No. 17-60

In the Supreme Court of the United States

CITY OF BLOOMFIELD, NEW MEXICO,
Petitioner,

v.

JANE FELIX, ET AL.,
Respondents.

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

BRIEF FOR THE ETHICS AND PUBLIC POLICY CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE[1]

The Ethics and Public Policy Center is a nonprofit research institution dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy. Its program on "The Constitution, the Courts, and the Culture" focuses on the ways the courts can facilitate—or, too often, frustrate—the ability of the American people to engage in responsible self-government and to maintain the "indispensable supports" of "political prosperity" that George Washington (and other Founders) understood "religion and morality" to be. George Washington, Washington's Farewell Address (1796), http://avalon.law.yale.edu/18th_century/washing.asp.

In light of that purpose, the Ethics and Public Policy Center has a strong interest in cases that prevent federal, state, and local governments from acknowledging the role that religion played, and continues to play, in the American experiment.

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[1] Counsel of record for all parties received timely notice of EPPC's intention to file this brief, and have consented to the brief's submission. No counsel for a party authored this brief in whole or in part; and no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

In his plurality opinion in *Van Orden v. Perry*, Chief Justice Rehnquist wrote that "[o]ur cases, Januslike, point in two directions in applying the Establishment Clause." 545 U.S. 677, 682 (2005) (opinion of Rehnquist, C.J.). The ensuing decade has proven that statement—though literally true on the day it was issued—to be overly optimistic about the clarity of the law. As the City of Bloomfield's petition explains, challenges to passive displays that acknowledge the role of religion in American public life have proliferated in the wake of *Van Orden* and *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005). And that proliferation has turned this Court's already Januslike precedent into a Hydra-like doctrinal monstrosity, with the Circuits disagreeing squarely not just about the outcomes of nearly identical cases, but about which tests to use, whether to use more than one test, what factors to consider in applying the test(s), and so on.

That this Court's Establishment Clause decisions concerning passive religious displays have generated pervasive confusion in the Courts of Appeals, however, is attributable to more than just *Van Orden* and *McCreary County*. In 1989, during his first full term on this Court, Justice Kennedy warned that the so-called "endorsement test" employed by the Tenth Circuit below (and Supreme Court majorities off-and-on over the past three decades) "is flawed in its fundamentals and unworkable in practice." *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). He predicted that the endorsement test would result in "a

jurisprudence of minutiae" that would "trivialize constitutional adjudication" by making application of the Establishment Clause dependent on "exquisite distinctions from fine detail in a wide variety of cases." *Id.* at 674, 675 n.11. It was "inevitable," he wrote, that a test dependent on "little more than intuition and a tape measure" would face "difficulties with its application." *Id.* at 675.

This case is a perfect example of the absurd analysis the endorsement test inevitably requires—and the aberrant results it all too frequently produces. In explaining why the Ten Commandments display on government grounds here was unconstitutional even though the similar display in *Van Orden* was not, the Tenth Circuit found itself focusing on how many inches underground the display's foundation had been laid, how close it was to a sidewalk used to pay one's water bills, the apparently damning fact that it was not "hidden or obscured by other monuments," the identities of people and organizations that had provided private funding for the display, and so forth. Pet. App. 12a, 18a, 19a. At the same time, it declared irrelevant any "evidence . . . that the government is not endorsing a religious view" that might be contained in "a difficult-to-access legislative record." *Id.* at 31a. As Judge Kelly explained in his dissent from denial of rehearing en banc, this picking-and-choosing of which facts to consider and which to ignore bristles with "hostil[ity]" to religion, *id.* at 126a—just as Justice Kennedy had predicted, *see County of Allegheny*, 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).

