

No. _____

**In The
Supreme Court of the United States**

CITY OF SAN DIEGO, UNITED STATES OF AMERICA,
MOUNT SOLEDAD MEMORIAL ASSOCIATION, AND
LEON E. PANETTA, SECRETARY OF DEFENSE,
IN HIS OFFICIAL CAPACITY,

Petitioners,

v.

STEVE TRUNK, PHILIP K. PAULSON, JEWISH WAR
VETERANS OF THE UNITED STATES OF AMERICA,
INC., RICHARD A. SMITH, MINA SAGHEB,
AND JUDITH M. COPELAND,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

KELLY J. SHACKELFORD
JEFFREY C. MATEER
HIRAM S. SASSER III
LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, Texas 75075
972.941.4444

CHARLES V. BERWANGER
GORDON & REES LLP
101 West Broadway,
Suite 2000
San Diego, California 92101
619.230.7784

ALLYSON N. HO
Counsel of Record
WILLIAM S.W. CHANG
CRAIG A. STANFIELD
JAMES B. TARTER
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street,
Suite 3200
Dallas, Texas 75201
214.466.4000
aho@morganlewis.com

*Counsel for Petitioner
Mount Soledad
Memorial Association*

QUESTION PRESENTED

In 2006, the federal government acquired the Mount Soledad Veterans Memorial “in order to preserve * * * a national memorial honoring veterans of the United States Armed Forces[.]” Congress found that “for over 52 years,” the Memorial has been “a tribute to the members of the United States Armed Forces who sacrificed their lives in the defense of the United States.” Congress found that the “memorial cross” at Mount Soledad is “fully integrated as the centerpiece of the multi-faceted * * * Memorial that is replete with secular symbols[.]” And Congress found that the “patriotic and inspirational symbolism” of the Memorial’s passive display “provides solace to the families and comrades of the veterans it memorializes.”

The question presented is:

Whether the Mount Soledad Veterans Memorial—recognized by Congress as a national veterans memorial that has stood for over 50 years “as a tribute to the members of the United States Armed Forces who sacrificed their lives in the defense of the United States”—violates the Establishment Clause because it contains a cross among numerous other secular symbols of patriotism and sacrifice.

LIST OF ALL PARTIES TO THE PROCEEDING

The caption of this petition contains all parties to the proceeding.¹

¹ In the proceedings below, Robert M. Gates, not Leon E. Panetta, was a named defendant. Leon E. Panetta was sworn in as Secretary of Defense on July 1, 2011, and is automatically substituted as defendant for the former Secretary of Defense. See FED. R. APP. P. 43(c)(2).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mount Soledad Memorial Association respectfully submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.



OPINIONS AND ORDERS BELOW

The opinion of the court of appeals denying *en banc* review, and the dissent therefrom (App., *infra*, 124-52), is reported at 660 F.3d 1091. The panel opinion (App., *infra*, 1-64) is reported at 629 F.3d 1099. The memorandum decision and order of the district court (App., *infra*, 65-123) is reported at 568 F. Supp. 2d 1199.



STATEMENT OF JURISDICTION

The court of appeals filed its opinion denying *en banc* review on October 14, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: “Congress shall

make no law respecting an establishment of religion
* * * *” U.S. CONST. amend. I.



STATEMENT

The Mount Soledad Veterans Memorial is the only memorial in the Nation that honors all veterans, living and deceased, from the Revolutionary War to the current conflicts in the Middle East. The Memorial includes over 3000 black granite plaques on the Memorial Walls honoring Presidents, Medal of Honor recipients, Admirals, Generals, and thousands of others who have proudly served their country in helping to preserve the freedoms we enjoy as Americans. Congress has expressly found that the “patriotic and inspirational symbolism of the Mt. Soledad Veterans Memorial provides solace to the families and comrades of the veterans it memorializes.” Pub. L. No. 109-272, 120 Stat. 770, § 1(4) (2006).

