No. 10-1297

In The Supreme Court of the United States

LANCE DAVENPORT, JOHN NJORD, AND F. KEITH STEPAN,

Petitioners,

v.

AMERICAN ATHEISTS, INC., R. ANDREWS, S. CLARK, AND M. RIVERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR THE STATE PETITIONERS

Respondents' opposition is most notable for what it concedes. Respondents do not dispute that different courts of appeals apply different legal tests to resolve Establishment Clause challenges to passive displays involving religious imagery. That split satisfies this Court's central criterion for granting certiorari.

Instead, respondents argue, the conceded split is "illusory" because a unique test applies to certain Ten Commandments monuments, different from the test that applies to every other passive display. But nothing in this Court's precedents suggests that different tests apply to different types of passive displays. Nothing in Justice Breyer's concurrence in *Van Orden* suggests that his legal judgment test was limited only to certain Ten Commandments monuments. And no court of appeals has ever understood it that way.

If respondents are wrong that there is a special test that applies uniquely to Ten Commandments monuments that resemble the one in Texas, then it is unequivocal that there is a clear 2-2-1 circuit split on the proper test for courts to apply to passive displays with religious imagery.

That the split is real is confirmed by Judge Gorsuch's dissent from the denial of rehearing *en banc*:

> It is a rare thing for this court to perpetuate a circuit split without giving due consideration to, or even acknowledging, the competing views of other courts or recent direction from the High Court. But that's the path we have taken.

Pet. App. 24.

That the split is worthy of this Court's review is confirmed by the enduring uncertainty and lower court confusion concerning the proper test to apply and when to apply it.

Respondents do not even attempt to defend on its merits the endorsement test, which has proven unworkable from day one. This case is the ideal vehicle for resolving that split and replacing the endorsement test with the coercion test—as five Justices of this Court, numerous judges of the courts of appeals, and commentators have long recommended.

Even if this Court chooses to retain the endorsement test, it should still grant the petition to resolve the conflict between the Tenth Circuit's decision and this Court's Establishment Clause precedents. Contrary to this Court's reasonable observer, the Tenth Circuit's observer is biased, selectively ignorant, and manifestly hostile to religious imagery. The Court should grant certiorari to resolve that conflict as well.

I. There Is An Entrenched Three-Way Split Regarding The Applicability Of The Endorsement Test.

Respondents concede that since *Van Orden* v. *Perry*, 545 U.S. 677 (2005), the lower courts have adopted three different approaches for evaluating Establishment Clause challenges to displays with religious imagery. Opp. 8, 10, 15-16.

As respondents further concede, the Fourth and Eighth Circuits use the legal judgment test set forth in Justice Breyer's concurring opinion in *Van Orden*; the Sixth and Tenth Circuits continue to rely on the endorsement test articulated by Justice O'Connor's concurrence in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984); and the Ninth Circuit uses both. Opp. 10, 11 n.6, 12, 13, & 14 n.9.

Respondents attempt to harmonize the split by proposing that a special rule applies only to Ten Commandments monuments that look like the one in *Van Orden*. Thus, respondents suggest, Justice Breyer's legal judgment test applies only to Ten Commandments monuments that are "factually indistinguishable" from that in *Van Orden*. Opp. 7, 16. And the endorsement test applies to all other passive displays that contain religious imagery. *Ibid.*

That legerdemain finds no support in this Court's precedents. Justice Breyer's concurrence in *Van Orden* did not so limit his test. On the contrary,

he instructed that the test governs "difficult borderline cases." *Van Orden*, 545 U.S. at 700.[1]

None of the courts of appeals struggling with this issue understood there to be a unique rule for "factually indistinguishable" Ten Commandments monuments. For example, in *Myers* v. *Loudoun County Public Schools*, the Fourth Circuit held that the legal judgment test governed a challenge to the recitation of the Pledge of Allegiance. 418 F.3d 395, 402 (4th Cir. 2005).[2]

And in *Card* v. *City of Everett*, the Ninth Circuit similarly determined that the legal judgment test has a broader application, governing "some" (unspecified) "longstanding plainly religious displays that convey a historical or secular message in a non-religious context." 520 F.3d 1009, 1016 (9th Cir. 2008).

