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

BRIEF OF THE FAMILY RESEARCH COUNCIL, LAW ENFORCEMENT LEGAL DEFENSE FUND, AND 15 MEMBERS OF THE U.S. SENATE AND U.S. HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Court should resolve the 2-2-1 circuit split over the appropriate test for evaluating whether a passive display with religious imagery violates the Establishment Clause.

2. Whether this Court should set aside the "endorsement test" – as five Justices have urged over the past three decades – and adopt instead the "coercion test."

3. Whether a memorial cross placed on state land by the Utah Highway Patrol Association, a private organization, to commemorate fallen state troopers is an unconstitutional establishment of religion.

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INTEREST OF *AMICI CURIAE*[1]

The Family Research Council (FRC) is a 501(c)3 nonprofit public-policy organization headquartered in Washington, D.C., that exists to develop and analyze governmental policies that affect families in the United States. Founded in 1983, FRC advocates legislative and regulatory measures that protect and strengthen family rights and autonomy, and assists in legal challenges to statutes and administrative actions detrimental to family interests. FRC informs and represents the interests of 39 state organizations and over 500,000 citizens on a daily basis. This case is of vital importance to FRC's Center for Religious Liberty.

The Law Enforcement Legal Defense Fund (LELDF) is a 501(c)3 nonprofit organization headquartered in Arlington, Virginia. LELDF exists to provide legal assistance to police officers who must defend themselves in court regarding actions the officer takes in the line of duty. LELDF provides this assistance through financial assistance to officers for legal representation, and also legal assistance in serving as co-counsel. LELDF also educates the public and especially youth in the proper role of law enforcement in keeping the peace. LELDF is interested

[1] Nelson Lund and Kenneth A. Klukowski authored this brief for *amici curiae*. No counsel for any party authored this brief in whole or in part and no one apart from *amici curiae* made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

in protecting memorials to officers who make the ultimate sacrifice while protecting the public.

Remaining *amici curiae* are Members of Congress of the United States Senate and the United States House of Representatives. Each of these Senators and Representatives currently represents constituents whose interests are implicated by whether this Court decides to grant certiorari in this case. Those Members of Congress are: in the United States Senate: Orrin G. Hatch of Utah and Mike Lee of Utah, where this case originated, and Jim DeMint of South Carolina; in the United States House of Representatives: Robert Aderholt of Alabama, Todd Akin of Missouri, Vicky Hartzler of Missouri, Tim Huelskamp of Kansas, Walter Jones of North Carolina, Jim Jordan of Ohio, Doug Lamborn of Colorado, Bob Latta of Ohio, Thaddeus McCotter of Michigan, Mike Pence of Indiana, Lamar Smith of Texas, and Marlin Stutzman of Indiana.

SUMMARY OF ARGUMENT

The endorsement of religion test under the Establishment Clause has proved as unworkable in practice as it is unsound in principle. This Court has issued a long series of narrowly divided and splintered decisions that have confused the lower courts, baffled the public, and given government officials strong incentives to suppress legitimate religious expression in order to avoid the costs and hazards of litigation.

Scholarly commentators are as sharply divided as the Court is about the proper interpretation of the Establishment Clause, but there is wide agreement among scholars about one thing: the endorsement test does not represent either a correct interpretation of the Constitution or a workable basis for a coherent jurisprudence. There is simply no hope that anyone will figure out how to clarify the endorsement test so as to avoid the serious problems that it has manifestly generated during its short and troubled life.

The Court should now replace the endorsement test with the traditional understanding that simply requires government to refrain from coercing participation in any religion or religious exercise or otherwise directly benefiting religion to such a degree as to create a state religion. That approach worked well for a very long time before it was abandoned, and it comes much closer than the endorsement test to the original meaning of the First Amendment.