The Memorial includes a “[m]emorial [c]ross” which, according to Congress’ express finding, is “fully integrated” into the “multi-faceted * * * Memorial that is replete with secular symbols.” *Id.* § 1(3). But that was not enough for the Ninth Circuit, which held that the Memorial—“presently configured and as a whole”—violates the Establishment Clause. App. 62. That decision conflicts with this Court’s cases holding that such use of religious symbols in passive displays does not run afoul of the Establishment

Clause. And it puts at risk one of the Nation's most cherished veterans memorials.

There is no question the cross is a religious symbol—just as there is no question prayer is a religious activity, or the Ten Commandments is a religious text. But as this Court recognized long ago in holding that prayers offered at the opening of state legislative sessions do not offend the Constitution—and recently affirmed in holding that a Ten Commandments monument on the Texas Capitol grounds does not either—that they are religious is not determinative. What matters is context and history. And the context and history of the Memorial make clear that its primary purpose and effect is not to endorse religion, but to honor veterans.

1. Located between Camp Pendleton and Naval Base San Diego, the Mount Soledad Veterans Memorial has stood in San Diego, California, “for over 5[6] years as a tribute to the members of the United States Armed Forces who sacrificed their lives in the defense of the United States.” Pub. L. No. 109-272 § 1(1); App. 152 (Bea, J., dissenting from denial of rehearing *en banc*). San Diego, long known as a “Navy town,” is the principal homeport of the Pacific Fleet. The city is heavily influenced by and dependent on the armed forces. *Ibid.*

In 1954, petitioner erected the cross that now stands at the Memorial. Pub. L. No. 109-272 § 1(2). That same year, it was officially dedicated to fallen

veterans of the First and Second World Wars and the Korean War. *Ibid.*

In 2004, Congress passed a resolution designating the Memorial as a “national memorial honoring veterans of the United States Armed Forces.” Pub. L. No. 108-447, 118 Stat. 2809, 3346 (2004). Then in 2006, the government acquired the Memorial “to preserve a historically significant war memorial * * * honoring veterans of the United States Armed Forces.” Pub. L. No. 109-272 § 2(a). Although the federal government acquired the Memorial, Congress directed the Secretary of Defense to “enter into a memorandum of understanding with the Mt. Soledad Memorial Association for the continued maintenance of the Mt. Soledad Veterans Memorial by the Association.” *Id.* § 2(c).

Congress expressly found that the “memorial [c]ross is fully integrated as the centerpiece of the multi-faceted * * * Memorial that is replete with secular symbols.” *Id.* § 1(3). Congress also found that the “patriotic and inspirational symbolism [at] the Mt. Soledad Veterans Memorial provides solace to the families and comrades of the veterans it memorializes.” *Id.* § 1(4).

The memorial cross is 29 feet tall, standing on a 14-foot base, with a plaque identifying it as a veterans memorial. App. 7. Six large granite walls circle the memorial cross. *Ibid.* They feature nearly 3000 plaques honoring veterans. *Ibid.* The plaques contain personal information and pictures. *Id.* at 70-71.

They also display various secular and religious symbols, *ibid.*, including 706 American flags, 134 crosses, 18 Stars of David, 18 Masonic symbols, and 12 Medals of Honor.

The memorial cross stood for 35 years without legal challenge or community dissension until one of the original plaintiffs in this case sought to enjoin the City of San Diego from displaying the memorial cross. App. 8. The district court granted the injunction, concluding that the display violated the No Preference Clause of the California Constitution. *Ibid.*

In 2006, the district court ordered the City to comply with the injunction. App. 10-11. The Ninth Circuit denied a stay pending appeal. *Id.* at 11. Soon after, three members of the House of Representatives introduced a bill to acquire the Memorial. *Ibid.*

The City petitioned Justice Kennedy, as Circuit Justice, to grant the stay, which he did. *San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1304 (Kennedy, Circuit Justice 2006). Justice Kennedy explained that "Congress' evident desire to preserve the memorial makes it substantially more likely that four Justices will agree to review the case in the event the Court of Appeals affirms." *Id.* at 1304.

