

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

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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,

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629 F.3d 1099

Steve TRUNK, Plaintiff,

and

**Jewish War Veterans of the United States of
America, Inc.; Richard A. Smith; Mina Sagheb;
Judith M. Copeland, Plaintiffs-Appellants,**

v.

**CITY OF SAN DIEGO; United States of America;
Robert M. Gates, Secretary of Defense,
Defendants-Appellees.**

**Steve Trunk, Philip K. Paulson,
Plaintiffs-Appellants,**

and

**Richard A. Smith; Mina Sagheb; Judith M. Cope-
land; Jewish War Veterans of the United
States of America, Inc., Plaintiffs,**

v.

**City of San Diego; United States of America;
Mount Soledad Memorial Association, Real
parties in interest; Robert M. Gates, Sec-
retary of Defense, in his official capacity,
Defendants-Appellees.**

Nos. 08-56415, 08-56436.

United States Court of Appeals, Ninth Circuit.

Argued Dec. 9, 2009.

Submitted Dec. 30, 2010.

Filed Jan. 4, 2011.

John David Blair-Loy, ACLU Foundation of San Diego and Imperial Counties, San Diego, CA, Matthew T. Jones [argued], Adam Raviv and A. Stephen Hut, Jr., Wilmer Hale LLP, Daniel Mach, American Civil Liberties Union, Washington, DC, James E. McElroy, Law Offices of James E. McElroy, Del Mar, CA, for the plaintiffs-appellants.

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Peter D. Lepiscopo, Lepiscopo & Morrow, LLP, Sacramento, CA, for Amicus Curiae Pacific Justice Institute.

Appeal from the United States District Court for the Southern District of California, Larry A. Burns, District Judge, Presiding. D.C. Nos. 3:06-cv-01597LAB-WMC, 3:06-cv-01728-LAB-WMC.

Before: HARRY PREGERSON, M. MARGARET McKEOWN, and RICHARD A. PAEZ, Circuit Judges.

OPINION

McKEOWN, Circuit Judge:

The forty-three foot cross ("Cross") and veterans' memorial ("Memorial") atop Mount Soledad in La

Jolla, California, have generated controversy for more than twenty years. During this time, the citizens of San Diego (where La Jolla is located), the San Diego City Council, the United States Congress, and, on multiple occasions, the state and federal courts have considered its fate. Yet no resolution has emerged. Indeed, we believe that no broadly applauded resolution is possible because this case represents the difficult and intractable intersection of religion, patriotism, and the Constitution. Hard decisions can make good law, but they are not painless for good people and their concerns.

Much lore surrounds the Cross and its history. But the record is our guide and, indeed, except for how they characterize the evidence, the parties essentially agree about the history. A cross was first erected on Mount Soledad in 1913. That cross was replaced in the 1920s and then blew down in 1952. The present Cross was dedicated in 1954 “as a reminder of God’s promise to man of everlasting life and of those persons who gave their lives for our freedom * * * *” The primary objective in erecting a Cross on the site was to construct “a permanent handsome cast concrete cross,” but also “to create a park worthy of this magnificent view, and worthy to be a setting for the symbol of Christianity.” For most of its history, the Cross served as a site for annual Easter services. Only after the legal controversy began in the late 1980s was a plaque added designating the site as a war memorial, along with substantial physical revisions honoring veterans. It was not until the late

1990s that veterans' organizations began holding regular memorial services at the site.¹

More fundamentally, this war memorial—with its imposing Cross—stands as an outlier among war memorials, even those incorporating crosses. Contrary to any popular notion, war memorials in the United States have not traditionally included or centered on the cross and, according to the parties' evidence, there is no comparable memorial on public land in which the cross holds such a pivotal and imposing stature, dwarfing by every measure the secular plaques and other symbols commemorating veterans.

The Latin cross, long acknowledged as a pre-eminent Christian symbol, remains, as a towering forty-three foot structure, the dominant feature of the Memorial. As we concluded the last time we considered this matter, albeit under the California Constitution, “[this] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion.” *Ellis v. City of La Mesa*, 990 F.2d 1518, 1527 (9th Cir. 1993). But we revisit the question in this case because the Cross, originally on city land, was transferred to the federal government through a 2006 congressional initiative. This suit requires us to consider whether the Memorial, with the Cross as its

¹ We include as Appendix A photographs from the record that depict the Cross up close and from a distance.

defining feature, violates the First Amendment to the federal Constitution.

Simply because there is a cross or a religious symbol on public land does not mean that there is a constitutional violation. Following the Supreme Court's directive, we must consider the purpose of the legislation transferring the Cross, as well as the primary effect of the Memorial as reflected in context, history, use, physical setting, and other background. Although we conclude that Congress did not harbor a sectarian purpose in establishing the Memorial in 2006, the resolution of the primary effect of the Memorial is more nuanced and is driven by the factual record. We do not look to the sound bites proffered by both sides but instead to the extensive factual background provided in the hundreds of pages of historical documents, declarations, expert testimony, and public records. Here, a fact-intensive evaluation drives the legal judgment.

The Supreme Court's framework for evaluating monuments on public lands and for resolving Establishment Clause cases under the First Amendment leads us to conclude that the district court erred in declaring the Memorial to be primarily non-sectarian, and granting summary judgment in favor of the government and the Memorial's supporters. We are not faced with a decision about what to do with a historical, longstanding veterans memorial that happens to include a cross. Nor does this case implicate military cemeteries in the United States that include headstones with crosses and other religious symbols

particular to the deceased. Instead we consider a site with a free-standing cross originally erected in 1913 that was replaced with an even larger cross in 1954, a site that did not have any physical indication that it was a memorial nor take on the patina of a veterans memorial until the 1990s, in response to the litigation. We do not discount that the Cross is a prominent landmark in San Diego. But a few scattered memorial services before the 1990s do not establish a historical war memorial landmark such as those found in Arlington Cemetery, Gettysburg, and the Vietnam Veterans Memorial in Washington, D.C. Resurrection of this Cross as a war memorial does not transform it into a secular monument.

We acknowledge the good intentions and heartfelt emotions on all sides of this dispute, and recognize the sincere anguish that will be felt regardless of whether we affirm or reverse the district court. We also acknowledge the historical role of religion in our civil society. In no way is this decision meant to undermine the importance of honoring our veterans. Indeed, there are countless ways that we can and should honor them, but without the imprimatur of state-endorsed religion. At the same time, in adopting the First Amendment, the Founders were prescient in recognizing that, without eschewing religion, neither can the government be seen as favoring one religion over another. The balance is subtle but fundamental to our freedom of religion.

BACKGROUND

Mount Soledad is an 822-foot hill in the La Jolla community of San Diego, California, between Interstate 5 and the Pacific Ocean. There has been a Latin cross atop Mount Soledad since 1913. After the first cross was destroyed by vandals in 1923, a new cross was erected. That cross stood until it blew down in 1952. The current Cross was erected in 1954 and was dedicated as a memorial to American service members and a tribute to God's "promise of everlasting life." The Cross is quite large—twenty-nine feet high and twelve feet across—stands atop a fourteen foot high base, and weighs approximately twenty-four tons. As a result, the Cross is visible from miles away and towers over the thousands of drivers who travel daily on Interstate 5 below. The Mount Soledad Memorial Association ("the Association"), the civic organization that erected the Cross, has largely paid for the Cross's maintenance, though some public funds have been expended as well. *Paulson v. City of San Diego*, 294 F.3d 1124, 1125 (9th Cir. 2002) (en banc).

Although the Cross stood alone for most of its history, it has, since the late 1990s, become the centerpiece of a more extensive war memorial. This Memorial now features six concentric walls around the base of the Cross and approximately 2,100 black stone plaques honoring individual veterans, platoons, and groups of soldiers. Brick paving stones also honor veterans; twenty-three bollards, or posts, honor community and veterans' organizations; and an American

flag flies from a large flagpole. Until the events leading up to this suit, the Memorial stood on land belonging to the City of San Diego (“the City”).

The Memorial has been the subject of contentious litigation for the last two decades. In 1989, two Vietnam veterans sued the City, seeking to enjoin it from allowing the Cross to remain on city land. *Murphy v. Bilbray*, 782 F. Supp. 1420, 1424 (S.D. Cal. 1991). Ultimately, the district court enjoined the display of the Cross—which, at the time, stood alone—as a violation of the No Preference Clause of the California Constitution.² *Id.* at 1438. We affirmed the injunction in *Ellis*, 990 F.2d at 1527-28, holding that the Cross, to the extent that it could be characterized as a memorial, was “[a] sectarian war memorial carr[ying] an inherently religious message and creat[ing] an appearance of honoring only * * * servicemen of [a] particular religion.” *Id.* at 1527. We did not reach the issue of whether the Cross violated the federal Constitution’s Establishment Clause.

In response to the injunction, the City submitted a ballot initiative known as Proposition F to authorize the sale of a twenty-two square foot parcel of land sitting directly beneath the Cross to the Association. Seventy-six percent of those voting approved the measure. In October 1994, the City sold the land

² The No Preference Clause provides that “[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed.” Cal. Const. art. I, § 4.

to the Association without soliciting offers or proposals from any other prospective buyers. *See Paulson*, 294 F.3d at 1126. The district court invalidated the sale, however, holding that the City's failure to consider other prospective buyers created the appearance that the City preferred the Christian religion and that the primary purpose of the sale was to preserve the Cross. *Murphy v. Bilbray*, No. 90-134 GT, 1997 WL 754604, at *10-11 (S.D. Cal. Sept. 18, 1997). The City responded by soliciting bids for a second land sale, ultimately selling the land to the Association in September 1998. The Association then proceeded to modify the property to incorporate elements directly honoring veterans.

After further litigation, our court, sitting en banc, held that the 1998 sale violated California's No Preference Clause because it was structured to give "a direct, immediate, and substantial financial advantage to bidders who had the sectarian purpose of preserving the cross." *Paulson*, 294 F.3d at 1133. Following that decision, the parties then reached a settlement that would move the Cross to a neighboring church. In July 2004, the City Council passed a resolution to compel the City to accept the settlement if voters did not approve Proposition K, which would have required a third sale of the land to the highest bidder. City voters rejected Proposition K.