ARGUMENT

I. The Endorsement Test Has Proved Unworkable

Just over twenty years ago, this Court adopted a novel test for judging the constitutionality of public displays that include religious images, one that asks "whether the challenged governmental practice either has the purpose or the effect of 'endorsing' religion." *County of Allegheny v. ACLU of Greater Pittsburgh*, 492 U.S. 573, 592 (1989). Justice O'Connor had

previously articulated and advocated the view underlying this test, which is that the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.* at 594 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

In order to determine whether a display endorses religion, this test asks how the display would appear to an "objective" or "reasonable" observer. "The eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act. *Santa Fe* [*Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)] (quoting *Wallace* [*v. Jaffree*, 472 U.S. 38, 76 (1985)] (O'Connor, J., concurring in the judgment))." *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 862 (2005) (internal quotation marks omitted); *see also Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("[W]hen the reasonable observer would view a government practice as endorsing religion, I believe that it is our *duty* to hold the practice invalid.").

This court has struggled with the endorsement test in a series of splintered and narrowly divided decisions, culminating in *Van Orden v. Perry*, 545 U.S. 677 (2005). In that case, the Court was unable to agree on a majority opinion. Justice Breyer's controlling concurrence articulated a new multi-factor test of

"legal judgment" for a narrow class of passive monument cases. Whether this is a new test, or a reformulation of a previous test, the new formulation is itself a sign that the Court should reconsider the path it has taken since 1989.

The multi-way circuit split that has arisen in the wake of *Van Orden*, which Petitioners have ably described, is only the latest manifestation of the disarray that the endorsement test has produced in the lower courts. Shortly after this Court's seminal *Allegheny* decision upheld the display of a menorah outside a public building, for example, a divided panel of the Second Circuit invalidated a similar display because of slight factual differences between the cases. *See Kaplan v. City of Burlington*, 891 F.2d 1024, 1028 (2d Cir. 1989). The next year, a divided panel of the Fourth Circuit invalidated the display of a crèche, reading *Allegheny* to imply that religious images are permissible only when sufficiently offset by surrounding non-religious images. *See Smith v. City of Albermarle*, 895 F.2d 953, 955-58 (4th Cir. 1990). The same day, a divided panel of the Sixth Circuit interpreted the endorsement test in a somewhat different way, allowing a stable scene used for nativity reenactments if accompanied by a sufficiently prominent written disclaimer of any intent to convey a religious message. *ACLU of Kentucky v. Wilkinson*, 895 F.2d 1098, 1103 (6th Cir. 1990).

It is no accident that the case law that has developed in the wake of *Allegheny* has been at best confusing and at worst incoherent. The test is fatally flawed by the subjective discretion that reviewing courts must exercise in determining what a "reasonable" or "objective" observer would perceive and feel,

and on the basis of what information those perceptions and feelings would arise.

Nor is this problem a matter of inside baseball, or one without significant effects on the Nation. Educated members of the public found *Allegheny*'s decision to strike down a nativity scene while upholding the display of a menorah baffling, or worse. For example, the *Los Angeles Times* editorialized that this Court "needlessly blurred" the "crucial line" drawn by the Establishment Clause by adopting the endorsement test. "Such a standard . . . is and should be offensive to sincere believers. More to the point, it is an open invitation to endless and needlessly divisive litigation. The fact is that a creche is a symbol of [Christianity]; a menorah represents [Judaism]." Editorial, *Blurring the Lines*, L.A. Times, July 5, 1989.

Even more significantly, the legal confusion created by the endorsement test inevitably has *in terrorem* effects on public officials charged with deciding when, how, or whether to permit the use of religious images in public spaces. Notwithstanding the fact that religious symbols and expressions are and always have been ubiquitous in our public life, including on the walls of the building in which this Court sits, recent years have seen a startling series of challenges to long-accepted practices. The Chief Justice of this Court was sued for using the words "so help me God" when administering the presidential oath of office. *See Newdow v. Roberts*, 603 F.3d 1002, 1006-07, 1013 (D.C. Cir. 2010) (affirming dismissal for lack of standing). Similarly, printing the National Motto "In God We Trust" on American currency was challenged as an endorsement of religion. *See*

Newdow v. Lefevre, 598 F.3d 638, 646 & n.12 (9th Cir. 2010) (dismissing the case for lack of standing).

