No. 10-1297

IN THE

Supreme Court of the United States

LANCE DAVENPORT, ET AL.,
Petitioners,

v.

AMERICAN ATHEISTS, INC., ET AL.,
Respondents.

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

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

INTRODUCTION 3

ARGUMENT 4

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE AND IN *UTAH HIGHWAY PATROL ASSOCIATION V. AMERICAN ATHEISTS* TO CONSIDER REJECTING THE ENDORSEMENT TEST. 6

A. The Endorsement Test lacks historical support and thus is likely inconsistent with the Establishment Clause's original meaning. 6

B. Because the Endorsement Test empowers federal courts to provide relief for government action that causes only offense or hurt feelings, and only for those opposing religious displays, the test is in tension with this Court's standing jurisprudence and is fundamentally unfair. 9

CONCLUSION 13

TABLE OF AUTHORITIES

Supreme Court Cases

City of Elkhart v. Books,
532 U.S. 1058 (2001) (Rehnquist, C.J., dissenting from denial of cert.) 1

Cnty. of Allegheny v. ACLU,
492 U.S. 573 (1989) 4, 5

Lee v. Weisman, 505 U.S. 577 (1992) 5

McCreary Cnty. v. ACLU, 545 U.S. 844 (2005) 7

Pleasant Grove City v. Summum,
555 U.S. 460 (2009) 1

Salazar v. Buono,
130 S. Ct. 1803 (2010) 3

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974) 9, 10

United States v. Richardson,
418 U.S. 166 (1974) 9, 10

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 10

Van Orden v. Perry, 545 U.S. 677 (2005) 5, 6

Other Cases

ACLU v. Mercer Cnty.,
240 F. Supp. 2d 623 (E.D. Ky. 2003)..... 2

ACLU of Neb. Found. v. City of Plattsmouth
419 F.3d 772 (8th Cir. 2005) 1

ACLU of Ohio Found., Inc. v. Ashbrook,
375 F.3d 484 (6th Cir. 2004) 1

Am. Atheists, Inc. v. Duncan,
616 F.3d 1145 (10th Cir. 2010) 3, 4, 12

Am. Jewish Cong. v. City of Chicago, 827 F.2d 120
(7th Cir. 1987) 8, 9

Books v. Elkhart Cnty.,
401 F.3d 857 (7th Cir. 2005) 5, 12

Freedom From Religion Found., Inc. v. City of Marshfield, 203 F.3d 487 (7th Cir. 2000) 1

Schmidt v. Cline,
127 F. Supp. 2d 1169 (D. Kan. 2000).....2

Statute

VA. CODE ANN. § 57-1 (2011).....8

Other Authorities

GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987) 7

Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 44 WM. & MARY L. REV. 933 (1986).....5

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992).....6, 7

Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987). 6, 7, 10

Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989) 8, 9

Utah Highway Patrol Ass'n v. Am. Atheists, No. 10-1276 (Petition for Certiorari filed April 20, 2011) 4

INTEREST OF AMICUS[1]

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued or participated as amicus curiae in numerous cases in this Court, with particular emphasis on the First Amendment, most recently in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

The ACLJ has represented nearly two dozen governmental entities in cases involving the defense of public displays of the Ten Commandments and other objects with religious significance, including the following reported cases: *City of Elkhart v. Books*, 532 U.S. 1058 (2001) (Rehnquist, C.J., with joined by Scalia and Thomas, J. J., dissenting from denial of cert.) (Fraternal Order of Eagles Ten Commandments Monument in front of city hall); *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484 (6th Cir. 2004) (Ten Commandments poster in courtroom display); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (Fraternal Order of Eagles monument in city park); *Freedom From Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000) (statue of Jesus Christ

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[1] Counsel of record for the parties received timely notice of the intent to file this brief pursuant to S. Ct. R. 37.2(a). The parties have consented to amicus filing this brief. Copies of the parties' written consent are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

in city park); *ACLU v. Mercer County*, 240 F. Supp. 2d 623 (E.D. Ky. 2003) (Decalogue included in Foundations of American Law and Government courthouse display); *Schmidt v. Cline*, 127 F. Supp. 2d 1169 (D. Kan. 2000) (In God We Trust poster in county treasurer's office). The ACLJ has developed special expertise in this area which would be of benefit to the Court.

