, the memorial's entrance includes a plaque with this quote from Jesus: "Greater love hath no man than this, that a man lay down his life for his friends." Under current Establishment Clause jurisprudence, one person who views the plaque and takes offense to this quote because it was originally spoken by a religious figure could potentially scuttle *Amici's* years of work to commemorate veterans' noble sacrifices.

This confused state of the law chills *Amici's* efforts to honor veterans by erecting new memorials. *Amici* have a strong interest in this Court providing a clear and consistent legal standard for analyzing passive displays under the Establishment Clause. This clarity is needed so that *Amici* can erect new veterans' memorials without fear of legal reprisal and those charged with maintaining existing memorials may protect them from extinction.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about a WWI memorial in Bladensburg, Maryland known as the "Peace Cross"—nearly a century old—that was dedicated for the sole purpose of honoring forty-nine men who gave their lives in service to our country. The Fourth Circuit decided that the Bladensburg Memorial is unconstitutional because it is shaped like a cross.

That decision is wrong. This Court has never held that the Establishment Clause requires eradicating all religious references from the public square. Not only does the Fourth Circuit's decision jeopardize other similar memorials, like the Argonne Cross and the Canadian Cross of Sacrifice in Arlington National Cemetery, it also conflicts with decisions of this Court and rulings by other Courts of Appeals.

Argonne Cross

Canadian Cross of Sacrifice

Given the effect of the Fourth Circuit's ruling, whether the Bladensburg Memorial is constitutional is "a question of substantial importance." *See Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J., statement respecting denial of certiorari). This Court should grant certiorari in this case for at least two reasons. First, lower courts inconsistently apply a variety of malleable legal tests, and so arrive at conflicting and often contradictory results. Second, this case presents an excellent

opportunity for this Court to affirm that psychological offense, in and of itself, does not confer Article III standing to lodge an Establishment Clause challenge.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY HOW THE ESTABLISHMENT CLAUSE APPLIES TO PASSIVE DISPLAYS WITH RELIGIOUS CONNOTATIONS ON PUBLIC PROPERTY, INCLUDING WAR MEMORIALS.

The Fourth Circuit's decision below is a striking example of the need for this Court to clarify its Establishment Clause jurisprudence. This Court's prior decisions involving passive displays have left lower courts to wrestle with four primary questions with little, and seemingly contradictory, guidance:

1. Does the *Lemon* test apply to passive displays?
2. To what extent is national history or a display's individual history relevant?
3. Does the existence of a similar, less-religious alternative foreclose the inclusion of a religious element in a display?
4. Is the meaning of a passive display's religious elements changed by the inclusion of secular elements?

This Court has signaled differing answers to each of these questions. Unsurprisingly, lower courts have reached different conclusions too. Leaving these questions unanswered puts "at risk hundreds, and perhaps thousands" of memorials dedicated to honoring the sacrifices of veterans throughout the history of the United States. *M-NCPPC*, 891 F.3d at 125 (Niemeyer, J., dissenting from denial of rehearing *en banc*).

A. It is unclear whether the *Lemon* test applies to passive displays.

This Court originally developed the *Lemon* test to decide whether state funding for private religious schools violated the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But forty-seven years and several expansions later, *Lemon* has resulted in irreconcilable and incoherent jurisprudence, particularly when applied to passive displays that merely acknowledge the role religion plays in American life. Memorials honoring the sacrifice of the fallen are a classic example of these passive displays, and the lack of clear guidance chills *Amici* who desire to erect and promote such memorials. It is simply impossible to predict what symbols or quotes commonly used to honor self-sacrifice courts will permit if they intersect with religion.

Lemon used a three-pronged test for Establishment Clause challenges—purpose, effect, and excessive entanglement. 403 U.S. at 612–13. But that test has defied consistent application. *See, e.g.*,

Lamb's *Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in the judgment) (collecting cases applying, ignoring, or criticizing *Lemon*). And the impossibility of applying *Lemon* coherently has only become clearer with time. In fact, few constitutional standards have drawn as much widespread criticism. *See, e.g.*, *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 21 (2011) (Thomas, J., dissenting from denial of certiorari) (collecting cases); *Tangipahoa Par. Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000) (Scalia, J., dissenting from denial of certiorari) ("Like a majority of the Members of this Court, I have previously expressed my disapproval of the *Lemon* test."); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (lamenting "the sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon*").

Perhaps the most compelling evidence of *Lemon*'s failure is the number of tests proposed to supplement or replace it. These include the "endorsement" test, *Lynch v. Donnelly*, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring), which ultimately modified *Lemon*; the "history" test, *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); the "narrow coercion test," *Lee v. Weisman*, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting); *Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); the "broad coercion test," *Lee*, 505 U.S. at 586–99; the "nonpreferentialist test," *Wallace*

v. Jaffree, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting); and the "exercise of legal judgment" test, *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring).