2. After Congress acquired the Memorial, Paulson and others filed this lawsuit. App. 12. On summary judgment, the district court held there was no Establishment Clause violation because (1) "Congress acted with the clear-cut and bona fide secular purpose to

preserve the site as a veterans' memorial," and (2) the primary effect of the Memorial is "patriotic and nationalistic." *Id.* at 91, 103.

3. The Ninth Circuit reversed, holding that the Memorial, "presently configured and as a whole," violates the Establishment Clause. App. 62. At the outset, the court exhibited uncertainty as to which legal framework to apply in its analysis—the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), or the *Van Orden* "exception," based on Justice Breyer's concurrence in *Van Orden v. Perry*, 545 U.S. 677 (2005). App. 13-18. Noting the lack of clear guidance, the court declined to decide which framework applies, and instead applied both. *Id.* at 18.²

The Ninth Circuit agreed with the district court that the government's purpose was "predominately secular." App. 19. Despite that secular purpose, the court of appeals held that Congress' preservation of the Memorial violates the Establishment Clause because "the Memorial[,] presently configured and as a whole, primarily conveys a message of government endorsement of religion." *Id.* at 62.

² Under the *Lemon* test, government conduct violates the Establishment Clause if (1) the primary purpose is sectarian; (2) the principle effect is to advance religion; or (3) the conduct causes excessive entanglement with religion. 403 U.S. at 612-13. In some cases, this Court has applied an "endorsement test," which modifies the "effect prong" of the *Lemon* test by asking how a well-informed reasonable observer would view the challenged conduct. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

The Ninth Circuit began its analysis by asserting that the memorial cross is a “sectarian, Christian symbol.” App. 40. Only then did the court examine the history and physical setting of the Memorial to determine, as the court put it, whether there were sufficient “[s]ecular elements” to “transform” the “sectarian” message of the memorial cross. *Id.* at 41-44.

As to history, the Ninth Circuit focused almost exclusively on religious activities associated with the Memorial before the government’s acquisition. App. 44-52. And as to the physical setting of the Memorial, the court concluded that the comparative size and centrality of the memorial cross send a sectarian message. *Id.* at 54-59. The court described the thousands of tributes to this Nation and its veterans as “less significant secular elements” of the Memorial. *Id.* at 25.

4. Defendants moved for panel rehearing and rehearing *en banc*. The court denied the request over a dissent by Judge Bea (joined by Judges O’Scannlain, Tallman, Callahan, and Ikuta). App. 125.

Judge Bea’s dissent objected that the panel had applied the wrong legal test. App. 129-32. According to the dissent, the panel should have applied Justice Breyer’s legal judgment test from *Van Orden*, because that test governs long-standing passive displays on government property, like the Memorial. *Id.* at 130.

The dissent identified three components of the legal judgment test that govern Establishment Clause challenges like this one: (1) the government's use of the religious symbol; (2) the context in which the symbol appears; and (3) the history of the symbol under government control, including how long it has stood without legal challenge. *Id.* at 130-32. Applying those factors, the dissent concluded that the Memorial did not violate the Establishment Clause.

As to use, the dissent noted that under this Court's plurality decisions in *Van Orden* and *Salazar v. Buono*, 130 S. Ct. 1803 (2010), the memorial cross has an "undeniable historical meaning * * * evoking the memory of fallen soldiers." App. 127, 133-35 (citations and internal quotation marks omitted). The dissent then explained that the government's use of the memorial cross has been consistent with that secular message, because "it is undisputed here that from the moment the federal government took title to the Mt. Soledad Memorial site in 2006, it has neither held nor permitted to be held any sort of a religious exercise there." *Id.* at 127.

As to context, the dissent emphasized that "the record evidence is also undisputed that at the time the federal government bought the Mt. Soledad Memorial site, the [c]ross was surrounded with over 2,100 plaques commemorating veterans of various faiths or of no faith * * * *'" App. 127.

And as to history, the dissent explained that the panel incorrectly examined the history of the

memorial cross before the government's use. App. 135-36. In the dissent's view, none of the history before the government's acquisition is relevant, because the issue is whether "the *present* use by the government—the precise use which plaintiffs seek to enjoin—constitutes an endorsement of religion." *Id.* at 137 (emphasis in original). And the present use of the Memorial has been consistent with that secular message, because "it is undisputed here that from the moment the federal government took title to the Mt. Soledad Memorial site in 2006, it has neither held nor permitted to be held any sort of a religious exercise there." *Id.* at 127.

