NO. 17-60

IN THE
Supreme Court of the United States

CITY OF BLOOMFIELD,
Petitioner,

v.

JANE FELIX; B.N. COONE,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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I. Respondents Cannot Obscure The Circuit Conflict On Passive Displays.

The petition outlined a widely acknowledged circuit conflict on the proper standard for evaluating passive monument displays under the Establishment Clause. It cited repeated calls by Justices, judges, and legal commentators for this Court to sort out the confusion created by *Van Orden* and *McCreary*. And it described how that confusion has led to disparate outcomes in cases that should have reached the same result.

Respondents' answer is that all this sound and fury actually obscures unanimous agreement on the appropriate test—in their words, "contextual analysis to assess whether the government has promoted a religious viewpoint." Respondents' Opposition Brief ("Opp.") 13. That contention ignores the conflicting opinions of this Court and among the courts below, which reflect an "Establishment Clause jurisprudence in shambles." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of certiorari).

The confusion stems from this Court's decisions in *Van Orden v. Perry* and *McCreary County v. ACLU of Kentucky*. While *McCreary* applied the *Lemon* test to strike down a Ten Commandments display, 545 U.S. 844, 859 (2005), *Van Orden*—decided the same day—eschewed the *Lemon* test and upheld a Ten Commandments display under a different analysis. 545 U.S. 677, 686 (2005) (plurality) (noting the *Lemon* test is "not useful in dealing with" the passive monument at issue); *id.* at 700 (Breyer, J., concurring

in judgment) (noting criticisms of *Lemon* and opting not to apply it). These two cases did not leave "intact the prevailing constitutional landscape." Opp. 17. Instead these conflicting analytical frameworks for evaluating passive monuments leave lower courts at a loss for how to proceed. *See, e.g.*, *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) ("Confounded by the ten individual opinions in [*Van Orden* and *McCreary*], and perhaps inspired by the Biblical milieu, courts have described the current state of the law as both 'Establishment Clause purgatory' and 'Limbo.'" (internal citations omitted)).

Respondents contend any confusion reflects quibbling over "nomenclature" (Opp. 21-22), but courts *are* applying different legal tests. *See, e.g.*, *Utah Highway*, 132 S. Ct. at 15 (Thomas, J., dissenting from the denial of certiorari) ("Since *Van Orden* and *McCreary*, lower courts have understandably expressed confusion. This confusion has caused the Circuits to apply different tests to displays of religious imagery challenged under the Establishment Clause."); Petition ("Pet.") 16-20 (summarizing circuit conflict).

These different tests are producing different outcomes. *See, e.g.*, *Card*, 520 F.3d at 1015-1016, 1021 (applying *Van Orden* to uphold a monument while noting "government displays of the Ten Commandments can never satisfy the *Lemon* Test"). Indeed, Respondents' claim that the conflict is vacuous is another reason to grant certiorari: if the lower courts are wasting their breath on these disagreements, this Court should say so.

Far from being the grand unified theory Respondents claim, their "contextual analysis" test has not been adopted by *any* court. And for good reason. "Context" is not a test. It provides no guidance. Context alone cannot tell judges or officials what facts matter, and how much. Legal principles do that, providing a framework for courts and others to evaluate the varying factual circumstances presented by actual controversies. Even if lower court decisions on passive displays could be reconciled in some fashion, Respondents' "context" test could not do so.

Finally, Respondents contend this Court "has had multiple opportunities to address" this conflict and denied review. Opp. 22 n.7. But this ongoing conflict argues *for* certiorari, not against it. Prior cases had problems that may have prevented this Court from accepting certiorari. *See, e.g.*, *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J. concurring in the denial of certiorari) (noting the interlocutory posture of the case but inviting the government to "raise the same issue in a later petition following entry of a final judgment"); *Utah Highway*, 132 S. Ct. at 22 n.11 (Thomas, J., dissenting from the denial of certiorari) (noting the argument "that this suit would be a poor vehicle to explore the contours of a coercion-based Establishment Clause test because the State has raised the specter of a preference for one religion over others").