INTRODUCTION

The Utah Highway Patrol Association, a private, nonreligious organization, erected Latin crosses that conspicuously displayed, along with the Highway Patrol logo, the names, pictures, ranks, badge numbers, service information, and years of death of Utah Highway Patrol officers who died in the line of duty. The Association erected the crosses in locations safely accessible to the public that were as close as possible to the sites where the officers died. The crosses were intended to serve as memorials to the officers' service and sacrifice and to remind drivers of the importance of driving safely. The Association erected a few of these crosses on private property and more, with the Utah Department of Transportation's permission, on public property.

The Tenth Circuit held that by allowing the Association to use the Highway Department logo and to place some of the crosses on public property, Utah violated the Establishment Clause. *See Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010). The Tenth Circuit so held even though the Association that actually erected the crosses was private and nonreligious; the plaintiffs themselves agreed that the crosses were erected for a valid secular purpose; the families of each fallen officer chose the crosses as suitable memorials; crosses are commonly used to memorialize roadside deaths; and a plurality of this Court recently observed in *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010), 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." Nonetheless, Utah violated the Establishment Clause, the Tenth Circuit opined, because a "reasonable observer" would conclude that by allowing the crosses, Utah—a state in which only eighteen percent of the population are Christians who revere the cross as a religious symbol, *American Atheists, Inc.*, 616 F.3d at 1163—was "endorsing Christianity." *Id.* at 1160.

The petitioners in this case and in the associated case of *Utah Highway Patrol Ass'n v. American Atheists*, No. 10-1276 (Petition for Certiorari filed April 20, 2011), have set forth and explained several compelling reasons why this Court should grant certiorari. This brief focuses on one of those reasons: This is an ideal case for the Court to reconsider its muddled Establishment Clause jurisprudence and, in particular, to reject the so-called Endorsement Test the Tenth Circuit used to hold that Utah violated the Establishment Clause by allowing a private organization to use roadside crosses to honor state troopers who died in the line of duty and to remind drivers of the importance of driving safely.

ARGUMENT

In his dissenting opinion in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, stated that the Endorsement Test is "flawed in its fundamentals and unworkable in practice," *id.* at 669, and that adopting the test was "troubling" and produced "bizarre" results. *Id.* In his concurring opinion in *Van Orden v. Perry*, 545 U.S. 677 (2005), Justice Thomas urged this Court to "return[] to the original meaning of the word

'establishment'…." *Id.* at 693 (Thomas, J., concurring). In Justice Thomas's view, establishment as originally understood necessarily connoted "actual legal coercion." *Id.* (citations omitted). *See also Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting). Judge Easterbrook of the Seventh Circuit has likewise noted that "'[e]stablishment' entails coercion: either mandatory religious observance or mandatory support (via taxes) for clergy on the public payroll." *Books v. Elkhart Cnty.*, 401 F.3d 857, 869 (7th Cir. 2005). *See also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 44 WM. & MARY L. REV. 933 (1986).

Two points relevant to this case are clear: First, merely endorsing religion or a particular religious perspective does not coerce anyone to accept that perspective or worship in a particular way. *See Cnty. of Allegheny*, 492 U.S. at 664 (Kennedy, J., dissenting) ("Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."); *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring); *Books*, 401 F.3d at 870 (Easterbrook, J., dissenting) ("words do not coerce."). Second, the Endorsement Test has no historical pedigree. "Equating 'endorsement' with 'establishment' is a novelty with neither linguistic nor historical provenance." *Books*, 401 F.3d at 870 (Easterbrook, J., dissenting). These two points by themselves provide good reason for this Court to grant certiorari in this case and to begin "a . . . fundamental rethinking of [its] Establishment

Clause jurisprudence." *Van Orden*, 545 U.S. at 698 (Thomas, J., concurring).