The *Lemon*/endorsement test naturally produces inconsistent results. It focuses on minutia and hinges on the perceptions of an imaginary observer who is often "biased, replete with foibles, and prone to mistake." *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1108 (10th Cir. 2010) (Gorsuch, J., dissenting from denial of rehearing *en banc*). And it cannot possibly provide meaningful guidance for judges or litigants. Justice Kennedy correctly labeled the *Lemon*/endorsement test "unworkable in practice." *Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in the judgment in part and dissenting in part). Its "unguided examination of marginalia," he wrote, "is irreconcilable with the imperative of applying neutral principles in constitutional adjudication," and would create "inevitable difficulties" for application. *Id.* at 675–76. Two decades later, Justice Thomas demonstrated that this warning had come true. *Utah Highway Patrol*, 565 U.S. at 1001 (Thomas, J., dissenting from denial of certiorari). The endorsement test has proven "entirely unpredictable," "render[ing] even the most minute aesthetic details of a religious display relevant to the constitutional question" and requiring the evaluation of these displays through the eyes of an ill-defined "hypothetical observer." *Id.* at 1004, 1007.

As a result, a Ten Commandments display near to secular displays is permissible in Kentucky but not in Oklahoma. *Compare ACLU of Ky. v. Mercer Cty.*, 432 F.3d 624 (6th Cir. 2005) (using *Lemon*/endorsement to uphold a Decalogue display), *with Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784 (10th Cir. 2009) (using *Lemon*/endorsement to strike down the Decalogue display). A city seal may feature three crosses in New Mexico, but including a single cross in a county seal is forbidden in Pennsylvania. *Compare Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008) (applying *Lemon* to uphold the use of three crosses in a city seal), *with Freedom From Religion Found., Inc. v. Cty. of Lehigh*, No. 16-4504, 2017 WL 4310247 (E.D. Pa. Sept. 28, 2017), *appeal docketed*, No. 17-3581 (3d Cir. Nov. 29, 2017) (concluding that incorporating a single cross in a county seal is unconstitutional under *Lemon*). Federal judges even disagree on whether the *Lemon*/endorsement test permits using "With God All Things Are Possible" as a state motto. *See ACLU of Ohio v. Capital Square Review & Advisory Bd.*, 210 F.3d 703 (6th Cir 2000) (striking down the Ohio state motto), *rev'd en banc*, 243 F.3d 289 (6th Cir. 2001) (upholding the Ohio state motto).

The time has come for this Court to decide whether *Lemon* or some other test governs passive displays. *See Utah Highway Patrol,* 565 U.S. at 995 (Thomas, J., dissenting from the denial of certiorari) ("Because our jurisprudence has confounded the lower courts and rendered the constitutionality of displays of religious imagery on government property

anyone's guess, I would grant certiorari."); *Trunk*, 567 U.S. at 944 (Alito, J., statement respecting the denial of certiorari) ("This Court's Establishment Clause jurisprudence is undoubtedly in need of clarity."); *Green v. Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1245 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing *en banc*) ("[A]ppellate judges seeking to identify the rule of law that governs Establishment Clause challenges to public monuments surely have their hands full after *McCreary* and *Van Orden*."); *cf. Salazar v. Buono*, 559 U.S. 700, 720–21 (2010) (plurality) (expressing doubt as to whether the endorsement test is "appropriate" for religious displays).

This Court in *Lynch* applied the three-prong *Lemon* test to approve a crèche used in a passive Christmas' display. 465 U.S. at 678–85. The Court later augmented the *Lemon* test by incorporating the endorsement test and reasonable observer standard, which resulted in striking down a crèche display in *Allegheny*. 492 U.S. at 597. Although this Court applied *Lemon* again to a passive display in *McCreary County v. ACLU*, 545 U.S. 844, 859–63 (2005), on the same day, a plurality of this Court declared that *Lemon* "is not useful in dealing with" passive displays, *Van Orden*, 545 U.S. at 686 (plurality). And Justice Breyer's *Van Orden* concurrence rejected "the literal application of any particular test." *Id*. at 700, 703–04.

In the thirteen years since this Court decided *McCreary*, a majority of this Court has never relied on the *Lemon*/endorsement test to resolve an

Establishment Clause challenge. When the Second Circuit struck down a legislative prayer practice, for instance, this Court reversed and applied a historically-based analysis, not *Lemon*. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819–20 (2014). And it emphasized that the Establishment Clause—in all of its applications—must be interpreted in keeping with "'historical practices and understandings.'" *Id.* at 1819 (quoting *Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part)).