Soon after the failure of Proposition K, two local members of Congress, then-Representative Randy Cunningham and Representative Duncan Hunter, inserted a rider into the 2005 omnibus budget bill

designating the Mount Soledad property as a national veterans' memorial and authorizing the federal government to accept its donation. Consolidated Appropriations Act, Pub. L. No. 108-447, § 116, 118 Stat. 2809, 3346-47 (codified at 16 U.S.C. § 431 note). The Thomas More Law Center,³ whose West Coast Director, Charles LiMandri, was a signatory of the ballot argument in favor of Proposition K, lobbied local members of Congress to intervene. President George W. Bush signed the omnibus bill into law on December 8, 2004.

The City Council declined to donate the Mount Soledad property to the federal government.⁴ A new organization formed by LiMandri and others launched a referendum petition to “save the Mount Soledad cross” via transfer to the federal government. The City Council rescinded its decision and submitted the donation question to the voters as Proposition A. Proposition A garnered seventy-six percent of the vote, but a state trial court enjoined its implementation. *See Paulson v. Abdelnour*, 145 Cal. App. 4th 400, 51 Cal. Rptr. 3d 575, 585 (2006).

While the appeal of the state court injunction was pending, the federal district court issued an

³ The Thomas More Law Center is a “not-for-profit public interest law firm dedicated to the defense and promotion of the religious freedom of Christians, time-honored family values, and the sanctity of human life.”

⁴ The then-City Attorney formally opined that the donation would violate the federal and state constitutions.

order directing the City to remove the Cross within ninety days or pay a daily fine of \$5,000. *Paulson v. City of San Diego*, No. 89-0820 GT, 2006 WL 3656149, at *2 (S.D. Cal. May 3, 2006). The City appealed and sought a stay pending appeal, which our court denied. Justice Kennedy then granted the City’s stay application. See *San Diegans for the Mt. Soledad Nat’l War Mem’l v. Paulson*, 548 U.S. 1301, 1302, 126 S. Ct. 2856, 165 L. Ed. 2d 941 (2006).

In June 2006, Representatives Hunter, Issa, and Bilbray introduced H.R. 5683 (“the Act”), which proposed to seize the Memorial by eminent domain.⁵ The House approved the bill by a vote of 349 to 74. 152 Cong. Rec. H5434 (daily ed. July 19, 2006). The Senate approved the measure by unanimous consent.

The Act authorized the land transfer “in order to preserve a historically significant war memorial, designated the Mt. Soledad Veterans Memorial in San Diego, California, as a national memorial honoring veterans of the United States Armed Forces * * * *” *Id.* at H5422, § 2(a). In support of the acquisition, Congress found that the Memorial has stood as a tribute to U.S. veterans for over fifty-two years, *id.* § 1(1), and “now serves as a memorial to American veterans of all wars,” *id.* § 1(2). The Act also declared

⁵ LiMandri stated publicly that he helped draft the legislation, a fact that the government contests. The Thomas More Law Center also lobbied Senator Jeff Sessions, the sponsor of the Senate version of the bill, for his support.

that “[t]he United States has a 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, and a memorial cross is fully integrated as the centerpiece of the multi-faceted Mt. Soledad Veterans Memorial that is replete with secular symbols.” *Id.* § 1(3). The Act required the Department of Defense, which has since assigned the duties to the Navy, to manage the property and enter a memorandum of understanding with the Association for the Memorial’s “continued maintenance.” *Id.* § 2(c).⁶

The federal government took possession of the Memorial in August 2006. Pub. L. No. 109-272, § 2(a), 120 Stat. 770 (2006). That same month, Steve Trunk and Philip Paulson (now deceased) filed suit against the City and the United States in district court, alleging violations of the U.S. and California Constitutions.⁷ Jewish War Veterans, which describes itself as “the oldest active national veterans’ service

⁶ This court dismissed the City’s appeal of the district court’s order as moot in light of the Act. *Paulson v. City of San Diego*, 475 F.3d 1047, 1048 (9th Cir. 2007). The California Court of Appeal also reversed the trial court’s injunction of Proposition A, holding that the City’s effort to donate the memorial to the United States did not violate the state or federal Constitutions. *Abdelnour*, 51 Cal. Rptr. 3d at 589-603.

⁷ Trunk later filed an amended complaint seeking, among other things, a declaration that the Act was void *ab initio*. The district court held that Trunk lacked standing to challenge the Act, dismissed that claim for lack of jurisdiction, and dismissed the City as a party.

in America” and as a group that “engages in extensive advocacy in support of religious liberty,” also filed suit against the Secretary of Defense, complaining that the display of the Cross violated the Establishment Clause. The district court consolidated the two cases.⁸

In 2008, the district court denied Jewish War Veterans’s motion for summary judgment and granted the government’s motion for summary judgment. Applying the Supreme Court’s frameworks set forth in both *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), and *Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005), the district court held that Congress had acted with a secular purpose in acquiring the Memorial and that the Memorial did not have the effect of advancing religion. This appeal followed.

ANALYSIS

I. THE *LEMON* AND *VAN ORDEN* FRAMEWORKS

We review de novo the district court’s decision on cross motions for summary judgment. *See Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1030 (9th Cir. 2010). “We must determine, viewing the evidence in the light most favorable to * * * the nonmoving party, whether there are any genuine issues of material fact

⁸ We refer to Trunk, Paulson, and Jewish War Veterans collectively as “Jewish War Veterans,” and to the United States and the Secretary of Defense collectively as “the government.”

and whether the district court correctly applied the [relevant] substantive law.” *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). We have jurisdiction to review the district court’s denial of the Jewish War Veterans’s summary judgment motion because the district court considered cross motions for summary judgment and granted the government’s motion. The district court’s grant of summary judgment was a final decision, giving us jurisdiction. *See Abend v. MCA, Inc.*, 863 F.2d 1465, 1482 n.20 (9th Cir. 1988).

The First Amendment provides that “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I. As the Supreme Court has explained, the “touchstone” of Establishment Clause jurisprudence is the requirement of “‘governmental neutrality between religion and religion, and between religion and nonreligion.’” *McCreary County v. ACLU*, 545 U.S. 844, 860, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968)). However, because “neutrality” is a general principle, it “cannot possibly lay every issue to rest, or tell us what issues on the margins are substantial enough for constitutional significance.” *McCreary*, 545 U.S. at 876, 125 S. Ct. 2722; *see also Van Orden*, 545 U.S. at 699, 125 S. Ct. 2854 (Breyer, J., concurring in the judgment) (“[W]here the Establishment Clause is at issue, tests designed to measure ‘neutrality’ alone are insufficient.”).

In particular, we do not apply an absolute rule of neutrality because doing so would evince a hostility toward religion that the Establishment Clause forbids. Thus the Court in *McCreary* approvingly cited Justice Harlan’s observation that “‘neutrality’ * * * is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation” by the First Amendment. *McCreary*, 545 U.S. at 876, 125 S. Ct. 2722 (quoting *Sherbert v. Verner*, 374 U.S. 398, 422, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) (Harlan, J., dissenting)); see also *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (Goldberg, J., concurring) (cautioning that an “untutored devotion to * * * neutrality” can lead to “a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious”). We must undertake a more nuanced analysis.

The Supreme Court has articulated two related constructs that guide our analysis: the test set forth in *Lemon*, which—through various twists and turns—has long governed Establishment Clause claims, and the analysis for monuments and religious displays more recently articulated in *Van Orden*. The *Lemon* test asks whether the action or policy at issue (1) has a secular purpose, (2) has the principal effect of advancing religion, or (3) causes excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13, 91 S. Ct. 2105. In recent years, the Supreme Court essentially has collapsed these last two prongs to ask “whether the challenged governmental practice has the effect of

endorsing religion.” *Access Fund v. U.S. Dep’t of Agric.*, 499 F.3d 1036, 1043 (9th Cir. 2007) (reviewing cases). Although *Lemon* has been strongly criticized, the Supreme Court has never overruled it, and in fact applied the *Lemon* test to a Ten Commandments display in an opinion issued the same day as *Van Orden*. *McCreary*, 545 U.S. at 859-64, 125 S. Ct. 2722; see also *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (discussing the Supreme Court’s criticism and use of the *Lemon* test).

In *Van Orden*, the Court declined to apply *Lemon* to a Ten Commandments monument on the grounds of the Texas State Capitol. Addressing whether that monument violated the Establishment Clause, the plurality struggled with reconciling “the strong role played by religion and religious traditions throughout our Nation’s history” with the constitutional separation of church and state. *Van Orden*, 545 U.S. at 683, 125 S. Ct. 2854. The plurality concluded that the *Lemon* test was “not useful in dealing with the sort of passive monument that Texas ha[d] erected on its Capitol grounds.” *Id.* at 686, 125 S. Ct. 2854. Instead, its analysis focused on “the nature of the monument and * * * our Nation’s history.” *Id.* Taking into consideration the role of God and the Ten Commandments in the nation’s founding and history, *id.* at 686-87, 689-90, 125 S. Ct. 2854, the monument’s passive use, and its “undeniable historical meaning,” *id.* at 690, 125 S. Ct. 2854, the plurality concluded that the display passed constitutional muster, *id.* at 692, 125 S. Ct. 2854.

As we have recognized, Justice Breyer’s concurrence provides the controlling opinion in *Van Orden Card*, 520 F.3d at 1017-18 n.10. Justice Breyer envisioned a set of “difficult borderline cases” like the Texas Capitol monument for which there could be “no test-related substitute” *Lemon* or otherwise—“for the exercise of legal judgment.” *Van Orden*, 545 U.S. at 700, 125 S. Ct. 2854 (Breyer, J., concurring in the judgment). Rather than requiring the application of a test, Justice Breyer concluded, displays like the Texas monument demand a fact-intensive assessment of whether they are faithful to the underlying purposes of the Establishment Clause. *See id.* He explained that this flexible assessment entails a range of factors, including the monument’s purpose, the perception of that purpose by viewers, the extent to which the monument’s physical setting suggests the sacred, and the monument’s history. *See id.* at 701-03, 125 S. Ct. 2854. Notably, this inquiry does not dispense with the *Lemon* factors, but rather retains them as “useful guideposts.” *Id.* at 700, 125 S. Ct. 2854. Justice Breyer’s analysis thus incorporated many of the same factors that figure in a *Lemon* analysis—in particular, the predominant purpose of the monument and its effect on viewers—while refusing to be bound to any lock-step formula. *See id.* at 701-04, 125 S. Ct. 2854.