Scholars have noted the Endorsement Test's theoretical and practical problems. *See, e.g.*, Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992). This brief will not repeat that analysis. Rather, this brief focuses on two reasons why this Court should consider rejecting the Endorsement Test: First, the test lacks historical support; and second, the test, which allows federal courts to grant relief—in one direction only—for offense or hurt feelings is in tension with this Court's standing jurisprudence, which requires injury beyond mere offense.

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE AND IN *UTAH HIGHWAY PATROL ASSOCIATION V. AMERICAN ATHEISTS* TO CONSIDER REJECTING THE ENDORSEMENT TEST.

A. The Endorsement Test lacks historical support and thus is likely inconsistent with the Establishment Clause's original meaning.

As Professor Michael McConnell has noted bluntly, "the endorsement test has no support in the history of the religion clauses." McConnell, *Religious Freedom*, 59 U. CHI. L. REV. at 154. McConnell went on to note,

> The early practice in the Republic was replete with governmental proclamations and other actions that endorsed religion in noncoercive ways, without favoring one sect over another. Consider, for example, the resolution of the First Congress requesting the President to "recommend to the people a day of thanksgiving and prayer; or the scheduling of divine services following the inauguration of President Washington . . . . The Religion Clauses were not directed against the evil of perceived messages, but of government power.

Id. at 155. *See also McCreary Cnty. v. ACLU*, 545 U.S. 844, 886–89 (2005) (Scalia, J., dissenting) (cataloguing examples of religious practices regarding religion in the early Republic); Smith, "*No Endorsement" Test*, 86 MICH. L. REV. at 302 ("Government endorsement of religion has a long history in this country."). *See generally* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987) (exploring in depth the understanding of the relationship between religion and government in the colonies and early republic).

Indeed, religion suffused the thinking of eighteenth-century Americans and formed the basis for most of the period's political discourse. *See* Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 967 (1989). The very argument for religious liberty was based, for the most part, on expressly religious premises. Jefferson's Bill for Establishing Religious Freedom provides perhaps the most striking example of this. The first sentence

of the Bill's preamble declares, "Almighty God hath created the mind free [and] that all attempts to influence it by burthens or by civil incapacitations…are a departure from the plan of the Holy Author of our religion, who being Lord of both body and mind, yet chose not to propagate it by coercions on either, as was his Almighty power to do…." *See* VA. CODE ANN. § 57-1 (2011).

As Judge Easterbrook has noted, Jefferson's preamble was "an exercise in religious persuasion." *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 135 (7th Cir. 1987) (Easterbrook, J., dissenting). In fact, the preamble asserts perhaps all of the rudiments of a rather advanced monotheistic religion—that God exists, that God is Almighty, that God created man, and that God is the "author of our religion," and "chose" how to propagate that religion (all of which can be taken to imply further that God is a personal God who cares about man's affairs)—all in an official promulgation of the Virginia legislature. If government "endorsement" of religion or a particular religious view violates the Establishment Clause, the Bill for Establishing Religious Freedom itself could well be held to violate the Establishment Clause. *See* Smith, *Separation and the "Secular,"* 67 TEX. L. REV. at 969 n. 77; *Am. Jewish Cong.*, 827 F.2d at 136 (Easterbrook, J., dissenting). That what is considered to be one of the foundational documents for our nation's understanding of religious liberty could be held to violate one of the clauses of the Constitution that exists to protect that liberty ought to be enough by itself to question, if not reject outright, any claim the Endorsement Test has historical support. And that

lack of historical support provides ample reason to reconsider whether the Endorsement Test is faithful to the Establishment Clause and should be embodied in this Court's Establishment Clause jurisprudence.

B. Because the Endorsement Test empowers federal courts to provide relief for government action that causes only offense or hurt feelings, and only for those opposing religious displays, the test is in tension with this Court's standing jurisprudence and is fundamentally unfair.