Although this Court's practice of adopting a different test *de jour* for each new dispute may offer "flexibility," it offers lower courts no consistent guidance. *Comm. for Pub. Ed. & Religious Liberty*, 444 U.S. at 662 (recognizing that this Court's ad hoc approach "sacrifices clarity and predictability for flexibility"); *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring) ("[T]he very 'flexibility' of this Court's Establishment Clause precedent leaves it incapable of consistent application"). It is thus unsurprising that lower courts' passive-display decisions are confused and inconsistent. *See, e.g.*, *Davenport*, 637 F.3d at 1110 (Gorsuch, J., dissenting from denial of rehearing *en banc*) (expressing uncertainty in whether *Lemon* or *Van Orden* controls); *Freethought Soc'y of Greater Phila. v. Chester Cty.*, 334 F.3d 247, 256 (3d Cir. 2003) (expressing uncertainty in whether *Lemon* or the endorsement test controls); *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991) (expressing uncertainty in whether *Lynch* or *Allegheny* supplanted *Lemon*).

In desperation, lower courts sometimes apply multiple tests at a time. But this scattershot analysis only compounds inconsistent results and makes it harder for any judge to know which test is "correct" for passive monuments. *Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011). The court below, for instance, purported to "apply *Lemon*" "with due consideration given to the *Van Orden* factors." *Am. Humanist Ass'n v. M-NCPPC*, 874 F.3d 195, 205 (4th Cir. 2017). When considering the ninety years that the Bladensburg Memorial has stood without challenge, the Fourth Circuit suggested that "[p]erhaps the longer a violation persists, the greater the affront to those offended." *Id.* at 208. But this statement directly conflicts with Justice Breyer's opinion in *Van Orden*, which reasoned that the forty years a monument stood unchallenged "suggest[ed] more strongly than can any set of formulaic tests that few individuals" regarded the monument as an establishment of religion. 545 U.S. at 702 (Breyer, J., concurring). Until this Court clarifies what standard governs passive displays, lower courts will continue to use every conceivable test to avoid being reversed on appeal. This buffet-style jurisprudence will only exacerbate the unpredictability of Establishment Clause cases.

Veterans groups that seek to honor fallen service members and wartime sacrifice through memorials now approach that task with trepidation. This Court should grant certiorari to provide guidance in a murky Establishment Clause jurisprudence that is "in need of clarity[.]" *Trunk*, 567 U.S. at 994 (Alito,

J., statement respecting denial of certiorari); *see also Rowan Cty. v. Lund*, 138 S. Ct. 2564, 2564 (2018) (Thomas, J., dissenting from denial of certiorari) ("This Court's Establishment Clause jurisprudence is in disarray.").

B. Courts are confused about the proper scope of relevant history.

This Court has held that the historical context of a monument is relevant. *See Van Orden*, 545 U.S. at 689 (plurality). But the scope of the relevant history varies depending on the perspective of the jurist.

For example, in *Van Orden*, the plurality noted that "[o]ur opinions, like our building, have recognized the role the Decalogue plays in America's heritage." *Id.* Justice Breyer's *Van Orden* concurrence also considered the history of the individual Ten Commandments display. *Id.* at 701–02 (Breyer, J., concurring) (noting the contextual history surrounding the creation of the display and the subsequent forty years of unchallenged existence). But on the same day, this Court held that a different Ten Commandments display in *McCreary* violated the Establishment Clause in part because the framers of the Bill of Rights did not have a "common understanding about the limits of the establishment prohibition." 545 U.S. at 879. These dueling opinions create confusion and tension regarding the weight national history or a display's individual history should receive.

Furthermore, Justice Breyer's reliance on the fact that the display in *Van Orden* went unchallenged for over forty years may comfort Petitioners and other defenders of historical markers, but it provides no solace or guidance to some *Amici* and others who seek to erect new monuments commemorating past and present military sacrifice. Are monuments to military valor, such as the Canadian Cross of Sacrifice that has stood in Arlington National Cemetery since 1925 acceptable only because they are old? If that memorial were donated today, would it be unconstitutional as soon as someone raised an objection? *Amici* find it difficult to understand how the First Amendment could permit a monument erected in 1925 to stand but prohibit erecting the same monument anew. Surely the First Amendment does not incorporate a grandfather clause.