The dissent further explained that in determining "whether a cross is traditionally a memorial symbol for the fallen servicemen, we should grant some deference to the reflection of the popular understanding of the symbol as established by Congress." App. 149. According to the dissent, Congress' finding on that matter—together with the expert evidence on the secular meaning of the cross—should have, at the very least, created a triable issue as to "whether the Cross conveys a predominantly religious or secular message given its setting, and the relevant history of the site." *Ibid.*

Petitioner and the government each moved the Ninth Circuit for a stay of the mandate pending petitions for certiorari. Both argued that the case presents substantial questions that likely meet this Court's criteria for granting certiorari and that there

is good cause for the stay. The Ninth Circuit granted the motions and stayed the mandate.



REASONS FOR GRANTING THE PETITION

The Ninth Circuit’s decision that the Mount Soledad Veterans Memorial violates the Establishment Clause sharply conflicts with this Court’s cases concerning passive displays that hold “[s]imply having religious content” or even “promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” *Van Orden*, 545 U.S. at 690 (plurality) (citing cases). It nullifies Congress’ express statutory purpose for preserving the Memorial—the same purpose to which Justice Kennedy gave great weight when he granted the prior stay. And it imperils one of the Nation’s most cherished tributes to the service and sacrifice of veterans and their families—as well as similar tributes across the Nation.

Given the ubiquity of crosses and other religious symbols on veterans memorials throughout the Nation—all of which are potentially at risk—there is a pressing national need for the Court to make clear that memorials adorned with religious symbols such as a cross or the Star of David are not constitutionally suspect. The Court should grant the petition and reverse the Ninth Circuit’s judgment.

I. The Ninth Circuit’s Decision That The Mount Soledad Veterans Memorial Is Unconstitutional Conflicts With This Court’s Cases

The Ninth Circuit’s decision hopelessly conflicts with this Court’s cases holding that religious symbols can convey primarily secular messages. The key under those cases is how religious imagery is used in a particular passive display—an examination that may very well lead to the conclusion that a religious symbol is not primarily religious at all in that context. Although the Ninth Circuit paid lip service to that principle, the court’s judgment that the Mount Soledad Veterans Memorial is unconstitutional violates it.

This Court’s decision in *Van Orden* compels that conclusion. In *Van Orden*, this Court made plain that “[s]imply having religious content * * * does not run afoul of the Establishment Clause.” *Id.* at 690 (plurality); *id.* at 701 (Breyer, J., concurring). Here, the memorial cross stood unchallenged (without provoking any legal action or community dissension) for 35 years—about as long as the monument in *Van Orden*—as a tribute to America’s veterans who paid the ultimate price in the defense of freedom. The federal government was not involved with the Memorial until it sought to save the Memorial from destruction. And the government’s actions since then have only confirmed the secular status of the Memorial.

In *Van Orden*, a plurality of this Court adopted a context-specific, fact-driven analysis for assessing claims, like the one in this case, that a passive display violates the Establishment Clause. See 545 U.S. at 691-92. Likewise, Justice Breyer’s opinion concurring in the judgment agreed that in Establishment Clause cases involving longstanding passive monuments, there is “no * * * substitute for the exercise of legal judgment.” *Id.* at 700 (Breyer, J., concurring).

In this case, Congress’ efforts to preserve the Memorial are permissible when evaluated in light of the Memorial’s nature, history, and context, as *Van Orden* requires. Any other result would “exhibit a hostility toward religion that has no place in our Establishment Clause traditions.” *Id.* at 704 (Breyer, J., concurring).

Indeed, Justice Breyer focused in particular on the extended period of time that the Texas monument had stood without controversy and on the lack of divisiveness those decades reflected:

This display has stood apparently uncontested for nearly two generations. That experience helps us understand as a practical matter of *degree* this display is unlikely to prove divisive. And this matter of degree is, I believe, critical in borderline cases such as this one.