Van Orden expressly establishes an “exception” to the *Lemon* test in certain borderline cases regarding the “constitutionality of some longstanding plainly religious displays that convey a historical or secular

message in a non-religious context.” *Card*, 520 F.3d at 1016. Unfortunately, Justice Breyer did not explain in detail how to determine whether a case was borderline and thus less appropriate for the typical *Lemon* analysis. *Card*—the only Ninth Circuit case to date to apply the *Van Orden* exception—considered a monument that was almost identical to the monument in *Van Orden* and therefore provides little additional guidance. *See Card*, 520 F.3d at 1018 (“We cannot say how narrow or broad the ‘exception’ may ultimately be * * * * However, we can say that the exception at least includes the display of the Ten Commandments at issue here.”).

Ultimately, we need not resolve the issue of whether *Lemon* or *Van Orden* controls our analysis of the Memorial. Both *Lemon* and *Van Orden* require us to determine Congress’s purpose in acquiring the Memorial and to engage in a factually specific analysis of the Memorial’s history and setting. On the detailed record here, which includes extensive evidence relevant to each of the factors in *Van Orden* and to the purpose and effect prongs of *Lemon*, both cases guide us to the same result.

II. CONGRESSIONAL PURPOSE IN ACQUIRING THE MEMORIAL

Under both *Lemon* and *Van Orden*, we first inquire as to the purpose of the government action to determine whether it is predominantly secular in nature. *See Van Orden*, 545 U.S. at 701-02, 125 S. Ct.

2854; *Lemon*, 403 U.S. at 612, 91 S. Ct. 2105. We hold that Congress's acquisition of the Memorial was predominantly secular in its goals.

As an initial matter, Jewish War Veterans argues that, to determine purpose, we need look no further than the Cross itself. In its view, "the government action itself besp[reaks] the purpose" because the Latin cross is the "preeminent symbol" of Christianity. This argument is at bottom one regarding the Memorial's predominant effect, and we consider it more appropriate to address in our discussion of effects below. *See infra* Section III.

The Supreme Court explained in *McCreary* that the purpose inquiry does not call for "any judicial psychoanalysis of a drafter's heart of hearts." *McCreary*, 545 U.S. at 862, 125 S. Ct. 2722. Rather, "[t]he 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." *Id.* (internal quotation marks omitted). Although the secular purpose must "be genuine, not a sham," *id.* at 864, 125 S. Ct. 2722, when a statute is at issue, we must defer to Congress's stated reasons if a "plausible secular purpose * * * may be discerned from the face of the statute," *Mueller v. Allen*, 463 U.S. 388, 394-95, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983).

The purpose of Congress's acquisition of the Memorial was predominantly secular in nature. The

Act sought “to preserve a historically significant war memorial * * * as a national memorial honoring veterans of the United States Armed Forces.” Pub. L. No. 109-272, § 2(a). As the district court noted, the statute is “not directed to the cross *per se*, nor does it require the continued presence of the cross as part of the memorial; it simply requires the Mount Soledad *site* be maintained as a veterans’ memorial.”

The Act’s statement of purpose likely ends the inquiry. *See Mueller*, 463 U.S. at 394-95, 103 S. Ct. 3062. Nevertheless, the Act is arguably ambiguous to the extent that it seeks “to preserve a *historically significant* war memorial.” Pub. L. No. 109-272 § 2(a) (emphasis added). In *Paulson*, the case invalidating the City’s 1998 land sale to the Association, we held that only *the Cross* on Mount Soledad bears historical significance. *Paulson*, 294 F.3d at 1132 n.5 (emphasis added). Under *Paulson*, the Act could be read to aim at preserving the Cross, which would arguably make its purpose predominantly religious.

But even assuming that the Act is ambiguous, the legislative history reflects Congress’s predominantly secular purpose in acquiring the Memorial.⁹

⁹ These legislative recitations do not bind us as to our evaluation of the actual history and chronology of the Cross. They are simply instructive as to congressional perspective and purpose. We must evaluate the Cross itself on the basis of the record before us, which includes not only the Act, but also hundreds of pages of documents about the Cross’s history and setting and about the use of crosses in war memorials more generally that were not before Congress when it acquired the Memorial.

Representative Hunter, for example, described the Cross as “not only a religious symbol,” but also “a venerated landmark beloved by the people of San Diego for over 50 years” and “a fitting memorial to all persons who have served and sacrificed for our Nation as members of the Armed Forces.” 152 Cong. Rec. H5423 (daily ed. July 19, 2006); *see also id.* at H5422-02 (stating that Mount Soledad “is without question a world-class memorial, dedicated to all of those, regardless of race, religion[,] or creed, who have served our armed services”). Representative Issa similarly stated that the Memorial “was intended to do what it does for the vast majority of San Diegans and people who come to our fair city. It honors our war veterans for the sacrifice they made.” *Id.* at H5424. According to Representative Issa, the acquisition was “consistent with how we as Americans have honored our war dead and those who have given in service to our country” and advanced the “freedom for people to observe their God as they chose fit.” *Id.*

Representative Bilbray argued for the Act on the grounds of religious tolerance and the memorial’s secular historical significance. He cited the presence of “many religious symbols on public lands” in San Diego County and argued that “this is not about religion; it is about the tolerance of our heritage and the memorials to those who have fought for our heritage across the board.” *Id.* at H5425.

Finally, although Senator Sessions introduced the Senate bill as intended “to preserve the cross that

stands at the center of Mt. Soledad Veterans Memorial * * * that is under attack by the ACLU,” he underlined that the Cross was “part of a memorial that has secular monuments also.” 152 Cong. Rec. S8364 (daily ed. July 27, 2006). Taken together, the floor statements support the text’s demonstration of Congress’s predominantly secular purpose in acquiring the Memorial.

Jewish War Veterans’s arguments to the contrary do not change our view. In particular, the evidence of the role of Christian advocacy organizations in the Act’s passage is not probative of Congress’s objective. Although such advocacy can form part of the context for determining an act’s purpose, *see, e.g., Epperson*, 393 U.S. at 107-09 & n.16, 89 S. Ct. 266, we must take into account the often complex, attenuated, and mediated relationship between advocacy and legislation. Although the advocacy by Christian organizations may have been a contributing factor to the Act’s drafting and passage, the record does not establish that the sectarian goals of the advocates can be reasonably attributed to Congress as a whole. In the end, “what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law.” *Mergens*, 496 U.S. at 249, 110 S. Ct. 2356 (emphases omitted).¹⁰

¹⁰ It bears noting that we do not adopt the district court’s inference of a secular purpose from the overwhelming majority support for the Act and relative absence of debate over its passage. Majority support for a measure indicates simply that—

(Continued on following page)

In crediting congressional purpose, we underscore, however, that these congressional statements reflect congressional sentiment and are not necessarily reflective of the factual record before us. We turn to the actual record to assess the primary effect of the Memorial.

III. THE EFFECT OF THE MEMORIAL

The heart of this controversy is the primary effect of the Memorial. The question is, under the effects prong of *Lemon*, whether “it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion.” *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1398 (9th Cir. 1994). By “endorsement,” we are not concerned with all forms of government approval of religion—many of which are anodyne—but rather those acts that send the stigmatic message

majority support. It does not illuminate whether the measure approved has a secular or religious purpose. *See McCreary*, 545 U.S. at 884, 125 S. Ct. 2722 (O’Connor, J., concurring) (noting that “we do not count heads before enforcing the First Amendment”).

The district court also cited the heterogeneity of religions in Congress as a basis for inferring secular purpose. We cannot credit this speculation as a foundation for our decision. Resolution does not rest on a popularity contest about the Cross. Importantly, nothing in the record suggests that the legislators voted based on their personal religious beliefs. Congress’s religious profile, without more, is an insufficient basis to infer its predominant purpose.

to nonadherents “that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members * * * *’” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O’Connor, J., concurring)).

Although it is often difficult to pinpoint “a community ideal of reasonable behavior” in an area where communities are so often divided in their views, *see Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O’Connor, J., concurring in part and concurring in the judgment) (internal quotation marks omitted), we conduct our inquiry from the perspective of an “informed and reasonable” observer who is “familiar with the history of the government practice at issue,” *Kreisner v. City of San Diego*, 1 F.3d 775, 784 (9th Cir. 1993).

The analysis required by *Van Orden* is similar. Under *Van Orden*, we are required to exercise our legal judgment to determine whether the Memorial is at odds with the underlying purposes of the First Amendment’s Religion Clauses. *See* 545 U.S. at 700, 125 S. Ct. 2854 (Breyer, J., concurring in the judgment). Those clauses

seek to assure the fullest possible scope of religious liberty and tolerance for all. They seek to avoid that divisiveness based upon religion that promotes social conflict * * * * They seek to maintain that separation of

church and state that has long been critical to the peaceful dominion that religion exercises in this country * * * *

Id. at 698, 125 S. Ct. 2854 (internal citations and quotation marks omitted).

In our analysis, we must consider fine-grained, factually specific features of the Memorial, including the meaning or meanings of the Latin cross at the Memorial's center, the Memorial's history, its secularizing elements, its physical setting, and the way the Memorial is used. *See, e.g., id.* at 700-02, 125 S. Ct. 2854; *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 598-602, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989). The government contends that these factors demonstrate that the Memorial's primary effect is patriotic and nationalistic, not religious. We disagree. Taking these factors into account and considering the entire context of the Memorial, the Memorial today remains a predominantly religious symbol. The history and absolute dominance of the Cross are not mitigated by the belated efforts to add less significant secular elements to the Memorial.

A. THE LATIN CROSS

We begin by considering the potential meanings of the Latin cross that serves as the centerpiece and most imposing element of the Mount Soledad Memorial. We have repeatedly recognized that “[t]he Latin cross is the preeminent symbol of Christianity.”