In contrast, focusing on the individualized history of a memorial seems to weigh against memorializing sacrifice that is less familiar or more removed from current events. For example, in *American Atheists, Inc. v. Port Authority of New York & New Jersey*, 760 F.3d 227, 243 (2d Cir. 2014), the Second Circuit held that The Cross at Ground Zero was constitutional. In attempting to psychoanalyze the mind of the "reasonable-observer," the court recognized that "in troubling times, many persons find comfort in prayer and religious rituals," including "in the aftermath of the September 11 attacks." *Id.* Because each judge involved had lived through the September 11th attacks, the court's rationale accounted for the secular and historical importance of the cross at issue.

The Fourth Circuit's analysis, however, discounted identical feelings from those "persons finding comfort in prayer and religious rituals" to commemorate loved ones who died during WWI. *M-NCPPC*, 874 F.3d at 210. Instead of crediting the secular, commemorative purposes of the Memorial's founders, the Fourth Circuit zeroed in on minutia taken out of context, such as the private organizers "devotion to faith in God." *Id.* These conflicting rulings only muddy the waters.

The Courts of Appeals also disagree on whether religious services at a secular memorial forever taints that memorial's constitutionality. The Second Circuit in *Port Authority* recognized that although religious groups had celebrated mass at The Cross at Ground Zero, once the cross was moved to the World Trade Center Memorial Foundation there would no longer be "religious services" associated "with the artifact." 760 F.3d at 240. In other words, the Second Circuit held that a concrete action, such as a transfer of ownership, could disassociate a memorial from previous religious associations.

Meanwhile, the Ninth Circuit held that no number of secular Memorial Day vigils could "overcome the effect of [the cross-shaped memorial's] decades long history," which included some religious services. *Trunk*, 629 F.3d at 1121. The Fourth Circuit similarly emphasized that "Christian-only religious activities had taken place at the Cross," *M-NCPPC*, 874 F.3d at 210, even though the record shows that, in ninety years, only one religious event

at the Memorial was ever proposed—an event that may or may not have actually occurred. *See* Pet'rs App. 38a, *Am. Legion v. Am Humanist Ass'n* (No. 17-1717) (U.S. 2018). Government entities entrusted with memorials that members of the public may once have occasionally used for religious purposes simply cannot know whether or at what point historical significance overcomes religious connotation. Nor is it clear why these private religious activities should even matter.

This Court should grant certiorari to resolve the conflicting holdings by lower courts and set forth an Establishment Clause test that reaches results consistent with our nation's history. *See Town of Greece*, 134 S. Ct. at 1819 (concluding that practices that have "'become part of the fabric of our society'" are consistent with the Establishment Clause (quoting *Marsh*, 463 U.S. at 792)).

C. Courts disagree whether a less-religious alternative forecloses including a religious element in a passive display.

This Court has indicated that public monuments may include religiously affiliated writings, quotes, and symbols. Yet this Court has also implied that designers should seek out a "less religious alternative" to any passive-display element that may have a religious connotation. This dichotomy creates a one-way ratchet that some lower courts have turned into an effective ban on religious symbolism.

On one hand, "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring); *see also id.* at 690 (plurality). On the other hand, the *McCreary* Court held that a display of the Ten Commandments was unconstitutional in part because "tablets with 10 roman numerals" would have referenced the Ten Commandments without "a sectarian conception of faith." 545 U.S. at 869. *McCreary*'s reasoning echoed *Allegheny*'s holding that a menorah was constitutional in part because there were no "reasonable alternatives that are less religious in nature" to celebrate Chanukah. *Allegheny*, 492 U.S. at 618 (plurality).

This less-religious alternative rule implied by *Allegheny* and *McCreary* conflicts with the "unbroken history of official acknowledgement by all three branches of government of the role of religion in American life." *Lynch*, 465 U.S. at 674–75. And a majority of this Court criticized such a rule when it was first proposed by the *Allegheny* plurality. 492 U.S. at 636 (O'Connor, J., concurring); *id.* at 676–77 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Still, lower courts have gravitated toward the less-religious alternative rule in practice. The Second Circuit, for example, held that The Cross at Ground Zero was constitutional in part because "there is no distinct artifact from which atheists, as a group, drew hope and comfort in the aftermath of September 11."

Port Auth., 760 F.3d at 244. This ruling implies that if such an artifact existed, it may have caused The Cross at Ground Zero to violate the Constitution. Similarly, the Ninth and Fourth Circuits have held that cross-shaped WWI memorials are unconstitutional in part because the poppy, which has less religious significance, could have been used to memorialize the fallen. *Trunk*, 629 F.3d at 1113; *M-NCPPC*, 874 F.3d at 207 n.10.