Ibid. (Breyer, J., concurring) (emphasis in original). Under *Van Orden*, the present case is straightforward. If anything, the arguments supporting the

constitutionality of the Memorial are stronger and more compelling than those in *Van Orden*.

First, the sole historical purpose of the Memorial is to commemorate veterans, just as similar memorials do the world over. And, until the Memorial was threatened with destruction, the federal government had taken no action whatsoever with respect to the Memorial. Since the federal government acquired the Memorial, it is undisputed that no religious ceremonies or events have been held there. Rather, the Memorial has been used primarily for veterans ceremonies.³

Second, “[t]he circumstances surrounding the display’s placement * * * and its physical setting” in San Diego suggest little of the sacred or the sectarian. See *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring). Although the cross is unquestionably a religious symbol, the question under *Van Orden* is not whether the Memorial includes facially religious content, but “how the [content] is *used*.” *Ibid.* (Breyer, J., concurring) (emphasis in original). Here, as Congress expressly found, the cross is used to honor

³ For example, according to the Memorial website, the most recent event was a special Veterans Day plaque presentation honoring Captain Louis Zamperini, a World War II Air Corps hero and the subject of the recent bestselling biography *Unbroken*. See <http://www.soledadmemorial.com/news-events/memorial-veterans-days/> (last visited Feb. 8, 2012). Home Box Office (or HBO)—hardly a purveyor of things religious—is the lead sponsor of these events. *Ibid.*

veterans and remember their sacrifices—part of the “long history and tradition of memorializing members of the Armed Forces who die in battle with a cross or other religious emblem of their faith * * * *” App. 12; Pub. L. No. 109-272 § 1(3).

The context and history of the Ten Commandments monument in *Van Orden* suggested that the State “intended the * * * nonreligious aspects of the tablets’ message to predominate” by conveying “an illustrative message reflecting the historical ‘ideals’ of Texans.” *Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring). Here, it is even clearer that the Memorial’s predominant message of commemorating and honoring veterans is secular because similar monuments are used for similar purposes throughout the world—and because Congress expressly so found. Given that history, it is not surprising that the Memorial stood without legal challenge or community complaint for 35 years until this litigation.

To be sure, the cross is an indisputably religious image, but not to the degree that is a direct physical representation of the baby Jesus, upheld by this Court in *Lynch v. Donnelly*, 465 U.S. 668 (1984). And not to the degree of the Ten Commandments, a text sacred to millions and believed to have been written by the hand of God Himself. Moreover, the cross has a more markedly secular significance, given its ubiquity in veterans memorials throughout the world.

Just as the Ten Commandments, while unquestionably religious, have also had a significant secular impact on law and culture, so also has the image of a cross, while unquestionably religious, had for centuries a prominent role in commemorating veterans. The image of the Ten Commandments reflected that dual history, just as do the thousands and thousands of crosses throughout the world that commemorate veterans who have given their lives in service. If anything, the monument upheld in *Van Orden* presented a closer question under the Establishment Clause than the Memorial under attack here.

That conclusion is confirmed by Justice Kennedy's plurality opinion in *Buono*. See 130 S. Ct. at 1820 (plurality). Of particular significance, the plurality stressed that, when used in veterans memorials, crosses convey a secular message of military service and remembrance:

But 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.

Ibid. Thus, a single Latin cross can “evoke[] far more than religion.” *Ibid.* “It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.” *Ibid.*

The veterans memorial in *Salazar*, for example, consisted of a single cross and a memorial plaque. 130 S. Ct. at 1817 (plurality). That context was sufficient for the plurality to view the cross as “not merely a reaffirmation of Christian beliefs,” but as a symbol of military sacrifice. See *id.* at 1820. Here too, a plaque at the base of the memorial cross identifies it to all visitors as the “MT. SOLEDAD VETERANS MEMORIAL CROSS DEDICATED IN 1954, AS A TRIBUTE TO ALL BRANCHES OF THE ARMED FORCES OF U.S.A. SERVICEMEN AND WOMEN.” And in acquiring the Memorial, Congress expressly found that the “patriotic and inspirational symbolism of the Mt. Soledad Veterans Memorial provides solace to the families and comrades of the veterans it memorializes.” Pub. L. No. 109-272 § 1(4).