Buono v. Norton, 371 F.3d 543, 544-45 (9th Cir. 2004) (internal quotation marks omitted); *accord Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) (per curiam) (“SCSC”); *Carpenter v. City & County of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996); *Ellis*, 990 F.2d at 1525, 1527. The other courts of appeals that have considered challenges to Latin crosses have unanimously agreed with our characterization of the cross. *See Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995); *Murray v. City of Austin*, 947 F.2d 147, 149 (5th Cir. 1991); *Harris v. City of Zion*, 927 F.2d 1401, 1403 (7th Cir. 1991); *ACLU v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986); *see also Gonzales v. North Township*, 4 F.3d 1412, 1418 (7th Cir. 1993) (“[W]e are masters of the obvious, and we know that the crucifix is a Christian symbol.”); *Friedman v. Bd. of County Comm’rs*, 781 F.2d 777, 779 (10th Cir. 1985) (en banc) (recounting testimony concerning the Christian nature of the cross); *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110-11 (11th Cir. 1983) (same); *Jewish War Veterans of the U.S. v. United States*, 695 F. Supp. 3, 12 (D.D.C. 1988) (“Running through the decisions of all the federal courts addressing the issue is a single thread: that the Latin cross * * * is a readily identifiable symbol of Christianity.”).

The cross is also “exclusively a Christian symbol, and not a symbol of any other religion.” *Buono*, 371 F.3d at 545. Thus, “[t]here is no question that the Latin cross is a symbol of Christianity, and that its

placement on public land * * * violates the Establishment Clause.” *SCSC*, 93 F.3d at 620; *see also County of Allegheny*, 492 U.S. at 661, 109 S. Ct. 3086 (Kennedy, J., dissenting) (stating that “the permanent erection of a large Latin cross on the roof of city hall” “would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion”); *American Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1159-60 (10th Cir. 2010) (“[T]here is little doubt that [a state] would violate the Establishment Clause if it allowed a private group to place a permanent unadorned twelve-foot cross on public property without any contextual or historical elements that served to secularize the message conveyed by such a display.”).

This principle that the cross represents Christianity is not an absolute one. In certain circumstances, even a quintessentially sectarian symbol can acquire an alternate, non-religious meaning. For example, a red Greek cross on a white background is so closely identified with the American Red Cross that it has largely shed any religious symbolism. *City of St. Charles*, 794 F.2d at 272. Notably the Red Cross cross does not include the Latin cross’s iconic horizontal arm that is shorter than the vertical arm. The cross can also have localized secular meanings. Because the name of Las Cruces, New Mexico means “The Crosses,” “it is hardly startling that [the city] would be represented by a seal containing crosses.” *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1035 (10th Cir. 2008). In *Las Cruces*, the cross possesses a

local “symbolism [that] is not religious” but civic. *See id.*; *see also Murray*, 947 F.2d at 155 (upholding the use of a part of Stephen F. Austin’s coat of arms, including a Latin cross, in the insignia of the City of Austin).¹¹ The cross can even be forced to serve non-religious ends by a small group: As Justice Thomas has recognized, “[t]he erection of * * * a cross [by the Ku Klux Klan] is” “not a Christian [act]” but rather “a political act” of “intimidation and harassment.” *Pinette*, 515 U.S. at 771, 115 S. Ct. 2440 (Thomas, J., concurring). Nonetheless, the Latin cross remains an iconic Christian symbol.

B. CROSSES AS WAR MEMORIALS

The relevant question in this case is whether, as the district court concluded, the Latin cross has a “broadly-understood ancillary meaning as a symbol of military service, sacrifice, and death.” Our prior cases counsel caution in ascribing this meaning to the cross. We have, in fact, previously held that the Mount Soledad Cross contravened the No Preference Clause of the California state constitution even while

¹¹ The argument that a cross has a historic connection cannot, of course, be treated as “an argument which [can] always ‘trump’ the Establishment Clause[] because of the undeniable significance of religion and religious symbols in the history of many [American] communities.” *Robinson*, 68 F.3d at 1232; *see also Zion*, 927 F.2d at 1414-15 (holding that even a city with “a unique history” “may not honor its history by retaining [a] blatantly sectarian seal, emblem, and logo”).

recognizing that the Cross is “dedicated to veterans of World Wars I & II.” *Ellis*, 990 F.2d at 1527. We have similarly rejected the view that a cross erected on public land in Oregon conveyed a secular message simply because it was identified as a war memorial. *See SCSC*, 93 F.3d at 619; *id.* at 625-26 (O’Scannlain, J., concurring); *see also Ellis*, 990 F.2d at 1525 (“We find unpersuasive the fact that the cross was built and dedicated as a memorial to a private individual * * * * This alone cannot transform the cross into a secular memorial.”).

The reasoning behind our prior decisions is straightforward. “A sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion.” *Ellis*, 990 F.2d at 1527. Thus, the use of exclusively Christian symbolism in a memorial would, as Judge O’Scannlain has put it, “lead observers to believe that the City has chosen to honor only Christian veterans.” *SCSC*, 93 F.3d at 626 (O’Scannlain, J., concurring). And insofar as the cross is “not a *generic* symbol of death” but rather “a *Christian* symbol of death that signifies or memorializes the death of a *Christian*,” *American Atheists*, 616 F.3d at 1161, a reasonable observer would view a memorial cross as sectarian in nature.

Nothing in the record suggests that our reasoning in *SCSC* and *Ellis* was mistaken or that the Latin cross possesses an ancillary meaning as a secular war memorial. The Jewish War Veterans have provided two expert declarations from G. Kurt Piehler, a

professor of history and Director of the Study for War and Society at the University of Tennessee. Those declarations provide extensive evidence that the cross is not commonly used as a symbol to commemorate veterans and fallen soldiers in the United States.¹² Piehler's history is not rebutted by the government's experts, and the record supports Piehler's conclusion that the vast majority of war memorials in the United States do not include crosses. We accordingly recount Piehler's history at some length.

¹² The district court "discounted" Piehler's statements on the grounds that the "declaration circumscribe[d] its focus on an individual element of the memorial" and "fail[ed] to fully consider other well-recognized meanings of the Latin cross." In "discounting" the expert's opinion, the district court was not gatekeeping but weighing the evidence, indeed inserting evidence, which is improper on summary judgment. *See Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9th Cir. 2010). The district court's reasons for minimizing the weight of the expert's conclusions were also erroneous and not a fair reading of the evidence. The district court simply assumed that the Latin cross has an ancillary meaning as a war memorial and leveraged that assumption to reject Piehler's declarations and other contrary evidence in the record. In doing so, the district court failed to consider the evidence in the light most favorable to Jewish War Veterans before granting summary judgment to the government. *See id.* More specifically, the district court erroneously branded Piehler's declarations as conclusory, ignoring the detailed listings and historical analysis provided in the record. At the same time, the district court accepted without comment the statements of the government's expert, Professor Linenthal, who offered a number of wholly conclusory statements without historical reference or supporting facts.

Piehler's declarations address both the individual commemoration of soldiers in national cemeteries and the large number of monuments that stand in tribute to groups of soldiers or to the veterans of particular wars. Piehler recounts that the first national cemeteries were established after the Civil War and were deliberately devoid of religious symbols. Even today, the only religious symbol that can be found in Civil War cemeteries is the Southern cross of honor, which has been allowed since 1930 on headstones built in memory of Confederate soldiers. The graves of soldiers who died before World War I and are buried in national cemeteries are similarly marked "only [by] the soldier's name, his unit, and his date of death."

Military cemeteries have not, of course, remained entirely free of religious symbolism. Most famously, American soldiers who fell in battle during World War I and World War II are movingly memorialized with "thousands of small crosses in foreign fields" in Europe and the Pacific. *Salazar v. Buono*, ___ U.S. ___, 130 S. Ct. 1803, 1820, 176 L. Ed. 2d 634 (2010) (plurality op.). But while the image of row upon row of small white crosses amongst the poppies remains an exceedingly powerful one, not all soldiers who are memorialized at those foreign battle-fields are honored with crosses. Jewish soldiers are instead commemorated with Stars of David. *American Atheists*, 616 F.3d at 1161. The cross was a marker of an individual grave, not a universal monument to the war dead. And tellingly, the universal symbol

emanating from those foreign wars is the poppy, not the cross.

Significantly, the cross never became a default headstone in military cemeteries in the United States. A visitor to Arlington or another national cemetery does not encounter a multitude of crosses but rather the “flat upright stone monument[s]” that mark the graves of individual soldiers. Symbols of faith are carved into the headstones, but those symbols are not restricted to crosses and now include everything from a Bahai nine-pointed star to a Wiccan pentacle. *See id.* The cross, in other words, has never been used to honor all American soldiers in any military cemetery, and it has never been used as a default gravestone in any national cemetery in the United States.¹³ Whatever memory some may have of rows of crosses as the predominant symbol for honoring veterans is not reflected in this record.

¹³ The article cited by the district court in support of its view that the cross is a generic war memorial reinforces this point. The article discusses a memorial display set up by anti-war protestors on the beach at Oceanside, California. The memorial does include a large number of crosses—each dedicated to an American soldier who died in Iraq—but those crosses represent dead *Christian* soldiers. As the article cited by the district court notes, the display also includes “a handful of Buddhist, Hindu, Muslim and Jewish symbols” presumably representing fallen soldiers of those faiths. Bruce V. Bigelow, *Beach exhibit calls attention to fallen*, *San Diego Union-Tribune* Nov. 11, 2007, available at http://www.signonsandiego.com/uniontrib/20071111/news_1mc11crosses.html.

Crosses have also been incorporated only rarely into monuments commemorating groups of soldiers. Piehler's declarations reveal that few war memorials were built in the antebellum United States, and those that were constructed most frequently took the form of an obelisk. Many more monuments—at least 3,500—were built to commemorate the Civil War. Only 114 of these 3,500 monuments include some kind of cross, however, and the cross is generally “subordinated to symbols that emphasize American nationalism and sacrifice of the fallen.” The memorial to Major General John Sedgwick at West Point, for example, includes a cross, but that cross is set off by “an eagle perched on a shield” and is overshadowed by a large statue of Sedgwick.

In the late nineteenth and early twentieth centuries, the number of crosses used in memorials increased slightly. Crosses and other religious symbols nevertheless were “seldom * * * dominant” and “usually [remained] subordinated to a commemoration of American nationalism.” For instance, the first chapel dedicated to the Civil War opened in Arlington National Cemetery in 1920—but the chapel is a small basement room annexed to a much larger outdoor auditorium.