Echoing Justice Breyer's reasoning in *Van Orden*, six Justices of this Court recognized in *Buono* that the Establishment Clause does not create a per se rule against cross-shaped memorials. 559 U.S. at 721 (plurality); *id.* at 747 n.7 (Stevens, J., dissenting). The *Buono* plurality, in particular, recognized that a cross-shaped memorial "evokes far more than religion": it "evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." *Id.* at 721 (plurality).

The less-religious alternative rule, applied by the Fourth Circuit below, effectively creates an irrebuttable presumption against cross-shaped memorials because there will nearly always be a less-religious alternative to a cross. As such, the Fourth Circuit's reasoning evinces "an arresting symbol of a Government that is . . . hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage." *Id.* at 726 (Alito, J., concurring). This type of

"absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) (internal citations omitted).

In light of the less-religious alternative standard, those like *Amici* who want to commemorate and honor the sacrifices of their comrades-at-arms have no consistent, predictable standard to design new memorials or defend existing monuments. For example, some *Amici* who like Vice President Coolidge on Memorial Day in 1923, want to quote John 15:13: "Greater love hath no man than this, that a man lay down his life for his friends"[2] on a memorial. But is that quote constitutional? What if the designer attributes that quote only to President Coolidge rather than the original speaker—Jesus? Or what if, like the Ten Commandments hypothetical in *McCreary*, the designer simply engraves the biblical reference, John 15:13? Would it matter if the reference used roman numerals? If designers guess

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[2] *See* Calvin Coolidge, The Price of Freedom: Speeches and Addresses 352 (Fredonia Books 2001). This Christian quote is used not only in a passive-display context. President Obama also quoted John 15:13 to honor Zaevion Dobson, who was tragically murdered as he protected three friends from a shooter. Chris Cillizza, President Obama's Amazingly Emotional Speech on Gun-Control, Wash. Post (Jan. 5, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/01/05/president-obamas-amazingly-emotional-speech-on-gun-control-annotated. No one knows if President Obama's words could appear on a public memorial for Zaevion without violating the current Establishment Clause regime.

incorrectly, they could be subject to extensive litigation and attorneys' fees, chilling the creation of memorials at all. Either way, designers are forced to guess and then hope that jurists cannot conceive of alternatives they consider less religious.

Because the less-religious alternative standard naturally whitewashes religious symbols from the public square, this Court should grant certiorari and reaffirm that the Establishment Clause "does not oblige government to avoid any public acknowledgement of religion's role in society," and that it does not "require eradication of all religious symbols in the public realm." *Buono*, 559 U.S. at 718–19 (plurality).

D. It is unclear whether the meaning of a passive display's religious elements is changed by the inclusion of secular elements.

The proper interplay between secular elements and religious elements in passive displays is undefined at best. As a result, lower courts have arrived at a variety of contradictory results.

Justice Blackmun's part-majority, part-plurality opinion in *Allegheny* illustrates the confusion. In *Allegheny*, the joint display of a Christmas tree and Chanukah menorah was deemed constitutional in part because the large tree cast a "shadow" of secularity upon the menorah. 492 U.S. at 617 (plurality). Yet Justice Blackmun deemed floral

decorations surrounding a crèche to "contribute to" the crèche's religiosity, rather than detracting from it. *Id.* at 599.

Likewise, the *McCreary* Court held that a display of documents foundational to American government that included the Ten Commandments was unconstitutional in part because it "omit[ted] the Fourteenth Amendment." 545 U.S. at 872. Yet the religious nature of the Ten Commandments display in *Van Orden* was found to be lessened by the secular elements of other monuments, none of which referenced the Fourteenth Amendment. 545 U.S. at 701 (Breyer, J., concurring).

Similarly, four Courts of Appeals within the last decade have applied conflicting, and in large part contradictory reasoning about whether a cross-shaped memorial violates the Establishment Clause. These courts disagree about the significance of a monument's nearby context and secular elements when evaluating its legality.

1. Is a memorial considered individually or in the context of surrounding memorials?

Passive-display cases are often won or lost based on the level of generality a court uses in analyzing the display's context. But courts have no consistent rationale for picking one level of generality over another. For consistency's sake, lower courts should not be able to "slide up and down" the generality scale

when considering passive displays, especially since the more widespread the context, the more likely a monument is to be deemed constitutional.