But this case is not only a perfect example of the endorsement test's folly; it is also a perfect opportunity

to finally do away with that failed test, and to provide clarity to a doctrine "undoubtedly in need of clarity," *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J., statement respecting the denial of certiorari). And an appropriate source of clarity is already waiting in the wings. Three years ago, in *Town of Greece v. Galloway*, this Court held that Establishment Clause doctrine "must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change," and that "[t]he Court's inquiry . . . must be to determine whether the . . . practice . . . fits within the tradition long followed in Congress and the state legislatures." 134 S. Ct. 1811, 1819 (2014) (citing *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part)). To be sure, *Town of Greece* arose specifically in the context of legislative prayer, and perhaps for that reason it has failed to reduce the lower courts' doctrinal confusion in passive religious display cases like this one. *Cf.* Pet. App. 130a (Kelly, J., dissenting from denial of rehearing) (noting that "returning to a more historically-congruent understanding of the Establishment Clause is the ultimate province of the Supreme Court"). But as the citation above indicates, *Town of Greece* explicitly drew its rule of decision from Justice Kennedy's dissent twenty-five years earlier in *County of Allegheny*. *See* 134 S. Ct. at 1819. This case provides a chance to close that loop, and finally apply Justice Kennedy's historical test to the context in which it originated. The Court should take it.

ARGUMENT

I. REVIEW IS NEEDED TO RESOLVE AN ACKNOWLEDGED SPLIT OVER THE PROPER ESTABLISHMENT CLAUSE TEST FOR PASSIVE RELIGIOUS DISPLAYS

The City of Bloomfield's petition ably describes the disagreement and confusion in the lower courts over what doctrinal test to apply in passive religious display cases following this Court's conflicting same-day decisions in *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005). *See* Pet. 15-19. The lower courts have confronted that question repeatedly over the last twelve years, and the answers they have reached—as Justice Thomas observed in connection with an earlier Tenth Circuit opinion that formed much of the basis for the panel's decision here—"remain incapable of coherent explanation." *Utah Highway Patrol Ass'n v. American Atheists, Inc.*, 565 U.S. 994, 1007 (2011) (Thomas, J., dissenting from denial of certiorari).

That by itself is reason enough to grant review here. This case presents the prototypical, frequently-arising fact pattern of a privately funded display of the Ten Commandments placed on public property. As such, it would allow the Court to announce a rule that will govern in a broad swath of cases—eliminating a potential concern in past cases that have involved more idiosyncratic facts (such as the 12-foot-high roadside memorial crosses in *Utah Highway Patrol Association*). Meanwhile, it lacks any of the potential vehicle issues that may have led this Court to deny review in earlier cases. *See id.* at 1008 & nn.10 & 11 (addressing vehicle issues raised by respondents in

Utah Highway Patrol Association); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944-45 (2012) (Alito, J., concurring in denial of certiorari) (explaining that the doctrine is "undoubtedly in need of clarity," but that review was not warranted given interlocutory posture). There can be no real dispute that this Court's intervention is needed to resolve the "mess" its divergent opinions in *Van Orden* and *McCreary County* created, *Utah Highway Patrol Ass'n*, 565 U.S. at 1008 (Thomas, J., dissenting from denial of certiorari), and this is an ideal case in which to provide that intervention.

II. THE ENDORSEMENT TEST APPLIED BY THE TENTH CIRCUIT BELOW TRIVIALIZES THE ESTABLISHMENT CLAUSE

Even if the lower courts were *not* in disagreement about whether to apply the endorsement test to passive religious displays, moreover, review would still be appropriate here. That is because the endorsement test itself is a recipe for confusion, misapplication, and trivialization of core constitutional principles—a fact that is nowhere more evident than in the Tenth Circuit. As Justice Gorsuch put it while serving on that court, "[o]ur court has now *repeatedly* misapplied the 'reasonable observer' test, and it is apparently destined to continue doing so until we are told to stop." *American Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1107 (10th Cir. 2010) (Gorsuch, J., dissenting from denial of rehearing en banc), *cert. denied*, 565 U.S. 994 (2011).

The Tenth Circuit, of course, is not solely to blame. In his *County of Allegheny* dissent, Justice Kennedy warned that this Court's embrace of the endorsement

test would prove "unworkable in practice." *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 669 (1989) (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.