But the Ninth Circuit effectively rejected the *Salazar* plurality’s view that “a Latin cross may be a generic symbol of memorialization * * * *” App. 39 n.18 (citation omitted). In the Ninth Circuit’s view, “[t]he Latin cross can * * * serve as a powerful symbol of death and memorialization, *but it remains a sectarian, Christian symbol.*” App. 39-40 (emphasis added). In short, the Ninth Circuit concluded, directly contrary to the *Salazar* plurality, that the cross can be only a sectarian, Christian symbol, no matter how it is used.

Moreover, as in *Van Orden*, other physical features of the Memorial further confirm that the memorial cross is being used as a veterans memorial and not as a “reaffirmation of Christian beliefs.” Six large

granite walls with over 3000 memorial plaques, bearing various religious and secular symbols, surround the memorial cross. App. 7, 41, 70-71, 127. Brick paving stones commemorate veterans and their supporters. *Id.* at 7, 71. Twenty-three bollards honor veterans' and other community organizations. *Id.* at 7, 71, 127-28. And a large American flag flies atop a 30-foot flagpole—a foot higher than the memorial cross itself. *Id.* at 7-8, 71. That physical setting underscores that the predominant effect of the Memorial is to convey a secular message of patriotism and sacrifice. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring).

Although the Ninth Circuit acknowledged that the Memorial includes thousands of tributes to this Nation and its veterans, it nonetheless discounted them as “less significant secular elements” of the Memorial because the memorial cross is taller and sits at the center of the Memorial. App. 25. That erroneous conclusion is based on a misreading of *County of Allegheny v. ACLU*, 492 U.S. 572, 617-21 (1989), which *upheld* a passive display consisting of a sign saluting liberty, an 18-foot menorah, and a 45-foot Christmas tree that stood at the center of the display.

Essentially, the Ninth Circuit reduced *Allegheny* to a mere height-and-centrality analysis. But the *Allegheny* display did not include anything comparable to the thousands of tributes here. The reasonable

observer—who is the “personification of a community ideal of reasonable behavior”—would hardly consider thousands of memorials honoring service and patriotism merely “less significant secular elements.” *Pinette*, 515 U.S. at 780 (O’Connor, J., concurring) (internal quotation marks omitted).⁴

Moreover, if the *Allegheny* display conveyed a secular message, then certainly the combination of thousands of tributes to veterans, bollards, memorial bricks, the American flag flying 30 feet in the air, and the memorial cross, with a plaque designating it as a veterans memorial, do as well. As the dissent from the denial of rehearing *en banc* observed:

If the Mojave Desert cross standing by itself, with only a single plaque, can be understood as a memorial to fallen soldiers, then surely the Mt. Soledad Cross, surrounded by more than 2100 memorial plaques, bollards commemorating groups of veterans, and a

⁴ This case highlights the ongoing confusion and troubling results produced by the endorsement test, narrowly adopted by the Court in *Allegheny*, 492 U.S. at 592. In light of the confusion the endorsement test has produced, this case may be an appropriate vehicle for considering whether it should be replaced by the coercion test advocated by Justice Kennedy in *Allegheny*. See 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part).

gigantic American flag, can be viewed as a memorial as well.

App. 135 (Bea, J., dissenting from denial of rehearing *en banc*).⁵

II. If Permitted To Stand, The Ninth Circuit's Decision Will Imperil Thousands Of Similar Memorials Across The Nation

This Court's review would be warranted even if the Ninth Circuit's decision threatened only the treasured Mount Soledad Veterans Memorial. But the decision's potential reach is hardly so limited.