For example, when evaluating the constitutionality of the Mount Soledad war memorial, the Ninth Circuit focused on the *individual cross element* and held that "the Cross remains the Memorial's central feature." *Trunk*, 629 F.3d at 1123. But when opining on cross-shaped memorials in Arlington National Cemetery, the Ninth Circuit focused on *the cemetery as a whole* and not on each individual element located therein. *Id.* at 1115. The Ninth Circuit provides no rubric for deciding when shifting contextual scope is appropriate. *Id.*

The district court below held that the Bladensburg Memorial was constitutional given the more general context of the surrounding secular memorials in Veterans Memorial Park. *Am. Humanist Ass'n v. M-NCPPC*, 147 F. Supp. 3d 373, 387 (D. Md. 2015). By contrast, the Fourth Circuit considered the Bladensburg Memorial *individually*, disregarding the context of the other patently secular memorials erected in the park. *M-NCPPC*, 874 F.3d at 209. This Court should grant certiorari to provide guidance on what context is relevant, if any, for purposes of Establishment Clause analysis.

2. How many secular elements are necessary relative to each sectarian element?

In the Ninth Circuit, "the recent addition of secular elements" could not save a cross-shaped memorial because "the Cross remain[ed] the Memorial's central feature." *Trunk*, 629 F.3d at 1123; *see also Felix v. City of Bloomfield*, 841 F.3d 848, 864 (10th Cir. 2016) (adding other monuments around a Ten Commandments display could not cure the "impermissible taint of endorsement"). The Second Circuit, by contrast, held that the cross-shaped memorial at Ground Zero, among "hundreds of other (mostly secular) artifacts" "ensure[ed] historical completeness, [and did not] not promot[e] religion." *Port Auth.*, 760 F.3d at 243.

The Fourth Circuit would apparently deem no amount of secular context sufficient to save a cross-shaped memorial from extinction. At the outset, it declared that "[e]ven in the memorial context, a Latin cross serves not simply as a generic symbol of death, but rather a Christian symbol of the death of Jesus Christ." *M-NCPPC*, 874 F.3d at 207. The Fourth Circuit considered crosses' common secular uses to memorialize the departed in this country "of no moment." *Id.* at 208. And the Fourth Circuit deemed it "too simplistic" to consider the Bladensburg Memorial's "unchallenged [existence] for 90 years" or the monument's secular elements because "passers-by would likely be unable" to notice them when driving past. *Id.* at 208–209. But as then-Judge

Gorsuch recognized in his *Davenport* dissent, a court should ensure that a passer-by will at least "bother to stop and look at a monument before having" courts declare the display "unconstitutional." 637 F.3d at 1108.

Those designing, building, and maintaining memorials dedicated to this nation's fallen service members have no clear or predictable standard to follow. Instead, they must parse the minefield of caselaw on this point, hoping that they have not guessed wrongly when divining the attitude of a particular court toward a monument's content and setting. For example, in Neosho, Missouri, a veterans group intends to expand a memorial containing an American flag and small plaque.[3] Designers intend to add additional flags and two statutes: one of a K-9 companion, the other of a battlefield cross. Is the battlefield cross insulated from an Establishment Clause challenge simply because it is not a Latin cross? If the battlefield cross statue is the same size as the K-9 companion statue, is it constitutional, like the crosses in Arlington Cemetery? What if the cross is a larger statue, like the memorial in this case or in *Trunk*? What if the memorial includes more artifacts, like in *Port Authority*, or only one symbol, like *Buono*?

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[3] Ashley Godwin, Neosho Community Raise Funds to Expand Veterans Memorial, FourStatesHomePage.com (July 4, 2018, 7:27 PM), https://www.fourstateshomepage.com/news/neosho-community-raise-funds-to-expand-veterans-memorial. While it is not clear whether this memorial is on public or private property, if an architect was designing a public memorial with the same elements, these constitutional questions would apply.

The current landscape of Establishment Clause cases gives veterans groups, including *Amici*, no clear or predictable standard to follow as they strive to honor their fallen comrades.

* * *

As predicted, Establishment Clause analysis under the *Lemon*/endorsement test has devolved into a "jurisprudence of minutiae," *Allegheny*, 492 U.S. at 674 (Kennedy, J., concurring in the judgment in part and dissenting in part), that has left each memorial's constitutionality up to judicial preference. *See Van Orden*, 545 U.S. at 697 (Thomas, J., concurring) ("[T]his Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections."). This uncertainty puts *Amici* in the untenable position of choosing whom to honor and how to honor them based on the whims of each Court of Appeals. This Court should grant certiorari to resolve the conflicts among the lower courts and clarify the framework for evaluating passive displays under the Establishment Clause.

II. THIS COURT SHOULD GRANT CERTIORARI TO REAFFIRM THAT MERE OFFENSE IS INSUFFICIENT TO CONFER STANDING.

In the Establishment Clause cases discussed above, lower courts have assumed that observers offended by religious symbols had standing to

challenge those symbols. But this Court's jurisprudence provides that standing does not exist where the only alleged injury is the "psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). In *Valley Forge*, this Court held that only litigants who were "subjected to unwelcome *religious exercises* or were forced to assume special burdens to avoid them" have standing to bring Establishment Clause claims. *Id.* at 486 n.22 (emphasis added).