Occasionally such challenges succeed in the lower courts. The Ninth Circuit struck down the Pledge of Allegiance as unconstitutional on the ground that "one Nation under God" is an endorsement of religion. *Newdow v. U.S. Cong.*, 292 F.3d 597, 607-09 (9th Cir. 2002), *as amended*, 328 F.3d 466, 490 (9th Cir. 2002), *rev'd on other grounds sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004). A district court struck down the National Day of Prayer as unconstitutional under the endorsement test. *Freedom from Religion Found., Inc. v. Obama*, 705 F. Supp. 2d 1039, 1057 (W.D. Wis. 2010), *vacated*, 2011 U.S. App. LEXIS 7678, at *10 (7th Cir. Apr. 14, 2011) (dismissing the case for lack of standing).

Prudent public officials would understandably be reluctant to rely on standing doctrines to protect them from such litigation. Even if they could be sure that no plaintiff with standing will ever emerge, they still face the prospect of significant costs (financial and otherwise) in litigating such cases. In any event, plaintiffs with standing can frequently be found, and a significant number of cases involving religious displays have already consumed enormous resources during the short life of the endorsement test.

Worst of all, perhaps, no official can be certain that he or she now knows what is permitted and what is forbidden. The path of least resistance, and the path of due regard for the innocent taxpayer, will often counsel erring on the side of banning religious symbols. In that way, even if in no other, the existing

jurisprudence must operate to suppress religious imagery in ways that go well beyond what this Court has ever indicated is legally required or appropriate.

The time has come, if it is not overdue, for the Court to replace the endorsement test with an approach that can be consistently applied by courts and understood by the people who are subject to the law.

II. A Wide Spectrum of Scholars Agree That the Endorsement Test is Fatally Flawed

Further wrestling with the endorsement test is unlikely to produce a workable refinement or clarification. Since its inception, the test has been subjected to withering criticism from a broad range of commentators. These commentators, who agree on little else about the Establishment Clause, share the view that this test is unworkable and inconsistent with the Constitution. The "Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices." Leonard Levy, *The Establishment Clause: Religion and the First Amendment* 163 (1986). If Professor Levy could say that in 1986, one can only imagine what he would say today.

The commentators fall into two principal groups. "Accommodationists" generally believe that the endorsement test puts too many restrictions on the government's discretion to employ or permit the use of religious images in public places. "Separationists"

generally believe that the test does not sufficiently suppress the use of religious imagery in public. Both groups can make principled arguments for their opposing views of what the Constitution requires and what an appropriate legal test *should* do, but neither group believes that the existing law has led or can lead to a consistent and defensible set of results.

A. "Accommodationist" Scholars Reject the Endorsement Test

Professor Michael McConnell, a prominent and respected critic of the Court's recent Establishment Clause jurisprudence, concludes that the "Court's conception of the First Amendment more closely resemble[s] freedom *from* religion . . . than freedom *of* religion. The animating principle [is] not pluralism and diversity, but maintenance of a scrupulous secularism in all aspects of public life. . . ." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 116 (1992) [hereinafter "McConnell, *Crossroads*"].

Responding to Justice O'Connor's stated goal of designing the endorsement test to achieve consistent results, *see Wallace v. Jaffree*, 472 U.S. at 69 (O'Connor, J., concurring in the judgment), Professor McConnell concluded that "this goal of consistency is the test's greatest failing." McConnell, *Crossroads*, *supra*, at 148. There are several reasons for the test's failure to deliver the hoped-for results.