This trend of emphasizing the secular nature of commemoration continued throughout the twentieth century. Monuments erected in honor of World War I soldiers remained predominantly secular, with statues of doughboys providing perhaps the most common theme. Some of these monuments were later updated

to commemorate World War II veterans as well. And many memorials constructed to remember those who fought in both world wars are, in fact, not stone monuments but rather secular “living memorials”—parks, hospitals, and other facilities that were built both to honor veterans and for daily use. The City of San Diego itself built in 1950, and still operates, a War Memorial Auditorium in Balboa Park that consists of “3,150 square feet of wood dance floor and a stage[] plus two smaller classrooms.” No cross or religious symbol is part of the memorial. The use of such living memorials has lately declined in favor of traditional stone monuments, but newer monuments remain secular in their imagery—as illustrated by the most recent additions to the National Mall in Washington, D.C., including the memorials to the Korean War and World War II.

On the basis of this detailed history, Piehler concludes that “the overwhelming majority of war memorials in the United States * * * avoid using religious symbols and inscriptions.” In particular, he states that “[t]here are few precedents for use of the Latin Cross in war memorials on public land,” and “when war memorials use religious imagery, [that imagery] generally [is] subordinated to symbols and inscriptions that commemorate American nationhood.”

None of Piehler’s history is contested by the government. The government instead cites to a small number of crosses that are incorporated into war memorials, but these examples do not create a material issue of fact concerning the meaning of the Latin

cross. Nor do those few examples fairly lead to the conclusion that the cross has become a secularized representation of war memory. Overwhelming evidence shows that the cross remains a Christian symbol, not a military symbol.

Several of the crosses the government references are parts of much larger secular or multi-faith complexes. The most significant examples are located in Arlington National Cemetery—the Canadian Cross of Sacrifice, the Argonne Cross, and a cross commemorating the Mexican Civil War. None of these crosses is a prominent or predominant feature of the cemetery, and the overall image and history of this military burial ground are not founded on religion. All three crosses stand among, if not immediately next to, the countless headstones of soldiers buried in Arlington and alongside a large number of other monuments that do not incorporate religious imagery.¹⁴ Headstone after headstone, punctuated by the eternal flame at President Kennedy's grave site, represent the imagery of Arlington. Much the same can be said for the Irish Brigade Monument and the monument to the 142nd Pennsylvania Infantry. Those monuments, which stand at Gettysburg National Military Park, are also surrounded by other statues and monuments—including over 100 other monuments honoring Pennsylvania troops alone—that do not feature

¹⁴ The same is true of the French Cross at Cypress Hill National Cemetery, which, as its name suggests, commemorates French soldiers.

the cross.¹⁵ The Arlington and Gettysburg crosses are, in other words, non-dominant features of a much larger landscape providing a “context of history” and memory that overwhelms the sectarian nature of the crosses themselves. *Van Orden*, 545 U.S. at 702, 125 S. Ct. 2854 (Breyer, J., concurring in the judgment). These crosses are not comparable to the Mount Soledad Cross, which dominates the small park of which it is the centerpiece and can be seen from miles away.

We do not question or address the constitutionality of the crosses at Arlington Cemetery and Gettysburg. While we conclude on this record that the Latin cross is a sectarian symbol, many monuments that include sectarian symbols do not have the primary effect of advancing religion. *See* Part III.C.1, *infra*. Our holding that the presence of the Mount Soledad Cross on federal land contravenes the Establishment Clause is driven by the history, setting, and appearance of that Cross—features that, as we discuss below, sharply distinguish the Cross from other war memorials containing religious symbols.

Aside from the Arlington and Gettysburg memorials, only two other crosses that serve as war memorials in the United States are mentioned in the record. One, the Mojave Cross, now stands on private

¹⁵ The Irish Brigade Monument cross is a Celtic cross and may celebrate the Irish origin of the soldiers instead of their religion.

land. See *Buono*, 130 S. Ct. at 1811, 1815-21 (rejecting a challenge to the “statute that would transfer [that] cross and the land on which it stands to a private party”). The other cross referenced, the Memorial Peace Cross in Bladensburg, Maryland, may or may not stand on public land. The record does not inform us.

Prior decisions inform us of just a handful of other standalone crosses that have been dedicated as war memorials on public land. These prior decisions do little to establish that the cross is a prevalent symbol to commemorate veterans. In two of the four cases we found in which crosses were used as war memorials, the crosses in question were only designated as war memorials after the start of litigation. See, e.g., *SCSC*, 93 F.3d at 618 (relating that Latin cross designated as a war memorial following rulings by the state courts that the cross violated the federal and state constitutions); *Greater Houston Chapter of the ACLU v. Eckels*, 589 F. Supp. 222, 225, 234-35 (S.D. Tex. 1984) (noting that three crosses and a Star of David were rededicated as a war memorial after litigation commenced). In a third case, the plaintiffs similarly alleged that the cross in question was rededicated as a memorial after a complaint from a Jewish naval officer that the cross violated the doctrine of separation of church and state, while the defendants claimed the cross had always been a memorial. *Jewish War Veterans*, 695 F. Supp. at 5. We could locate only one case in which it was undisputed that the cross in question was dedicated as a

war memorial from the outset. *Gonzales*, 4 F.3d at 1414, 1421-23 (holding unconstitutional a crucifix in a public park “to honor the heroic deeds of servicemen who gave their life in battle”). In light of the multitude of war memorials in the United States, however, these few examples do not cast doubt on our conclusion and that of the Jewish War Veterans’s expert, that the cross has not been a universal, or even a common, feature of war memorials.¹⁶

In sum, the uncontested facts are that the cross has never been used as a default grave marker for veterans buried in the United States, that very few war memorials include crosses or other religious imagery, and that even those memorials containing crosses tend to subordinate the cross to patriotic or other secular symbols. The record contains not a single clear example of a memorial cross akin to the Mount Soledad Cross. On another record, we might reach a different result, but on the basis of the

¹⁶ The parties and *amici* mention several other memorials, none of which raises a material question of fact as to whether the cross possesses an ancillary meaning as a war memorial. Three of these monuments—the Cape Henry Memorial Cross, the statue of Father Junipero Serra in the U.S. Capitol, and a statue at Cabrillo National Monument in San Diego—are not war memorials but tributes to the memory and achievements of particular (Christian) Europeans. Another, the Navy memorial at Fort Rosecrans, does not include a cross. Two others stand on property owned by Christian churches. Finally, the government and *amici* name several other war memorials without offering a description of the memorials’ physical characteristics. These passing references provide no basis for any comparison with the Cross on Mount Soledad.

evidence here, we can only conclude that the Latin cross does not possess an ancillary meaning as a secular or non-sectarian war memorial. There is simply “no evidence * * * that the cross has been widely embraced by”—or even applied to—“non-Christians as a secular symbol of death” or of sacrifice in military service. *American Atheists*, 616 F.3d at 1162.¹⁷ It is thus unsurprising that, as the government’s expert admits, “[o]ver the course of time, Mount Soledad and its cross became a generic Christian site.” The Latin cross can, as in Flanders

¹⁷ We recognize that one of the government’s experts, Edward T. Linenthal, submitted a declaration opining that “[c]rosses at battle sites, or memorials to veterans’ service are not sectarian religious symbols” but instead “signify enduring national themes of” American civil religion, such as “redemptive blood sacrifice and the virtue of selfless service.” Linenthal’s declaration discusses American civil religion, its “[r]itual expression[s],” and its symbols in some detail and specifically lists the symbols used to celebrate Memorial Day, including “the American flag, the meticulous decorating of graves * * * [and] parades of civic groups, high school bands, and veterans of the American Legion and Veterans of Foreign Wars.” But Linenthal attempts to incorporate crosses into American civil religion only by stating that war memorials are part of the civil religion and then listing a few of the monuments discussed above. In light of the uncontested history submitted by Jewish War Veterans, the few memorials cited by Linenthal provide less than a scintilla of evidence to support his conclusion that the Latin cross serves as a non-sectarian war memorial. Linenthal’s conclusory declaration is insufficient to create an issue of material fact on this issue. See, e.g., *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081 (9th Cir. 1996) (“The mere existence of a scintilla of evidence is not enough to create a genuine issue of material fact in order to preclude summary judgment.”) (internal quotation marks omitted).

fields, serve as a powerful symbol of death and memorialization, but it remains a sectarian, Christian symbol.¹⁸

¹⁸ In *Buono*, Justice Kennedy, writing for the plurality, suggested that a Latin cross may be a generic symbol of memorialization, noting that “one Latin cross in the desert evokes far more than religion. 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.” 130 S. Ct. at 1820.

We note that the Court in *Buono* was not addressing the merits of the Establishment Clause challenge to the cross at issue in that case. Nonetheless, we have thoroughly considered Justice Kennedy’s opinion. As we have discussed, the record before us does not establish that Latin crosses have a well-established secular meaning as universal symbols of memorialization and remembrance. On the record in this appeal, the “thousands of small crosses” in foreign battlefields serve as individual memorials to the lives of the Christian soldiers whose graves they mark, not as generic symbols of death and sacrifice. Even assuming that a Latin cross can convey a more secular message, however, Justice Kennedy himself states that the meaning of the cross cannot be “divorced from its background and context.” *Id.* As we discuss below, the background and context of the Mount Soledad Cross projects a strongly sectarian message that overwhelms any undocumented association with foreign battlefields or other secular meanings that the Cross might possess.

Further, we cannot overlook the fact that the Cross is *forty-three feet tall*. It physically dominates the Memorial, towering over the secular symbols placed beneath it, and is so large and placed in such a prominent location that it can be seen from miles away. A forty-three foot cross that was erected in part to celebrate Christianity, and that serves as the overwhelming centerpiece to a memorial is categorically different from the small crosses used to mark the graves of individual Christian soldiers. The size and prominence of the Cross evokes a message of aggrandizement and universalization of religion, and not the message of individual

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C. THE MOUNT SOLEDAD MEMORIAL

Our conclusion that the Latin cross is a Christian religious symbol of remembrance or memorialization does not, of course, end the matter. The cross on Mount Soledad does not stand alone. Instead, it is the overwhelming centerpiece of a memorial that now consists of approximately 2,100 plaques, six concentric stone walls, twenty-three bollards, and an American flag. These other elements are either uniquely secular or contain symbols of varying faiths. These changes are, however, of recent vintage, and we must gauge the overall impact of the Memorial in the context of its history and setting.