Nor do respondents dispute that the Ninth Circuit has used both tests. Opp. 14 n.9. Instead, they

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[1] Respondents fault Petitioners for not discussing *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844 (2005). *McCreary* did not involve the endorsement test—which informs the "effect" prong of *Lemon*—but focused exclusively on the "purpose" prong. *Id.* at 881. Purpose is not at issue here. The Tenth Circuit correctly determined that nothing suggests the government's purpose "is other than secular," Pet. App. 48-49, and respondents do not contest that finding.

[2] Respondents erroneously assert that the Fourth Circuit's adoption of *Van Orden* in *Myers* "speaks * * * [for] only a single judge." Opp. 15-16. But a concurring judge joined that portion of the opinion, making it the opinion of the court. *Id.* at 408 (Duncan, J., concurring).

argue that the Ninth Circuit deemed it unnecessary to decide which test to use because either one would have yielded the same result. Not so. The Ninth Circuit applied both tests because it was unable to determine which one should apply: "Unfortunately, Justice Breyer did not explain in detail how to determine whether a case was borderline and thus less appropriate for the typical *Lemon* analysis." *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (petitions for rehearing *en banc* filed Mar. 18, 2011).

Once respondents' "special" rule for certain Ten Commandments monuments is rejected, no dispute exists that there is at least a 2-2-1 split on which test to apply in Establishment Clause cases like this one—just as the State Petitioners explained in their petition (at i).

Also unavailing is respondents' attempt to downplay the national importance of resolving the split. The memorial program here is hardly unique. At least 13 states "have roadside memorial programs to honor the memory of deceased persons"—and those memorials often include crosses. Br. of *Amici* States 1, 6-9. And there are virtually identical programs in our national forests that use crosses to memorialize the sacrifice of firefighters, Br. of *Amicus* New Tribes Mission 4—something respondents altogether ignore. Those programs are all in danger—indeed, some local governments have already removed crosses rather than endure the burden and expense of uncertain litigation. Br. of *Amici* States 5-6. *Amicus* Mothers

Against Driving Drunk (MADD), which constructs similar memorials, correctly asserts that the decision below "threatens any effort by any private group wishing to erect any memorial on state land that some observer might perceive, correctly or not, to convey a religious viewpoint." Br. of *Amicus* MADD 13.

Nor is the threat limited to highway memorials. The Becket Fund, in its *amicus* brief supporting certiorari, explained that the Tenth Circuit's decision:

> Would even prohibit display of the "Ground Zero Cross"—a privately owned artifact—at the World Trade Center Memorial—a privately owned building—because the land on which the Memorial rests is owned by the New York/New Jersey Port Authority.

Br. of *Amicus* Becket Fund 11.

The Becket Fund's *amicus* brief proved prescient. Just last week, respondent American Atheists, Inc., made *precisely that argument*, filing suit seeking the removal of the Ground Zero Cross from the Memorial. See Compl., *Am. Atheists, Inc., et al.* v. *Port Authority, et al.*, No. 108670-2011 (N.Y. Sup. Ct., New York Cnty. filed July 25, 2011) ¶ 27.

Respondents' contemporaneous claim (at 17) that there is no "reason to think that cases presenting similar facts will occur in the future" rings more than a little hollow.

Indeed, "purg[ing] from the public sphere all that in any way partakes of the religious" (*Van Orden*, 545 U.S. at 699 (Breyer, J., concurring)) is the inevitable consequence of the confusion in the case law—and would only be compounded if the Tenth Circuit's decision stands. The Court should grant the petition, resolve the conflict, and dispel the confusion about the proper legal standard.

II. This Case Is The Ideal Vehicle For Rejecting The Endorsement Test And Adopting The Coercion Test.

Respondents do not attempt to defend the endorsement test on its merits—and for good reason. The test is "flawed in its fundamentals and unworkable in practice." *Cnty. of Allegheny* v. *ACLU*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in judgment and dissenting in part, joined by Rehnquist, C.J., White and Scalia, JJ.). Nearly three decades of Establishment Clause jurisprudence have confirmed that conclusion. Pet. 19-21; Br. of *Amici* Family Research Council *et al.* 8-16. The time has come for this Court to reject that test as unworkable and adopt the coercion test instead.