First, the terms of the test cannot even be clearly defined:

> There is no generally-accepted conception of what "endorsement" is, and there cannot be. Whether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no "neutral" position, outside the culture, from which to make this assessment. The bare concept of "endorsement" therefore provides no guidance to legislatures or to lower courts about what is an establishment of religion. It is nothing more than an application to the Religion Clauses of the principle: "I know it when I see it."

McConnell, *Crossroads*, *supra*, at 148 (citing William P. Marshall, "*We Know It When We See It": The Supreme Court and Establishment*, 59 S. Cal. L. Rev. 495 (1986)).

In McConnell's view, moreover, the endorsement test is biased against religion. He criticizes the test as asymmetrical, calling "spurious" its assurances that it equally condemns both endorsement and disapproval of religion. He notes that no court has ever applied it to strike down a government action for disapproving of religion, which is not surprising since disapproval typically has a secular purpose and obviously does nothing to establish a religion. McConnell, *Crossroads*, *supra*, at 152.

McConnell traces back the development of the endorsement principle, and finds that it is the product of a flawed approach to the Religion Clauses.

Establishment Clause jurisprudence has become so far divorced from the original meaning of the First Amendment that it would be utterly unrecognizable, not only to the Framers, but also to courts throughout most of our history:

> In these days of the Meese-Brennan debate about the significance of the original intention of the framers of the Constitution, it is like stepping into a time warp to read the establishment clause opinions of the 1940's, 1950's, and 1960's. Was it really Justice Brennan in *Abington School District v. Schempp* who told us that, in deciphering the first amendment, "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers?"

Michael W. McConnell, *The Origins of the Religion Clauses of the Constitution: Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 933 (1986) (quoting *Abington School District v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)) [hereinafter "McConnell, *Coercion*"].

Similarly, Professor Jesse Choper stresses the unworkability and perverse effects of the endorsement test:

> [T]he endorsement test raises important, troublesome questions. One . . . concerns how to define the "reasonable (or objective) observer" . . . [L]ower courts, struggling to give it content, have succeeded only in producing

> ad hoc fact-laden decisions that are difficult to reconcile. Another unwise feature of the test, more serious because not curable, is its grounding of a constitutional violation on persons' reactions to their sense that the state is approving of religion . . . [M]ere feelings of offense should [not] rise to the level of a judicially redressable harm under the Establishment Clause, absent any real threat to religious liberty . . . [S]ince its effect is to grant an inappropriately broad discretion to the judiciary, the endorsement approach proves unworkable . . . Finally, fair application of the test is unduly restrictive of government authority and may permit abridgement of core values sought to be secured by the Religion Clauses.

Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & Pol. 499, 510 (2002); *see also id.* at 510-34 (elaborating these points in great detail).

Professor Steven Smith focuses on the ahistorical roots of the endorsement test:

> If the possibility of separating church and state presented eighteenth century Americans with a genuine option, the separation of politics and religion, or of government and religion, did not. Religious premises, assumptions, and values provided the general framework within which most Americans thought about and discussed important philosophical, moral, and political issues. For that reason, Americans of the time could not seriously contemplate a thoroughly secular

> political culture from which religious beliefs, motives, purposes, rhetoric, and practices would be filtered out.

Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 Tex. L. Rev. 955, 966 (1989).

According to Smith, the failure to begin with a proper understanding of the Establishment Clause has led to the current judicial quagmire. "Far from eliminating the inconsistencies and defects that have plagued establishment clause analysis, the [endorsement test] introduce[s] further ambiguities and analytical deficiencies into [Establishment Clause] doctrine." Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 267 (1987).

There is perhaps no element of Establishment Clause jurisprudence that has deviated farther from the original meaning of the Clause than the endorsement test. Even if the Court is not prepared to return entirely to the original understanding, rejection of the recently minted endorsement test would correct an unnecessary and unhelpful deviation from that understanding. Not so long ago, a requirement of government coercion was central to this Court's understanding of religious establishment. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The "Court's decision to abjure coercion as an element of an establishment clause claim essentially was without explanation." McConnell, *Coercion*, *supra*, at 935.