The Fourth Circuit lowered the normal standing bar when it held that "regularly encounter[ing] the Cross as residents while driving in the area" was sufficient to confer standing to respondents. *M-NCPPC*, 874 F.3d at 203. Viewing a passive display honoring our nation's veterans is not a religious exercise, and drive-by standing is not sufficient under Article III.

This Court has rejected the notion that Establishment Clause claims require a lesser injury than other claims. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011) ("To alter the rules of standing or weaken their requisite elements would be inconsistent with the case-or-controversy limitation on federal jurisdiction imposed by Article III."). Yet many Courts of Appeals have held that mere "unwelcome contact" with a display that has a religious element is sufficient to establish standing for Establishment Clause claims "regardless of

whether such contact is infrequent or [a plaintiff] does not alter [his or] her behavior to avoid it." *Freedom From Religion Found., Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476 (3d Cir. 2016); *see also Red River Freethinkers v. City of Fargo*, 679 F.3d 1015, 1023 (8th Cir. 2012) (unwelcome contact without altering behavior sufficient to confer standing); *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) (*en banc*) (same). In short, Courts of Appeals have developed an Establishment Clause standing jurisprudence that is "impossible to reconcile with *Valley Forge*." *Books v. Elkhart Cty.*, 401 F.3d 857, 871 (7th Cir. 2005) (Easterbrook, J., dissenting).

Not only are many Courts of Appeals decisions at odds with *Valley Forge*, they also apply inconsistent standards. The obvious conflict within the circuits as to whether "offended observer" standing is consistent with Valley Forge has been acknowledged for over twenty years. *See, e.g.*, *City of Edmond v. Robinson*, 517 U.S. 1201, 1202–03 (1996) (Rehnquist, C.J., dissenting from denial of certiorari) (noting the "disagreement among the Courts of Appeals about whether Valley Forge allowed standing to a plaintiff alleging direct injury by being exposed to a state symbol that offends his beliefs").

This case presents an ideal opportunity for this Court to resolve the impropriety of "offended observer" standing. Lower courts have struggled to read the tea leaves of how standing functions in the

Establishment Clause context for over thirty years. This Court should grant certiorari to reaffirm its holding in *Valley Forge* that the "observation of conduct with which one disagrees" does not constitute an injury in fact sufficient to confer standing. 454 U.S. at 485.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX

DESCRIPTION OF *AMICI* AND THEIR PARTICULAR INTERESTS

Major General Patrick H. Brady (United States Army, retired) is a recipient of the Medal of Honor—the highest award for military valor that can be given to a member of the United States Armed Forces. He received the Medal of Honor for conspicuous gallantry and intrepidity in action at the risk of his life, above and beyond the call of duty, in the Vietnam War. Indeed, General Brady is credited with over 2,000 combat missions, in which he and his crew rescued over 5,000 severely wounded soldiers. He has been regarded as America's most decorated living veteran. General Brady views the cross as a symbol of selfless service, valor, and the giving of one's life for others. As such, it is often used to recognize honorable military service. General Brady himself was awarded a Distinguished Service Cross and six Distinguished Flying Crosses for his courageous service, each of which includes the emblem of an actual cross:

 Distinguished Service Cross[4]	 Distinguished Flying Cross[5]

General Brady strongly believes it would be absurd for a court, or anyone else, to hold that military medals like these violate the Constitution, simply because they are granted by the federal government and may cause alleged offense to someone who subjectively perceives such medals of valor to convey some sort of religious message. He believes just as fervently it is absurd to conclude the Constitution requires the defacement or removal of crosses honoring fallen veterans at war memorial sites, like the Bladensburg Memorial.

Patriot Outreach provides compassionate tools and services that help veterans develop personal coping strategies to achieve victory over PTSD, and works to instill in veterans the conviction that their lives remain necessary to the survival of others suffering from PTSD and suicidal thoughts. Patriot Outreach has distributed more than 250,000 separate

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[4] https://commons.wikimedia.org/wiki/File:Army_distinguished _service _ cross_ medal.png (last accessed July 18, 2018).