By contrast, this case comes to this Court after a substantial bench trial with numerous stipulated facts and presents an excellent vehicle to address the questions presented. Respondents identify *no* issue

that would prevent the Court from reaching those questions.

II. Conflicting Establishment Clause Tests Are Driving Inconsistent Outcomes Below.

Respondents mistakenly argue this Court should deny review because "any dispute over the precise articulation of the governing analytical framework [is] irrelevant to the outcome of this case." Opp. 27. Conflicting tests do yield inconsistent results.

In *Van Orden* itself, Justice Breyer noted that the display in that case only "might satisfy" the *Lemon* test. 545 U.S. at 703. *Green v. Haskell County Board of Commissioners* is another example. There, the Tenth Circuit applied *Lemon* to invalidate a Ten Commandments monument because "the reasonable observer would view the Monument as having the impermissible principal or primary effect of endorsing religion." 568 F.3d 784, 788 (10th Cir. 2009). As a dissenting judge explained, that outcome "cannot be reconciled with *Van Orden*, which ought to control given the substantial similarities between the operative facts in the two cases." 574 F.3d 1235, 1237 (10th Cir. 2009) (Kelly, J., dissenting from the denial of rehearing en banc). In both *Green* and *Van Orden*, the Ten Commandments display was "located outside, on the grounds of a public building … along with other secular displays." *Id.* But while Justice Breyer's opinion in *Van Orden* upheld the display based on a broad "consideration of the basic purposes of the First Amendment's Religion Clauses," 545 U.S. at 704, the *Green* decision applied the more exacting *Lemon* analysis—focusing on the perspective of a

hypothetical "objective observer" who is "presumed to know far more than most actual members of a given community," 568 F.3d at 800—and held the display unconstitutional.

This case, too, shows why it matters whether *Lemon* or *Van Orden* applies. Here, as in *Van Orden*, (1) the monument has "been used as part of a display that communicates not simply a religious message, but a secular message as well," 545 U.S. at 701 (Breyer, J., concurring in judgment); (2) the monument "prominently acknowledge[s] that [private citizens] donated the display," *id.* at 701; and (3) "[t]he physical setting of the monument … suggests little or nothing of the sacred," *id.* at 702. *See Green*, 574 F.3d at 1249 (Gorsuch, J., dissenting from the denial of rehearing en banc) ("[C]ases like *Van Orden* should come out like *Van Orden*."). Yet, applying *Lemon*, the court below framed its analysis from the perspective of a "hostile 'reasonable observer'" (Pet. App. 126a), and struck the monument down.

In many respects, this case is easier than *Van Orden*. The Bloomfield monument is not as "religious" as the one in *Van Orden*, which included "two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ," 545 U.S. at 681, and which "g[a]ve particular prominence to the Commandments' first sectarian reference, 'I am the Lord thy God,'" *id.* at 738-39 (Souter, J., dissenting). Moreover, Bloomfield was not nearly as involved in erecting the monument as was the government in *Van Orden* where two state legislators "presided over" the dedication ceremony. *Id.* at 682. Here no official spoke

at or played any role in the monument ceremony. Pet. App. 100a, 160a.

In fact, Bloomfield distanced itself from the monument's message by creating a written policy that designated the City Hall lawn as a "limited public forum" for privately funded historical monuments and required all monuments to contain a disclaimer. Pet. App. 158a, 263a, 266a. This fact should have been dispositive, as this Court has never found an Establishment Clause violation when the government created a public forum for private speech.[1]

Respondents' attempts to distinguish the Bloomfield monument from the *Van Orden* monument are simply inaccurate. While Respondents accuse Petitioner of presenting an "incomplete and inaccurate summary of the pertinent facts," Opp. 1, Respondents are the ones guilty of inaccuracies.

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[1] While Respondents argue that this Court has created a categorical rule that permanent monuments are government speech (Opp. 28), this Court has done no such thing. *See* Pet. 26 (explaining this point).

Respondents also argue that *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), "broadened the concept of government speech" to encompass the monument in Bloomfield. Opp. 29. But *Matal v. Tam,* 137 S. Ct. 1744 (2017), held that *Walker*—which involved specialty license plates containing the State's name on them—"likely marks the outer bounds of the government-speech doctrine." *Id.* at 1760. Moreover, in *Walker*, the state did not intend to create "a designated public forum or a limited public forum." 135 S. Ct. at 2251.