The Court's adoption of the endorsement test in 1989 formalized this deviation. Restoring coercion as a required element of Establishment Clause violations would bring the law much closer to the understanding with which our Nation began and with which this Court was perfectly comfortable through most of its history.

B. "Separationist" Scholars Also Reject the Endorsement Test

The endorsement test also fares poorly among separationists. When the test first appeared in Justice O'Connor's concurring opinion in *Lynch*, Professor Laurence Tribe objected that the "Court dispensed at a stroke with what should have been its paramount concern: from *whose perspective* do we answer the question whether an official crèche effectively tells minority religious groups and non-believers that they are heretics, or at least not similarly worthy of public endorsement?" Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 Harv. L. Rev. 592, 611 (1985) (footnote omitted). Professor Mark Tushnet echoed this objection: Justice O'Connor's conclusion in *Lynch* that the crèche at issue was not an endorsement of religion "came as a surprise to most Jews, whose views on this issue turn out to be 'unfair' in Justice O'Connor's eyes." Mark Tushnet, *The Constitution of Religion*, 18 Conn. L. Rev. 701, 712 n.52 (1986).

The endorsement test has been criticized by separationists because it does not in their view adequately protect against public expressions of religious

faith. Professor Steven Shiffrin charges that it tries and fails to frame a facially neutral test with the appearance of equal treatment. Shiffrin believes that the *Allegheny* Court should have held that the "county's action favors Christianity. This it may not do. End of case." Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 Cornell L. Rev. 9, 63 (2004). Shiffrin also criticizes Justice O'Connor's conclusion that the Pledge of Allegiance is constitutional, citing this as an example of the failure of the endorsement test to stop religious establishments. *See id.* at 67-76.

Professor Steven Gey criticizes the endorsement test as "half-heartedly enforcing the separation principle" that he believes is mandated by the Establishment Clause. Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. Ill. L. Rev. 463, 476. He also articulates the widespread criticism that the endorsement test employs an unacceptably subjective standard. "In contrast to Justice Brennan, whose *Schempp* standard focuses on the objective facts of government aid to religion, Justice O'Connor converts the analysis of Establishment Clause issues into a question of subjective perceptions." *Id.* at 477. "The obvious problem with any approach that measures constitutional compliance by the *appearance* of compliance is that every individual perceives the world differently, depending on factors such as the individual's background, prejudices, sensitivity, and general personality." *Id.* at 478-79 (emphasis added). In sum, "any hypothetical 'objective observer' is only as objective as its creator wants the observer to be." *Id.* at 479.

Amici emphatically reject the separationist view of the Establishment Clause, but the intense dissatisfaction of separationists with the endorsement test highlights one of its principal flaws: it does not implement a coherent principle and it cannot be made to generate a principled and coherent body of case law.

III. This Court Should Abandon the Endorsement Test and Replace It With the Coercion Test

The endorsement test was a novelty when Justice O'Connor devised it in her *Lynch v. Donnelly* concurrence, 465 U.S. at 687-91, and it was unprecedented when the Court narrowly adopted it in *Allegheny*. That adoption was clearly a mistake, as Justice Kennedy eloquently demonstrated in his *Allegheny* dissent. Twenty years of experience have richly confirmed his diagnosis, and provided a wealth of reasons to return to the long-established principles that he defended:

> "[G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith, or tends to do so." *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part) (quoting *Lynch v. Donnelly*, 465 U.S. at 678) (brackets in the original).

This approach is far more consistent than the endorsement test with the original meaning of the First Amendment. It is consistent with the weight of pre-1989 case law. It is perfectly capable of principled and consistent application by the courts. And its restoration will prevent reasonable observers from concluding that this Court's jurisprudence "border[s] on latent hostility toward religion." *Id*. at 657.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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