1. The Importance of Setting and History

Secular elements, coupled with the history and physical setting of a monument or display, can—but do not always—transform sectarian symbols that otherwise would convey a message of government endorsement of a particular religion. In *County of Allegheny*, for instance, the Supreme Court upheld a holiday display—located outside a public building—consisting of an eighteen foot menorah, a forty-five foot Christmas tree that the Court deemed a typically

memorialization and remembrance that is presented by a field of gravestones. See *American Atheists*, 616 F.3d at 1162 (“The massive size of the crosses displayed on Utah’s rights-of-way and public property unmistakably conveys a message of endorsement, proselytization, and aggrandizement of religion that is far different from the more humble spirit of small roadside crosses.”).

secular emblem of the holidays, and a sign saluting liberty. *See* 492 U.S. at 616-17, 109 S. Ct. 3086. Although Justice O'Connor's controlling opinion considered the menorah to be an entirely sectarian object, she determined that the display as a whole communicated a secular message. In the same way that a museum might convey the message of art appreciation without endorsing a religion even though individual paintings in the museum have religious significance, the holiday display in *Allegheny* conveyed a message of religious pluralism and freedom, even though some elements of the display were sectarian. *Id.* at 635, 109 S. Ct. 3086 (O'Connor, J., concurring in part and concurring in the judgment).

By contrast, the Court in *Allegheny* held that a crèche displayed on the Grand Staircase of the county courthouse violated the Establishment Clause. The crèche is a Christian display, and the crèche in *Allegheny* “st[ood] alone” on the staircase in a “floral frame,” which, “like all good frames, serve[d] only to draw one’s attention to the message inside the frame.” *Id.* at 598-99, 109 S. Ct. 3086. The crèche therefore “convey[ed] a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community.” *Id.* at 626, 109 S. Ct. 3086 (O'Connor, J., concurring in part and concurring in the judgment).

But to complicate things, in the line of Establishment Clause jurisprudence, the display of a crèche on

public property does not always convey such a message. The Christmas display sponsored by the City of Pawtucket, Rhode Island, for example, included both a crèche and secular decorations such as “a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, [and] cutout figures” of animals and a clown. *Lynch*, 465 U.S. at 671, 104 S. Ct. 1355. Given the presence of these secular elements, “[t]he evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols.” *Id.* at 691, 104 S. Ct. 1355 (O’Connor, J., concurring).

Like the crèche, the text of the Ten Commandments conveys an “undeniably * * * religious message.” *Van Orden*, 545 U.S. at 701, 125 S. Ct. 2854 (Breyer, J., concurring in the judgment). When placed in the midst of numerous other, non-religious monuments, however, a display of the Commandments can also impart a “secular moral message.” *Id.* As a result, such a display is, like the crèche among secular objects, permissible—at least when the monument was privately donated and stood without legal controversy for forty years. *See id.* at 701-03, 125 S. Ct. 2854.

The question, then, is whether the entirety of the Mount Soledad Memorial, when understood against the background of its particular history and setting, projects a government endorsement of Christianity. We conclude it does. In so holding, we do not discount the fact that the Cross was dedicated as a war memorial, as well as a tribute to God’s promise of

“everlasting life,” when it was first erected, or that, in more recent years, the Memorial has become a site for secular events honoring veterans. We do not doubt that the present Memorial is intended, at least in part, to honor the sacrifices of our nation’s soldiers. This intent, however, is insufficient to render the Memorial constitutional. Rather, we must inquire into the overall effect of the Memorial, taking into consideration its entire context, not simply those elements that suggest a secular message. *See American Atheists*, 616 F.3d at 1159 (“[A] secular purpose is merely one element of the larger factual and historical context that we consider in order to determine whether [the display] would have an impermissible effect on the reasonable observer.”). In conducting this inquiry, we learned that the Memorial has a long history of religious use and symbolism that is inextricably intertwined with its commemorative message. This history, combined with the history of La Jolla and the prominence of the Cross in the Memorial, leads us to conclude that a reasonable observer would perceive the Memorial as projecting a message of religious endorsement, not simply secular memorialization.

2. History of the Mount Soledad Memorial and La Jolla

The Supreme Court has instructed that, when assessing the effect of a religious display, we must consider history carefully: “reasonable observers have reasonable memories, and [the Court’s] precedents

sensibly forbid an observer to ‘turn a blind eye to the context in which [the] policy arose.’” *McCreary*, 545 U.S. at 866, 125 S. Ct. 2722 (quoting *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308, 120 S. Ct. 2266); accord *Pinette*, 515 U.S. at 780, 115 S. Ct. 2440 (O’Connor, J., concurring in part and concurring in the judgment) (“[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.”); *Buono*, 371 F.3d at 550. The Memorial’s history stretches back more than five decades, and we must consider how the Memorial was used and the message it conveyed throughout this entire period, and not just in the short time that it has stood on federal land. Congress’ acquisition of the Cross in 2006 did not erase the first fifty-two years of its life, or even its history dating back to the beginning of the twentieth century. As the district court noted, when Congress acquired the Memorial, it was obligated to “tak[e] history as it [found] it.”

History would lead the reasonable observer to perceive a religious message in the Memorial. For most of its life, the Memorial has consisted of the Cross alone. The Cross is the third in a line of Latin crosses that has stood on Mount Soledad since 1913. Mount Soledad was chosen as the site for the first cross because it was considered “a fitting place on which to erect an emblem of faith.” The earlier crosses were not dedicated as war memorials, but served as the site of intermittent Easter sunrise services. When the Cross was erected in 1954, it was

dedicated “as a lasting memorial to the dead of the first and second World Wars and the Korean conflict.” There was no physical indication that the Cross was intended as a war memorial, however, until a plaque was added to the site in 1989, after litigation over the Cross had begun.

At the same time, the Cross’s religious nature has been widely recognized and promoted since it was first erected. When seeking permission from the La Jolla Town Council to erect the Cross, the Association explained that its objective was to “create a park * * * worthy to be a setting for [this] symbol of Christianity.” The Association sent out fundraising letters that called on potential donors to support “this manifestation, this symbol, of our faith.” The Association also raised funds for the Cross at Easter services and through the performance of a Christian play, “Paul of Corinth,” at a local church.

The Cross was dedicated on Easter Sunday in a ceremony that included a Christian religious service. The Cross was dedicated not only to fallen soldiers, but also to Jesus Christ with the hope that it would be “a symbol in this pleasant land of Thy great love and sacrifice for all mankind.” The program for the ceremony referred to the Cross as “a gleaming white symbol of Christianity.”

After the Cross’s dedication in 1954, the Association held Easter services at the Memorial annually until at least 2000, and other religious ceremonies have been held there since. The annual Easter

services included readings from the Bible, a Christian prayer and benediction, and songs such as “Jesus Christ is Risen Today” and “All Hail the Power of Jesus’ Name.” Until the early 1990s, the program for the annual Easter service recounted the Cross’s history and described it as “a gleaming white Cross” that serves as a “reminder of God’s Promise to man of redemption and everlasting life.” During this same time period, the Cross was referred to as the “Easter Cross” on local maps.

In contrast to this ample evidence of religious usage, the record of secular events at the Memorial is thin. The Association represented in its 1998 bid for the land sale that it had conducted annual memorial services at the site for forty-six years, but the government’s expert historian could point to evidence of only two Veterans day ceremonies—one in 1971 and one in 1973—that occurred prior to 1989. The government provides record evidence of secular events at the Memorial only from 1996 onward—after the litigation began and after the government started attempting to transform the site.

The Cross’s importance as a religious symbol has been a rallying cry for many involved in the litigation surrounding the Memorial.¹⁹ LiMandri and the

¹⁹ The district court largely discounted this fact, holding that it was “neither logical nor proper” to impute the motivations of the Association and City to the federal government. This reasoning is correct on its own terms, *see Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S. Ct. 1125, 1136, 172 L. Ed. 2d 853

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Thomas More Law Center were integral in devising the plan to designate the land as a national veterans' memorial. They publicly characterized the campaign to save the Cross in religious terms—for example, as a “spiritual battle.” LiMandri declared that “Christ won the war on Calvary. These are just kind of mop-up battles * * * *” LiMandri also participated in a fifty-four day prayer movement in front of the Cross that opened with the singing of “Immaculate Mary,” and the prayer of twenty mysteries of the rosary.

Other Christian advocacy groups like the American Family Association, the American Center for Law & Justice, and Fidelis launched national petition campaigns for the Cross; an intercessory prayer movement was held by the Christian Defense Counsel outside the White House. Representatives from many of these groups participated in a meeting of the San Diego City Council to consider whether to accept the federal transfer. At the meeting, participants

(2009) (distinguishing the intent of private donors and the government's objectives in accepting a monument) and *Card*, 520 F.3d at 1019-20 (same), but something of a red herring. Regardless of the issue of imputed intent, the history of the Memorial is relevant to determining its effect on the reasonable viewer. Thus, while this evidence may not be relevant to congressional purpose, it cannot be ignored in assessing the history and context of the Cross, which remains on public land. Again, simply because the Cross was transferred from the local government to the federal government does not wipe out the history of the site. The transfer did not divest the Cross of its Christian symbolism or of the long history and association of the site as one of religious significance.

advocated for the transfer by invoking the Cross's importance as a Christian symbol, and denouncing their opponents as "Satanists" or "hate[rs] of Christianity." When the Act passed, the Christian Coalition "commend[ed] the great efforts * * * in saving this historic symbol of Christianity in America." The starkly religious message of the Cross's supporters would not escape the notice of the reasonable observer. See *Van Orden*, 545 U.S. at 703, 125 S. Ct. 2854 (Breyer, J., concurring in the judgment) ("[T]he short (and stormy) history of the courthouse Commandments' displays [at issue in *McCreary*] demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them.").