Rather than defend the endorsement test, respondents attack the coercion test—arguing that adopting that test (1) would require overturning "scores of cases and leave Establishment Clause doctrine in disarray," and (2) would not reduce the need for fact-specific analysis. Opp. 28-29. Neither

objection has merit. First, Establishment Clause jurisprudence is already in disarray. That confusion is precisely why a new test is needed.

Second, cases will always turn on their facts. But the coercion test would at least provide clearer guidance (capable of consistent application) in applying the law to those differing facts. See, e.g., Br. of *Amicus* Am. Civil Rights Union 17-19.

Respondents argue that the Court "specifically reaffirmed *Lemon*'s continued validity" in *McCreary*. Opp. 28. But *McCreary* addressed only the *first* prong of *Lemon*—purpose. 545 U.S. at 861. This Court therefore had no need to consider the endorsement test, which concerns only *Lemon*'s *second* prong—effects.[3]

Respondents contend that this case is an inappropriate vehicle for adopting the coercion test because it involves direct—not indirect—coercion. Opp. 30-31. But this case has nothing to do with coercion—there is no government compulsion to practice (or refrain from practicing) any religion. See

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[3] Respondents cite the denial of other petitions asking the Court to reject the endorsement test. But those cases suffered from vehicle problems not present here. See *Catholic League for Religious & Civil Rights* v. *City of San Francisco*, No. 10-1034, 131 S. Ct. 2875 (2011) (standing issue); *McCreary Cnty.* v. *ACLU of Ky.*, No. 10-566, 131 S. Ct. 1474 (2011) (concerns about the law-of-the-case doctrine); *Borden* v. *Sch. Dist.*, No. 08-482, 129 S. Ct. 1524 (2009) (public school context); *Vasquez* v. *Los Angeles Cnty.*, No. 07-427, 552 U.S. 1062 (2007) (atypical "hostility toward religion" claim).

Allegheny, 492 U.S. at 656-57 (Kennedy, J., concurring in judgment and dissenting in part). As demonstrated in the petition (at 22-23), this case is an ideal vehicle for revisiting the endorsement test and resolving the circuit split about its application.[4]

III. The Tenth Circuit's Erroneous Decision Conflicts With This Court's Jurisprudence.

The Tenth Circuit erroneously assumed that crosses are presumptively unconstitutional. Pet. App. 53. Only then did the court consider whether the memorial had other features that somehow "secularize[d] the message." *Id.* at 54. That analytical framework sharply conflicts with this Court's precedents.

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[4] Respondents argue that the Court should deny certiorari because "the State—which has the ultimate authority over the matter—explicitly told the district court and the Tenth Circuit that only a Latin cross may be used to memorialize fallen * * * officers." Opp. 31. That is a mischaracterization of the State's argument below that "a significant change in the fallen trooper memorial * * * would not be able to [be approved] *in the same manner* that it had for the prior memorials." Opp. App. 11a, 13a, 15a (emphasis added).

And respondents' hypothetical concerns raise no vehicle problems. It is undisputed that (1) the record reveals no instance of any other memorial symbol ever having been requested, and (2) the Association has stated that it would provide a different memorial if, in the future, a family requests one. Pet. App. 33. Respondents have no standing to raise challenges that might theoretically be brought by other third parties in circumstances that have not arisen, and may never arise. Any such hypothetical issues cannot help respondents with their *as applied* challenge to the actual memorials that currently stand.

By starting with the assumption that a cross must necessarily be a sectarian symbol—and only afterward considering whether context could sufficiently "secularize" it—the panel got it exactly backward. *Van Orden* is clear that courts must thoroughly analyze the context and background of a challenged symbol or text *before* determining its message. 545 U.S. at 701 (Breyer, J., concurring). Instead, only *after* holding that the crosses were unconstitutional did the Tenth Circuit consider the "four contextualizing facts that, [defendants] argue, render these cross memorials sufficiently secular to pass constitutional muster." Pet. App. 56.