A second reason for reconsidering the Endorsement Test is the tension that exists between it and this Court's standing jurisprudence. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 222 (1974), and *United States v. Richardson*, 418 U.S. 166, 179–80 (1974), established that being disturbed that the government has violated the Constitution is never enough, by itself, to qualify as a concrete, particularized injury under Article III. *Schlesinger*, 418 U.S. at 220; *Richardson*, 418 U.S. at 176–77. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482–90 (1982), this Court applied the principles articulated in *Richardson* and *Schlesinger* to claims brought to enforce the Establishment Clause. The Court in *Valley Forge* repudiated the notion that offense at alleged Establishment Clause violations is somehow distinguishable from the offense suffered by the plaintiffs in *Schlesinger* and *Richardson*. *See id.* at 484–85. *Valley Forge* thus made clear that Article III

standing cannot be premised upon mere psychological offense at the government's alleged complicity in religion. The "psychological consequence presumably produced by *observation* of conduct with which one disagrees," does not constitute "an injury sufficient to confer standing under Article III." *Id.* at 485 (emphasis added).

But when government has allegedly violated the Establishment Clause merely by endorsing religion, what injury do those who disagree with the tenets allegedly endorsed suffer? The endorsement does not oblige those who disagree to worship in any particular way (or at all). For example, in this case, the crosses' presence did not oblige the plaintiffs to convert to Christianity, to venerate the cross, or to embrace Christian doctrine concerning Christ's death and resurrection. Nor did the crosses' presence alter the plaintiffs' political standing or deprive them of their civil rights. Plaintiffs did not lose the rights, for example, to vote or speak. *See* Smith, *"No Endorsement" Test,* 86 MICH. L. REV. at 307–08 (noting that government action endorsing religion does not necessarily alter political standing; when, if ever, it does, the constitutional violation is the religious-based discrimination, not the endorsement). Plaintiffs and others who do not believe in the religious tenets that a cross symbolizes for some are still free to disbelieve, argue against, or even mock those tenets.

The only conceivable injury the alleged endorsement causes is offense—offense at the religious tenets allegedly endorsed or offense that the government is endorsing these (or any) religious tenets. As Judge Easterbrook noted,

Words do not coerce. *See Rust v. Sullivan*, 500 U.S. 173 (1991). A barrage of advertisements tempting young people to join the military does not oblige anyone to do so; no more does display of the Ten Commandments coerce support for religion. The Magna Carta (which begins "John, by the grace of God, king of England…") is part of this display, yet Elkhart County does not establish divine-right monarchy. Lady Justice, derived from the Greek goddess Themis, is in the display, but Elkhart County has not established the ancient pantheon as its religion. No one would understand any document's presence in this display to suggest that Elkhart County imposes either legal or social sanctions on nonbelievers….

What the display may do is give offense, either to persons outside the religious tradition that includes the Book of Exodus or to those who believe that religion and government should be hermetically separated. Yet Themis may offend Christians (and all icons offend Muslims), the military's ads offend religious pacifists, and the message in *Rust* supports one religious perspective on human life while deprecating others. Public policies and arguments pro and con about them often give offense, as do curricular choices in public schools. But the rebuke implied when a governmental body supports a point of view that any given person finds contemptible (or believes should be left to the

> private sector) is a great distance from "coercion."

Books, 401 F.3d at 870 (Easterbrook, J., dissenting) (citations omitted).

In this case, the Tenth Circuit found that the plaintiffs have standing, *see Am. Atheists*, 616 F.3d at 1153, and neither the petitioners here nor in *Utah Highway Patrol Association* have raised standing as an issue for this Court to examine. Given that the parties have not raised the issue, we are not suggesting that this Court grant certiorari specifically to consider standing. But a clear tension exists between this Court's standing jurisprudence, which generally denies standing based on mere offense at allegedly unconstitutional government action, and the Endorsement Test, which empowers federal courts to provide relief for government action that causes only offense or hurt feelings. This tension is itself sufficient reason for this Court to grant certiorari to re-examine its Establishment Clause jurisprudence and, specifically, the Endorsement Test.

Finally, the Endorsement Test is fundamentally unfair. It weighs the offense perceived by those who object to a display, but it does not consider the offense felt by those who object to a display's removal. The test, therefore, is not evenhanded even in the assessment of "offense." This provides still another reason for this Court to re-examine the Endorsement Test.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urge this Court to grant the Petitions for Certiorari, in this case and in *Utah Highway Patrol Association*.

Respectfully submitted,

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