First, Respondents argue that, unlike here, the donors of the *Van Orden* monument "sought to highlight the Commandments' role in shaping civic morality." Opp. 24 (quoting *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in judgment)). But Respondents stipulated that Mr. Mauzy "chose to erect a Ten Commandments monument because of the Ten Commandments' historical nature and message."[2] Pet. App. 157a. Moreover, the City policy expressly requires each monument to "relate to the history and heritage of the City's law and government." Pet. App. 269a.

Respondents further attempt to distinguish *Van Orden* by noting the Fraternal Order of Eagles (an allegedly secular group that described the Commandments as "a fundamental part of our lives, the basis of all our laws for living, the foundation of our relationship with our Creator," 545 U.S. at 714 (Stevens, J., dissenting)), paid for the monument while, here, Mauzy attempted to fundraise at two local churches. *See* Opp. 25 (citing *Van Orden*, 545 U.S. at 701). But Mauzy relied on support of various private donors to create the monument (Pet. App. 87a, 103a, 146a), and the constitutionality of a monument

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[2] This fact and others in the petition come from stipulated facts or other undisputed evidence. While Respondents ask this Court to ignore this evidence, this Court holds parties to their stipulated facts and refuses "to consider a party's argument that contradict[s]" stipulated facts. *Christian Legal Soc. Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 677 (2010). Moreover, in First Amendment cases, this Court has "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995).

that complies with a neutral public-forum policy and that does not even identify each individual donor should not depend on a forensic investigation into the religious activities or affiliations of those donors.

Next, Respondents contend that, unlike in *Van Orden*, "the dedication ceremony here was decidedly religious." Opp. 25. But as stipulated, the dedication ceremony was held by private citizens pursuant to "Bloomfield's practice to let anyone use City Hall lawn for events so long as those events are safe." Pet. App. 160a. Bloomfield created a public forum which private parties accessed for the dedication ceremony. Bloomfield officials did not speak at or play any role in the ceremony. Pet. App. 91a, 100a, 160a. To be sure, Mauzy spoke at the ceremony, but he had not been a city official for three years. Pet. App. 87a. A ceremony of private speakers in a public forum cannot establish that the *government* violated the Establishment Clause.

Respondents also argue that the Bloomfield monument, unlike the *Van Orden* monument, "stood alone on the City Hall lawn." Opp. 25-26. But the *Van Orden* monument was never closely surrounded by any other monument, *see* 545 U.S. at 706, and the Bloomfield monument stood "alone" for only four months before private parties erected the nearly adjacent and larger Declaration of Independence monument in November 2011, the Gettysburg Address in 2012, and the Bill of Rights in 2014. Pet. App. 110a, 161a-162a. Even when this lawsuit was filed, the Ten Commandments monument did not stand alone. And Bloomfield surely cannot be blamed for the decisions of private parties who chose which

monument to erect in the forum first, especially when Bloomfield officials did not influence that decision. Pet. App. 253a-254a. *See also Peck v. Upshur Cty. Bd. of Educ.*, 155 F.3d 274, 285-87 (4th Cir. 1998) (rejecting Establishment Clause attack based on the fact that "the first speaker in the forum happens to deliver a religious message…").

Respondents also dispute the legitimacy of Bloomfield's forum policy by mischaracterizing it as giving the City "'absolute discretion' to reject any proposed display." Opp. 28. The district court actually found that the City Council "maintains absolute discretion to reject a monument proposal *based on aesthetic, safety, or practical concerns*." Pet. App. 97a (emphasis added). Such limited discretion—roughly equivalent to the imposition of time, place, and manner restrictions—hardly undermines the neutrality of Bloomfield's forum, especially when that policy explicitly limits the discretion of city officials. *See* Pet. App. 267a (Bloomfield "shall" not "refuse to allow the placement of an item because of the viewpoint of any message communicated by the item."); *see also Christian Legal Soc.*, 561 U.S. at 681 (restricting limited public forum based on speaker identity and subject matter upheld).