[5] https://commons.wikimedia.org/wiki/File:Dfc-usa.jpg (last accessed July 18, 2018).

coping resources online and serves more than 2,000 veterans per year through in-person volunteer work and group activities. Patriot Outreach is attuned to the reality that veterans suffering from PTSD experience particularly severe, deleterious reactions when symbols of America or military service are disrespected or defaced, and expect that any action to remove the Bladensburg Memorial would likely cause at least some veterans who suffer from PTSD to experience severe episodes of very stressful emotional trauma. Moreover, Patriot Outreach is involved in the process of erecting two separate memorials to veterans on public property: the Parkville Veterans Memorial in Parkville, Missouri, and the General Hays Veterans Memorial in Hays, Kansas. Patriot Outreach needs clarity regarding what symbols, designs, and words may be included as part of these memorials if they hope to avoid a potential federal lawsuit. Considerations include whether it is constitutionally permissible to commemorate veterans and their sacrifice by incorporating a cross, or a Bible verse (with or without attribution to Jesus), or a symbol or phrase associated with some other religious book or leader. Specifically, Patriot Outreach desires to include an entrance plaque to the General Hays Veterans Memorial that reads: "'Greater love hath no man than this, that a man lay down his life for his friends.'— *Jesus.*" But Patriot Outreach is currently chilled in its efforts to proceed because of the potential litigation and uncertainty associated with attempting to use any symbol or phrase honoring valorous military service that could theoretically be perceived by someone as conveying a

religious message. Patriot Outreach seeks clarity in the law that will permit it to fully honor veterans with memorials in ways it determines most meaningful for communicating gratitude for their military service.

Casper J. Middlekauf American Legion Post 173 based in Hays, Kansas is the local American Legion post in that community, comprised of veterans who are committed to mentoring youth and sponsoring wholesome programs for their development, advocating patriotism and honor, and supporting active duty military members and other veterans (as well as their families). Post 173 has over 300 members. ***The Society of 40 Men & 8 Horses Voiture 1543*** based in Hays, Kansas is the local chapter in that community of a broader fraternal and charitable honor society of American veterans. It was chartered to promote the well-being of veterans and their families (including widows, widowers, and orphans), and to actively participate in charitable endeavors in the community (such as through its nurse training and child-welfare programs). It has 28 members. ***The Edwin A Shumacher Marine Corps League, Detachment 740*** based in Hays, Kansas is the local chapter in that community of the Marine Corps League, bringing together United States Marine Corps veterans for the purposes of camaraderie and fellowship in order to preserve the traditions and promote the interests of the Marine Corps. It has eighteen members. These three groups are participating together with Patriot Outreach in the process of creating the General Hays Veterans Memorial. Like Patriot Outreach, they are in a state

of uncertainty as to whether their desired design that includes a well-recognized statement by Jesus (that there is no greater expression of love than for a man to lay down his life for his friends) will be considered constitutionally permissible or will lead to oppressive litigation. These organizations are therefore also in need of clear rules and guidelines governing allowable content for new memorial displays.

American Legion Newport Harbor Post 291 based in Newport Beach, California is the local American Legion chapter in that community, which focuses its mission on serving the various needs of veterans (through many projects, and the donation of over $100,000 per year to veterans in financial need), protecting children and youth, and defending traditional patriotic American values. Post 291 is the largest active American Legion post in the United States, with over 4,000 wartime veteran members, and an additional 3,000 members of the Sons of the American Legion or the Auxiliary. Uniquely, Post 291 operates its own Defense of Veterans Memorials Project, protecting memorials "where they are, as they are" against desecration by individuals and organizations allegedly offended by the sight of a cross or other symbol that may have religious significance in addition to its significance for honoring veterans. Post 291 was actively involved in the successful fights to preserve the Mojave Desert National Veterans Memorial and the Mt. Soledad National Veterans Memorial, both of which contain crosses as part of their commemoration of veterans. Post 291 seeks clarity in the law to avoid the need to

expend precious time and resources defending memorials that should not be considered controversial. It also seeks clarity in the law to extinguish the fear it currently has regarding whether memorials it is planning to construct on city property to honor the service of veterans, and a veterans cemetery it is actively engaged in trying to establish in Orange County, California, will provoke lawsuits if crosses or other elements that may have a religious connotation in addition to their significance for commemorating military service are included.

Father Vincent Capodanno Memorial Catholic War Veterans Post 1974 based in Liberty, Missouri is the local post of the Catholic War Veterans in that community. Its mission is to serve veterans physically, mentally, and spiritually, without regard to their individual characteristics. Catholic War Veterans is one of only three faith-based Veterans Service Organizations chartered by the federal government. Members of Post 1974 believe strongly that, in the context of the Bladensburg Memorial, the cross reflects the selfless sacrifice of those who served and gave their lives in WWI. Post 1974 is adamantly opposed to the removal of the Bladensburg Memorial.