The wide recognition of the Cross as a religious symbol and its long "and stormy" history of religious usage distinguishes the Memorial from the displays in *Van Orden* and *Card*. The Ten Commandments monuments at issue in those cases passed muster in part because they were *not* used as religious objects—they simply adorned the grounds of their respective government buildings in the company of other monuments. See *Van Orden*, 545 U.S. at 701, 125 S. Ct. 2854 (Breyer, J., concurring in the judgment) ("[T]o determine the message that the text [of the Ten Commandments monument] here conveys, we must examine how the text is *used*." (emphasis in original)). In *Van Orden*, Justice Breyer emphasized that the organization that erected the Ten Commandments monument "sought to highlight the Commandments'

role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency." *Id.* at 701, 125 S. Ct. 2854. Given the Monument's history and use in those cases, a reasonable viewer would not have inferred from the use of the monuments that their function was religious in nature. By contrast, a reasonable observer of the Memorial would be aware of the long history of the Cross, and would know that it functioned as a holy object, a symbol of Christianity, and a place of religious observance. The Cross's religious history heightens, rather than neutralizes, its "undeniably *** religious message." *See id.* (finding that although the text of the Ten Commandments "undeniably has a religious message," that message did not predominate in the display because the text was not used in a sectarian manner); *see also Eckels*, 589 F. Supp. at 235 ("[T]hat the effect of the symbols' presence is religious is evidenced by what the site has been used for since the [cross was] constructed [including Easter sunrise services]. There is nothing remotely secular about church worship.").

The fact that the Memorial also commemorates the war dead and serves as a site for secular ceremonies honoring veterans cannot overcome the effect of its decades-long religious history. *See Jewish War Veterans*, 695 F. Supp. at 5, 13-14 (holding that religious symbolism of a Latin cross and use of cross in religious ceremonies rendered it unconstitutional even though it had been dedicated as a war memorial). Although the Memorial was labeled a war memorial in 1954, for almost three decades—during

which it served primarily as a site of religious observance—the Memorial consisted of only the Cross, with no physical indication of any secular purpose. Further, recognition of the Memorial as a tribute to veterans has usually been coupled with Christian ceremonies and statements about the Cross’s religious significance. The simultaneous invocation of the Cross as a tribute to veterans and a “gleaming white symbol of Christianity” lends a distinctly sectarian tone to the Memorial’s secular message of commemoration. See *Carpenter*, 93 F.3d at 631 (holding cross was not constitutional in part because its secular history was “intertwined with its religious symbolism”). The Memorial’s relatively short history of secular usage does not predominate over its religious functions so as to eliminate the message of endorsement that the Cross conveys. See *Van Orden*, 545 U.S. at 701-03, 125 S. Ct. 2854.

La Jolla—where the Memorial is located and serves as a prominent landmark—has a history of anti-Semitism that reinforces the Memorial’s sectarian effect. The record contains various documents reporting “long-standing, culturally entrenched anti-Semitism” in La Jolla from the 1920s through about 1970. The details of this history are well documented in a study that is part of the district court record.²⁰

²⁰ The district court stated that there “is no history of religious discrimination” surrounding the Memorial. Presumably the district court was referring to the fact that there is no evidence of non-Christian groups requesting to use the Memorial

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See Mary Ellen Stratthaus, *Flaw in the Jewel: Housing Discrimination Against Jews in La Jolla, California*, 84 AM. JEWISH HISTORY 3, 189-219 (1996). The anti-Semitism manifested itself in various forms but “most prominently in the housing market.” Until the late 1950s, Jews were effectively barred from living in La Jolla by a combination of formal and informal housing restrictions. La Jolla was forced to abandon these restrictions in 1959, in order to persuade the University of California to open a new campus—the University of California San Diego. The aura of anti-Semitism, however, continued at least through the 1960s. An informed observer is far more likely to see the Memorial as sending a message of exclusion against this backdrop than if it had been erected in a city without this pointed history.

La Jolla’s anti-Semitic history also informs our conclusion that the historical lack of complaint about the Memorial is not a determinative factor in this case. See *Van Orden*, 545 U.S. at 702-03, 125 S. Ct. 2854 (Breyer, J., concurring in the judgment).

and being denied access on the basis of their faith. We agree with the district court that there is no evidence of this type of religious discrimination, although we also note that there is hardly an extensive record of non-Christian religious events taking place at the site. More importantly, there *is* extensive evidence of religious discrimination in La Jolla, unrefuted by the government. Given that the Cross was constructed in La Jolla with a distinctly religious purpose, by La Jolla residents, during the height of this discriminatory period, we cannot ignore that such discrimination is part of the Memorial’s history and context and informs the reasonable observer’s views.

In *Van Orden*, there was little to explain why there had been no complaints about the Ten Commandments monument other than the hypothesis that people had not been especially bothered by it. Here, the Memorial stood in the heart of a largely homogeneous and exclusionary community. Even the government's expert noted that, for residents of La Jolla, being religious meant "by definition, without really thinking about it as inclusive or exclusive today, [] being Christian." The Association's President noted that residents thought the site was primarily religious, although, in his view, it was primarily a veterans memorial. Under these circumstances, a lack of complaints from the minority population is hardly reflective of the lack of controversy.

As it turns out, the record indicates that the first questions about the constitutionality of the Memorial arose in 1969 or 1970, less than a decade after La Jolla real estate was opened up to Jews (and other minorities). This sequence of events lends support to the argument that the discriminatory housing policies of La Jolla may have stifled complaints about the Memorial early in its lifetime.²¹ In any case, the

²¹ The district court discounted an article reporting the story of early questions about the Memorial's constitutionality. Again, the court appeared to be weighing evidence rather than crediting it to the nonmoving party. In any event, the article documents that "[a]round 1969 or 1970, the church-state question arose," and a member of the San Diego City Council "took up the cause and researched the legal status of the cross," ultimately determining that it did not violate the Establishment

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Memorial has been the subject of continuous and heated litigation and political controversy for the last twenty years. However one assesses the early years, the Cross has long since become a flashpoint of secular and religious divisiveness.

Moreover, the suggestion that the longevity and permanence of the Cross diminishes its effect has no traction. As the Seventh Circuit explained in *Gonzales*,

We believe this argument is much like [saying] the longer the violation, the less violative it becomes. The longer the cross is displayed in the Park, the more the effect is to memorialize rather than sermonize. We do not accept this sort of bootstrapping argument as a defense to an Establishment Clause violation, nor have we found any other case that adopted this reasoning.

4 F.3d at 1422.

Overall, a reasonable observer viewing the Memorial would be confronted with an initial dedication for religious purposes, its long history of religious use,

Clause. The article goes on to describe certain steps taken to “blunt any possible legal challenges” and quotes a La Jolla municipal employee as saying “the church-state question has come up.” None of this suggests that a debate was raging over the Memorial in the 1960s and ’70s, but it certainly shows that the constitutionality of the Memorial was questioned during that period, seriously enough that the Association took action to ward off litigation.

widespread public recognition of the Cross as a Christian symbol, and the history of religious discrimination in La Jolla. These factors cast a long shadow of sectarianism over the Memorial that has not been overcome by the fact that it is also dedicated to fallen soldiers, or by its comparatively short history of secular events.

3. The Memorial's Physical Setting

The Memorial's physical setting amplifies the message of endorsement and exclusion projected by its history and usage. Despite the recent addition of secular elements, the Cross remains the Memorial's central feature. The Cross physically dominates the site. It weighs twenty-four tons, stands forty-three feet tall on its base, and is visible from many more locations and perspectives than the Memorial's secular elements. The Cross is placed in a separate, fenced off box, which highlights it, rather than incorporates it as a natural part of the Memorial.

The engraved plaques and paving stones ring the hill on which the Cross sits, placed literally in the Cross's shadow.²² The relationship of the Cross to the

²² In holding that the Memorial's secular elements predominated, the district court emphasized that there were far more secular objects in the Memorial than religious ones. Our evaluation of the Memorial's setting, however, cannot rest on the total number of secular versus religious elements. Our analysis is not a numbers game. Rather, we must examine the primary *effect* of the Memorial's various elements, to determine whether

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Memorial's secular features inverts the relationship between religious and secular that was presented in *County of Allegheny*. There, the forty-five foot tall secular Christmas tree was "clearly the predominant element of the city's display," occupying the central position in the display and towering over the eighteen foot menorah placed to one side. *County of Allegheny*, 492 U.S. at 617, 109 S. Ct. 3086 (opinion of Blackmun, J.). The Supreme Court found that the display did not convey a religious message. *Id.* at 635, 109 S. Ct. 3086 (O'Connor, J., concurring in part and in the judgment). Here, just the opposite is true: The way in which the Cross overshadows the Memorial's secular aspects presents a strongly sectarian picture. *See id.* at 617, 109 S. Ct. 3086 (opinion of Blackmun, J.) (explaining that because the Christmas tree overshadowed the menorah, it was "sensible to interpret the meaning of the menorah in light of the tree, rather than vice versa"); *id.* at 598-99, 109 S. Ct. 3086 (finding that crèche conveyed religious message because "nothing in the context of the display," including the secular flower wreath, "detracts from the crèche's religious message"); *see also City of St. Charles*, 794 F.2d at 267 (holding cross in a multifaceted Christmas display unconstitutional and noting that the cross was "an overpowering feature of the

they convey a secular or religious message. Here, the Memorial's religious element—the Cross—is by far its most prominent and dominant feature, completely eclipsing the more numerous plaques and bollards sitting beneath it.

*** decorations *** and *** there [was] no taller object in the city’s Christmas display”). A reasonable observer would view the Cross as the primary feature of the Memorial, with the secular elements subordinated to it. It is the cross that catches the eye at almost any angle, not the memorial plaques.

From the perspective of drivers on Interstate 5, almost directly below, the Cross is the *only* visible aspect of the Memorial, and the secular elements cannot neutralize the appearance of sectarianism. For these drivers, the Cross does not so much present itself as a war memorial, but rather as a solitary symbol atop a hill. In fact, the Cross is the only element of the Memorial that can be seen from *anywhere* except the site of the Memorial itself—including from Interstate 15, which is much farther from Mount Soledad than Interstate 5.

As we explained in *Ellis*, the fact that the “Cross stands as the focal point of the park, visible to those looking at the hill from a substantial distance” contributes to its sectarian effect. 990 F.2d at 1527; *see also Buono*, 371 F.3d at 549 (highlighting the fact that cross is visible to vehicles on adjacent road from 100 yards away); *American Atheists*, 616 F.3d at 1160 (finding that secular elements of the highway crosses did not diminish the message of endorsement in part because “a motorist driving by one of the memorial crosses *** may not notice *** the biographical information *** [but] is bound to notice the preeminent symbol of Christianity”); *Gonzales*, 4 F.3d at 1414 (finding cross unconstitutional and noting that

it “is located in an area * * * which borders a busy intersection * * * [and] is visible to virtually anyone who passes through”); *Rabun County Chamber of Commerce, Inc.*, 698 F.2d at 1101, 1111 (holding illuminated cross erected at the top of a mountain in a local state park unconstitutional and noting that it “[shines] over the North Georgia mountains” and “is visible for several miles from the major highways”). Although the Cross is located miles from downtown, it is located at the highest point in La Jolla—a place of particular prominence in San Diego.²³ See *Ellis*, 990 F.2d at 1527.