Justice O'Connor, providing the fifth vote for application of the endorsement test, disagreed, writing in a concurrence that she "remain[ed] convinced that the endorsement test is capable of consistent application." *Id.* at 629 (O'Connor, J., concurring). But nearly three decades later, it is clear that Justice Kennedy's predictions were "prescient," and that Justice O'Connor's "confidence was misplaced." *Utah Highway Patrol Ass'n*, 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 their evaluation through the eyes of an ill-defined "hypothetical observer." *Id.* at 1004, 1007. This has led other Justices to bemoan the "[r]eduction of the Establishment Clause to such minutiae," which "trivializes the Clause's protection against religious establishment" and "may inflame religious passions by making the passing comments of every government official the subject of endless litigation." *McCreary Cty.*, 545 U.S. at 908 (Scalia, J., dissenting); *see also, e.g.*, *Salazar v. Buono*, 559 U.S. 700, 723 (2010) (Roberts, C.J., concurring) (rejecting focus on an "empty ritual" like tearing down and then rebuilding a cross because "'[t]he Constitution deals with substance,

not shadows.'" (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

This case is as good an example as any of the "unguided examination of marginalia" that the endorsement test produces. *County of Allegheny*, 492 U.S. at 675-76 (Kennedy, J., concurring in the judgment in part and dissenting in part). According to the Tenth Circuit, its "imaginary objective observer" would attach significance to the fact that the Ten Commandments display is placed "directly" in front of the "principal government building" in Bloomfield, rather than alongside the building or perhaps next to a city annex. Pet. App. 18a & n.5. He would care that the display is "located immediately next to the sidewalk," rather than being "hidden or obscured by other monuments." *Id.* at 18a. He would discount the city's stated requirement that donors reapply for placement on city land every ten years (demonstrating that the display expressed the views of the donors, rather than of the city), because he would believe that the display's heavy weight and 14-inch foundation makes it "essentially permanent." *Id.* at 25a; *see also id.* at 12a-13a.

The Tenth Circuit's "objective observer," moreover, is "presumed to know far more than most actual members of a given community." *Id.* at 15a (quoting *Green v. Haskell Cty. Bd. of Comm'rs*, 568 F.3d 784, 800 (10th Cir. 2009), *cert. denied*, 559 U.S. 970 (2010)). He would remember, for example, that "two active City Council members donated to the monument's construction through their church," *id.* at 23a—even though the primary sponsor of the display could not himself remember who all had contributed funds for its installation, *id.* at 238a. He would have closely tracked

the handful of letters to the editor criticizing the intended display that had been published by the local newspaper, and would recall that the City Council had allowed private parties to install it despite those letters. *Id.* at 23a. And he would likewise see an illicit intent in the fact that the Ten Commandments display had been erected before the other installations on the same plot, and dedicated in a private ceremony that was (as the Tenth Circuit disparagingly put it) "riddled with Christian allusions." *Id.* at 19a.[2]

But there are limits to the knowledge of this "imaginary objective observer"—and those limits suggest that not just the observer, but also his objectivity, is imaginary. For example, while the Tenth Circuit presumed that its observer would know (and attribute illicit meaning to) the fact that the display had gone forward despite a "present and objecting city council member," *id.* at 23a, the objective observer would *not* be willing to "burrow into a difficult-to-access legislative record for evidence to

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[2] In focusing on the fact that the Ten Commandments display was erected first, the Tenth Circuit replicated the same sort of error suggested by the respondents in *Salazar*. As the Chief Justice noted in his concurrence, respondents there conceded that the VFW cross at issue would be constitutional if it were torn down, the land transferred, and then the cross were reinstalled, but argued that it would be unconstitutional if the land were simply transferred with the cross still standing. Determining the constitutionality of religious monuments based on such "empty ritual[s]," the Chief Justice explained, fails to deal with the substance of the Establishment Clause. *Salazar*. 559 U.S. at 723 (Roberts, C.J., concurring). So too here: This case should not depend on whether the City tore down the Ten Commandments display, then re-installed it after the surrounding displays had been put in place.