Not surprisingly, none of this Court's cases that respondents cite (at 22-24) to justify the Tenth Circuit's legal analysis condones such an approach. To the contrary, *Allegheny* held the display unconstitutional only *after* examining the relevant context. 492 U.S. at 601-02. Nor does *McCreary* help respondents, for the reasons discussed above. 545 U.S. at 844.

The Tenth Circuit mistakenly presumed that crosses are unconstitutional because they convey only a sectarian message. As a plurality of this Court has explained, a cross is "often used" for non-sectarian purposes, such that a "cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as a statement of governmental support for sectarian beliefs." *Salazar* v. *Buono*, 130 S. Ct. 1803, 1818, 1820 (2010) (plurality).

Thus, "a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people." *Id.* at 1820; see also Br. of *Amicus* The American Legion 5, 7; Br. of *Amicus* MADD 2.[5]

Respondents point to a "long line of appellate decisions" striking down public displays of crosses. Opp. 14. Those decisions predate *Van Orden* and do nothing to diminish the need for this Court's review. If anything, they highlight the need for this Court to clarify the legal standard that applies to such challenges and, if need be, to reinforce its repeated warnings that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee* v. *Weisman*, 505 U.S. 577, 598 (1992); see also *Salazar*, 130 S. Ct. at 1818 (plurality) ("The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm.").

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[5] Respondents attempt to diminish *Salazar* by emphasizing that the merits of the underlying Establishment Clause challenge were not before the Court. Opp. 27. That offers respondents little help. Respondents ignore that the plurality prefaced its discussion by expressly noting that the plurality opinion "should not be read to suggest this Court's agreement with that judgment, some aspects of which may be questionable." *Salazar*, 130 S. Ct. at 1818-19.

The Tenth Circuit's decision conflicts with this Court's cases in yet another way. As demonstrated in the petition (at 24-29), the Tenth Circuit's observer is markedly different from the reasonable observer required by this Court. The State Petitioners' argument is not, as respondents would have it, that the Tenth Circuit "should have given more weight to some facts" in its reasonable-observer analysis. See Opp. 25. The Tenth Circuit's error is more fundamental. Its observer was explicitly unaware of numerous material facts—all of which emphasize the memorials' secular message of sacrifice and death. See Pet. App. 10-15, 19-22.

For example, respondents insist that a reasonable observer viewing the memorials would see only the crosses with the Utah Highway Patrol beehive logo and would therefore conclude that the memorials convey government endorsement of Christianity. Opp. 25. That analysis ignores the troopers' names, dates of death, and biographical information—all of which the Tenth Circuit assumed the reasonable observer would somehow overlook. Such faulty vision has never before plagued this Court's reasonable observer.

The reasonable observer not only sees the *entire* display, but as a matter of law he is also fully aware of, and bases his assessment on, all relevant history and context. *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). The reasonable observer would also know that the State has disclaimed any association

with the memorials, and that the private designers of the memorials expressly selected the cross not for its religious significance, but for its message of sacrifice and death. Pet. App. 11-15.

Had the Tenth Circuit's observer been the properly informed reasonable observer that this Court requires, he would have concluded that the memorials were secular symbols of sacrifice and death, not that the State of Utah endorses Christianity. And no reasonable observer would have concluded, as the Tenth Circuit's observer did, that these memorials establish that the Utah Highway Patrol is a "Christian police" and "Christians are likely to receive preferential treatment from the [Patrol.]" *Id.* at 55-56.

As Judge Gorsuch's dissent from the denial of rehearing *en banc* makes clear, this case is not merely a "one off" misapplication of the reasonable-observer standard. *Id.* at 19, 22. It is part of an ongoing pattern in which the Tenth Circuit has repeatedly employed an observer "full of foibles and misinformation"—and will continue to do so until reversed by this Court. *Id.* at 22.

The circuit split the State Petitioners (and Judge Gorsuch) identify implicates a "pressing concern"—whether a federal court can "invalidate not only duly enacted laws and policies that actually respect the establishment of religion, but also laws and policies a reasonable hypothetical observer could think do so."

Id. at 24. The Court should grant the petition, resolve the conflict, and reverse the judgment below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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