Crosses and other religious symbols are used in countless memorials across the Nation to honor veterans who have fought and died for their country. The Ninth Circuit's decision holding that the Mount Soledad Veterans Memorial—"presently configured and as a whole," App. 62—violates the Establishment Clause puts all of those tributes at risk. And the

⁵ This Court recently denied certiorari in *Utah Highway Patrol Association v. American Atheists, Inc.*, which involved an Establishment Clause challenge to roadside memorials to state troopers that include a cross. See 565 U.S. ___, 132 S. Ct. 12, 22-23 (2011) (Thomas, J., dissenting from denial of certiorari) ("[S]ix years after *Van Orden*, our Establishment Clause precedents remain impenetrable, and the lower courts' decisions * * * remain incapable of coherent explanation."). Although the various legal tests produce a myriad of legal outcomes in an unending parade of factual contexts, one thing should be clear—veterans memorials like Mount Soledad deserve protection under any of this Court's tests.

Ninth Circuit itself acknowledged that its decision—which necessarily requires permanent, physical changes to the Memorial—will inflict “sincere anguish” on veterans, their families, and others. App. 6; see also *San Diegans for the Mt. Soledad Nat’l War Mem’l*, 548 U.S. at 1303 (referring to the “irreparable harm” of “altering the memorial and removing the cross”).

For centuries, memorials containing religious symbols have evoked, honored, and solemnized the ultimate sacrifice made by this country’s fighting men and women. If, as the Ninth Circuit held, the existence of those monuments gives rise to a constitutional violation, the only remaining option would be the removal, defacement, or destruction of countless cherished memorials across the Nation. Among them are the Canadian Cross of Sacrifice; the Mexico Civil War Memorial; the Argonne Cross Memorial at Arlington National Cemetery; the Irish Brigade Monument at Gettysburg National Military Park; a memorial to American servicemen who endured the Bataan Death March in World War II in Taos, New Mexico; and an American Legion War Memorial in La Mesa, California. See App. 145 (Bea, J., dissenting from denial of rehearing *en banc*) (identifying those and other prominent crosses used to commemorate the sacrifice of those in the American military).

That litigation threat is not theoretical, but real. Two days after 9/11, a rescue worker found two connecting steel beams wrenched from the rest of the structure in the rubble of the World Trade Center. Left standing after the Twin Towers had fallen, the

steel beams formed a 20-foot cross, and it became a symbol of hope for rescue workers. In the weeks following the 9/11 terrorist attacks, the steel-beam cross served as a powerful sign of life, hope, and triumph over adversity. It honored the dead and imparted courage to the living.

Today, the 9/11 cross stands in the September 11 Memorial and Museum bearing a plaque that proclaims it a “symbol of hope for all.” Like the memorial cross, it commemorates those who perished and “honor[s] and respect[s] those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.” See *Salazar*, 130 S. Ct. at 1820 (plurality). Like the memorial cross, the 9/11 cross stands among other secular symbols that reflect the personal and collective sacrifices and triumphs on and since that day. And like the memorial cross, the 9/11 cross is currently under the cloud of an Establishment Clause challenge. See Complaint, *Am. Atheists, Inc. v. Port Auth. of New York*, Index No. 11108670 (N.Y. Sup. Ct. filed July 27, 2011); Notice of Removal, *Am. Atheists, Inc. v. Port Auth. of New York*, Case No. 1:11-cv-06026-DAB (S.D.N.Y. filed Aug. 26, 2011).

Enough is enough. The Court should grant the petition, reverse the judgment of the Ninth Circuit, and make clear that the Establishment Clause does not require the destruction, alteration, or removal of memorials honoring those who have valiantly served

their country merely because those memorials contain religious symbolism.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KELLY J. SHACKELFORD
JEFFREY C. MATEER
HIRAM S. SASSER III
LIBERTY INSTITUTE
2001 West Plano Parkway,
Suite 1600
Plano, Texas 75075
972.941.4444

CHARLES V. BERWANGER
GORDON & REES LLP
101 West Broadway,
Suite 2000
San Diego, California 92101
619.230.7784

ALLYSON N. HO
Counsel of Record
WILLIAM S.W. CHANG
CRAIG A. STANFIELD
JAMES B. TARTER
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street,
Suite 3200
Dallas, Texas 75201
214.466.4000
aho@morganlewis.com
Counsel for Petitioner
Mount Soledad
Memorial Association