Finally, Respondents argue that, unlike in *Van Orden*, the Bloomfield monument "incited community discord almost immediately after it was proposed" (Opp. 26), but Respondents fail to cite any facts supporting that assertion. The district court found that "[t]he vast majority of people who have publicly expressed an opinion about the [monument] have supported it." Pet. App. 106a. Furthermore, the "if

you don't like living here" statement Respondents cite repeatedly is taken from 2007, before the City adopted its neutral forum policy and four years removed from when the monument was actually installed.

In short, this case should have been analyzed under *Van Orden* and decided like *Van Orden*. Only the confusion among lower courts about the proper standard prevented that result. This state of affairs puts towns like Bloomfield (and states like the twenty-three participating here as *amici*) in an untenable position. However closely they follow *Van Orden*'s guidance, they still risk costly and lengthy litigation and the prospect of a court applying *Lemon* to order a display removed. The end result—the only safe choice—is for governments to prohibit or remove displays tinged with religious significance. While Respondents would welcome this, the Establishment Clause surely does not require it. Indeed, "purg[ing] from the public sphere all that in any way partakes of the religious … would … promote the kind of social conflict the Establishment Clause seeks to avoid." 545 U.S. at 699 (Breyer, J., concurring in judgment).

III. Lower Courts Have Ignored *Valley Forge.*

Respondents argue Petitioner "seeks to rewrite the doctrine of Establishment Clause standing." Opp. 31. But Petitioner seeks only to reground the lower courts' standing jurisprudence in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, which many lower courts have ignored.

While "noneconomic injuries" (Opp. 29) may be sufficient for standing, *Valley Forge* clarifies that such injuries must be more than "psychological consequence[s] presumably produced by observation of conduct with which one disagrees." 454 U.S. 464, 485 (1982). Such psychological harm is all Respondents alleged here: they contend that their occasional, non-coerced exposure to a monument that one Respondent has not even read creates non-economic, psychological harm arising solely because they disagree with the message on that monument. *Valley Forge* precludes standing in such circumstances.

The plaintiffs in *Valley Forge* objected to an activity that they only read about in newspapers, whereas Respondents here have observed the Bloomfield monument (from a distance). But *Valley Forge* stands for a legal principle that extends beyond the specific facts of that case. And the legal distinction *Valley Forge* draws is not between "personal contact" with government action and mere indirect exposure. Opp. 30. *Valley Forge* precluded standing even in cases of personal contact, holding that standing cannot be based merely on "*observation* of conduct with which one disagrees." 454 U.S. at 485 (emphasis added).

The line *Valley Forge* actually draws is between mere personal disagreement with government activity and government coercion to participate in some religious expression or exercise. This Court accordingly distinguished *School District of Abington Township. v. Schempp*, 374 U.S. 203 (1963), on the ground that "impressionable schoolchildren were

subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 486 n.22. Indeed, both *Schempp* and *Lee v. Weisman*, 505 U.S. 577 (1992), involved "[s]ocial pressure to participate in a religious exercise" that the Court found to be "functionally equivalent to a government requirement, due to the unique impressionability of schoolchildren combined with the strong pressure they feel to attend even non-mandatory school activities." *Habecker v. Town of Estes Park,* 518 F.3d 1217, 1226 (10th Cir. 2008).[3]

Valley Forge rejected the argument that the Establishment Clause requires "special exceptions" to the traditional standing inquiry. 454 U.S. at 488. Yet lower federal courts have done exactly that in finding standing in passive display cases. These cases now "occupy their own special corner of standing jurisprudence." *Barnes-Wallace v. City of San Diego*, 551 F.3d 891, 896 (9th Cir. 2008) (O'Scannlain, J., dissenting from denial of rehearing en banc). Allowing standing in these cases tends to *sharpen*, not avoid, divisiveness by turning every personal disagreement with a monument or government message into a federal case. This Court should grant certiorari to bring lower courts' standing jurisprudence back in line with *Valley Forge*.

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[3] Contrary to Respondents' suggestion, this Court's decisions where standing was not challenged do not prove the existence of standing. *See* Pet. 31 n.9; *see also Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006).

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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