assure [himself] that the government is not endorsing a religious view," *id.* at 31a, such as the fact that the display's sponsor had indicated from the very outset that he intended the Ten Commandments display to be just the first of several historical installations. "Bad" legislative history? He's all over that. "Good" legislative history? Sorry, too difficult. Indeed, the objective observer would even be reluctant to "get on his knees and inspect closely" the display itself, which contained a disclaimer, etched in stone, that "[a]ny message hereon is of the donors and not the City of Bloomfield." *Id.* at 24a, 6a. Instead, this observer (who in other contexts pays attention to so much more than the ordinary citizen) would disregard that warning like one of the "rapid-fire warnings at the end of prescription drug commercials," "a barely audible afterthought [included] just to comply with the rules." *Id.* at 24a.

In light of all this, "[a] truly reasonable observer could be forgiven for wondering whether there exists a gap between the test [the Tenth Circuit] purport[ed] to apply and a more stringent one [it] secretly require[d]," which was "tantamount to a *hostile* 'reasonable observer.'" *Id.* at 126a (Kelly, J., dissenting from denial of rehearing en banc) (emphasis added). The same could be—and has been—said for *many* of the Tenth Circuit's passive display cases. *See*, *e.g.*, *Green v. Haskell Cty. Bd. of Comm'rs*, 574 F.3d 1235, 1246 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc) ("Not only does [the Tenth Circuit's] observer do the wrong job, he does it poorly."); *American Atheists, Inc.*, 637 F.3d at 1108 ((Gorsuch, J., dissenting from denial of rehearing en

banc) ("[O]ur observer continues to be biased, replete with foibles, and prone to mistake.").

"But to be fair to the Tenth Circuit, it is [this Court's] Establishment Clause jurisprudence that invites this type of erratic, selective analysis of the constitutionality of religious imagery on government property." *Utah Highway Patrol Ass'n*, 565 U.S. at 1006 (Thomas, J., dissenting from denial of certiorari). By making the constitutional question turn on the impressions of an imaginary person who focuses on some facts and ignores others according to criteria this Court has never defined, the endorsement test makes it *inevitable* that passive display cases will appear more subjective than objective.

As Justice Kennedy observed in *County of Allegheny*, "[t]his view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and [this Court's] precedents." 492 U.S. at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part). It is long past time for this Court to bury this passive-display variant of the *Lemon* test once and for all.

III. THIS COURT'S LEGISLATIVE PRAYER PRECEDENT OFFERS A TAILOR-MADE ALTERNATIVE TEST

Fortunately, this Court need not look far to find an appropriate replacement for the endorsement test. In *County of Allegheny*, Justice Kennedy argued "that the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings." *Id.* at 670. On that understanding, the Establishment Clause "permit[s] not only

legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Id.*

At the time, Justice Kennedy's proposed rule fell one vote short. But in 2014, this Court recognized the wisdom of Justice Kennedy's approach in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Writing for a majority this time, Justice Kennedy invoked his prior dissent, with the Court now holding 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 (Kennedy, J., concurring in the judgment in part and dissenting in part)). The proper Establishment Clause test, the Court held, "must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.*

Town of Greece, of course, did not directly address passive religious displays, nor did it purport to resolve the conflict between this Court's decisions in *Van Orden* and *McCreary County*. But the implications of *Town of Greece* for that conflict are obvious. Having decided to evaluate the constitutionality of legislative prayer practices using the test set out in a dissent concerning passive religious displays, the Court should take the next logical step and make the test applicable in the doctrinal area in which it originated, too. And under that test, there can be little doubt that the display here is constitutional. As Chief Justice Rehnquist explained for a plurality of the Court in *Van Orden*, displays of the Ten Commandments on public property are consistent with the "unbroken history of official acknowledgement by all three branches of

government of the role of religion in American life from at least 1789." 545 U.S. at 686 (plurality opinion) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)); *see also id.* at 689-90 (cataloguing examples of analogous displays of the Ten Commandments).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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