The centrality and prominence of the Cross in the Memorial distinguishes the Memorial from other war memorials containing crosses. For example, the Argonne Cross and the Canadian Cross of Sacrifice at Arlington National Cemetery and the Irish Brigade Monument at Gettysburg are located among the many secular monuments in those memorials. The crosses are on equal footing with these other monuments and do not dominate the landscape. The constitutionality of these crosses is not before us and we

²³ The district court held that the distance between the Memorial and government buildings weighed against a finding of endorsement, noting that the Memorial was “an unlikely place for government indoctrination.” The proximity of a religious display to government buildings is not dispositive as to constitutionality. We impute to the reasonable observer the awareness that the Memorial sits on public land. Whether identified by the public as city or federal land, it is well known that the site is a public park.

do not question their legitimacy. Their setting, however, is reflective of how crosses are incorporated within a larger memorial setting. That a cross may be permissible when it is merely one facet of a large, secular memorial in which it does not hold a place of prominence does not speak to the constitutionality of a cross that is the centerpiece of and dominates a memorial, the secular elements of which are subordinated to the cross. Faced with such a cross, a reasonable observer would perceive a sectarian message of endorsement.

In addition to overshadowing the Memorial's secular elements, the Cross's central position within the Memorial gives it a symbolic value that intensifies the Memorial's sectarian message. The Memorial's secular elements—the plaques, paving stones and bollards—represent specific individuals or groups of veterans, but the Cross, at the center of the Memorial, is meant to represent *all* veterans, regardless of their faith. The Cross, however, is the “preeminent symbol”—a “gleaming white symbol”—of one faith, of Christianity. The particular history of this Cross only deepens its religious meaning. The Cross is not only a preeminent symbol of Christianity, it has been *consistently used* in a sectarian manner. As even the government's expert noted, “over time * * * Mount Soledad and its cross became a * * * Christian site.” The Cross's history casts serious doubt on any argument that it was intended as a generic symbol, and not a sectarian one. *See Rabun County Chamber of Commerce, Inc.*, 698 F.2d at 1110-11 (finding that

dedication of cross at Easter service and Easter services occurring at the cross were evidence that cross was erected for a religious purpose).

The use of such a distinctively Christian symbol to honor all veterans sends a strong message of endorsement and exclusion. It suggests that the government is so connected to a particular religion that it treats that religion's symbolism as its own, as universal. To many non-Christian veterans, this claim of universality is alienating. As one World War II veteran who fought in both D-Day and the Battle of the Bulge put it:

I don't know if it is a Christian monument, but it does not speak for me. I was under Hitler and in a concentration camp and a cross does not represent me. The Cross does not represent all veterans and I do not know how they can say it represents all veterans. I do not think a cross can represent Jewish veterans.

One of the plaintiffs, Steve Trunk, explained that he was "a veteran who served his country during the Vietnam conflict [but] I am not a Christian and the memorial sends a very clear message to me that the government is honoring Christian war veterans and not non Christians."²⁴ *See also City of St. Charles,*

²⁴ We note that not all veterans agree, and that a local Jewish veterans group opposes the effort of the national group to challenge the Cross.

794 F.2d at 273 (“[T]he story of the death and resurrection of Christ, the story that the cross calls to mind, moves only Christians deeply.”).

By claiming to honor all service members with a symbol that is intrinsically connected to a particular religion, the government sends an implicit message “to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *See Lynch*, 465 U.S. at 688, 104 S. Ct. 1355 (O’Connor, J., concurring); *see also American Atheists*, 616 F.3d at 1160-61 (“[T]he fact that all of the fallen * * * troopers are memorialized with a Christian symbol conveys a message that there is some connection between [the state] and Christianity * * * * [T]he significant size of the cross would only heighten this concern.”); *Eckels*, 589 F. Supp. at 235 (the primary effect of crosses and Stars of David used as war memorials “is to give the impression that only Christians and Jews are being honored by the country”). This message violates the Establishment Clause.²⁵

²⁵ The fact that individual veterans can purchase plaques representing their own beliefs does not cure the constitutional problem with the Memorial. The Memorial appears to represent Christian veterans generally, even if non-Christian veterans can take steps to be honored specifically. Simply purchasing a single small plaque with a Star of David would do little to mute the overall effect of the Cross.

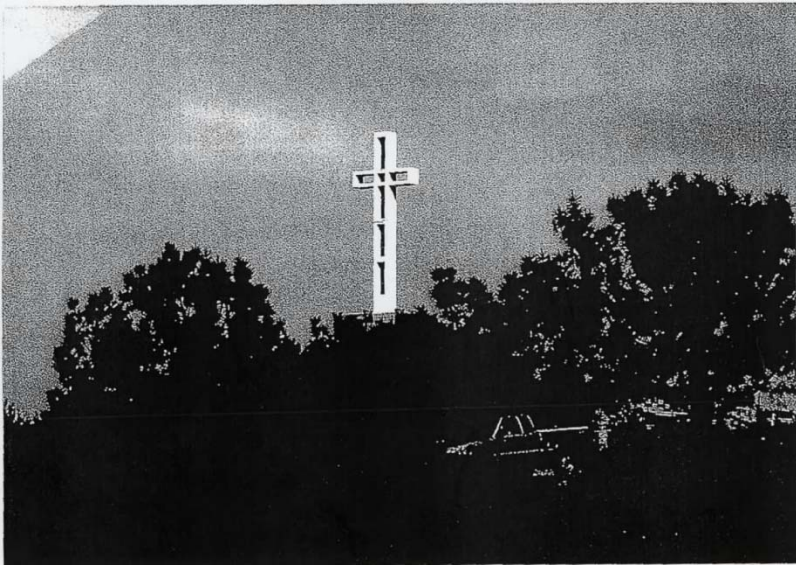
Accordingly, after examining the entirety of the Mount Soledad Memorial in context—having considered its history, its religious and non-religious uses, its sectarian and secular features, the history of war memorials and the dominance of the Cross—we conclude that the Memorial, presently configured and as a whole, primarily conveys a message of government endorsement of religion that violates the Establishment Clause. This result does not mean that the Memorial could not be modified to pass constitutional muster nor does it mean that no cross can be part of this veterans' memorial. We take no position on those issues.

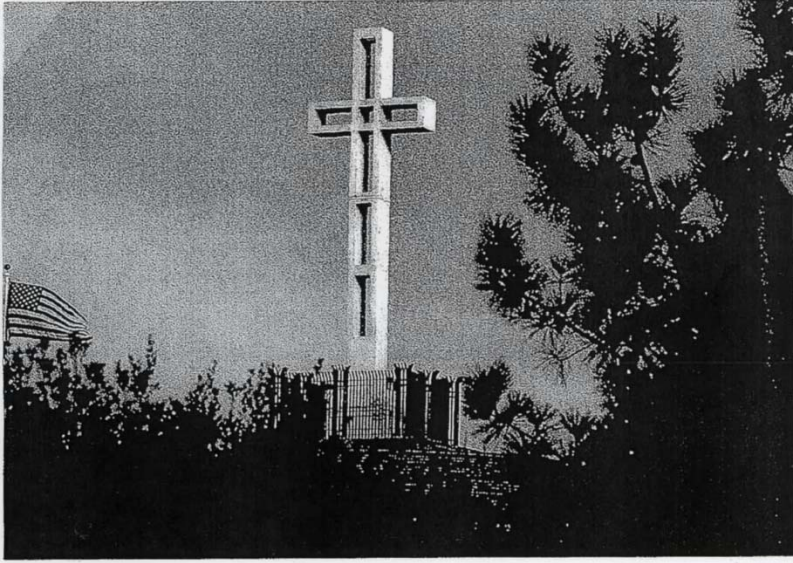
We reverse the grant of summary judgment to the government and remand for entry of summary judgment in favor of the Jewish War Veterans and for further proceedings consistent with this opinion.

REVERSED AND REMANDED.



APPENDIX A





568 F. Supp. 2d 1199

Steve TRUNK, Plaintiff,

v.

**CITY OF SAN DIEGO, United States of America,
Robert M. Gates, Secretary of Defense and
Does 1 through 100, inclusive, Defendants.**

**Mount Soledad Memorial Association,
Real Party in Interest.**

**Jewish War Veterans of the United States of
America, Inc., Richard A. Smith, Mina Sagheb,
and Judith M. Copeland, Plaintiffs,**

v.

**Robert M. Gates, Secretary of Defense, in his
official capacity, Defendant.**

**Nos. 06cv1597-LAB (WMc),
06cv1728-LAB (WMc).**

United States District Court,
S.D. California.

July 29, 2008.

James E. McElroy, Law Offices of James E. McElroy, San Diego, CA, Justin S. Rubin, Wilmerhale, Matthew T. Jones, Eric R. Columbus, A. Stephen Hut, Jr., Wilmer Cutler Pickering Hale and Dorr, Daniel Mach, American Civil Liberties Union Foundation, Lane Dilg, ACLU Program On Freedom of Religion and Belief, Washington, DC, for Plaintiff.

James E. McElroy, Law Offices of James E. McElroy, San Diego, CA, Justin S. Rubin, Matthew T. Jones, Eric R. Columbus, A. Stephen Hut, Jr., Wilmer,

Cutler, Pickering, Hale and Dorr, Daniel Mach, American Civil Liberties Union Foundation, Lane Dilg, ACLU Program on Freedom of Religion and Belief, Washington, DC, for Plaintiffs.

Thomas C. Stahl, U.S. Attorneys Office, George F. Schaefer, Law Offices of George F. Schaefer, San Diego, CA, David L. Negri, U.S. Department of Justice, Boise, ID, E. Kenneth Stegeby, Peter McVeigh, U.S. Department of Justice, Washington, DC, for Defendants.

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Charles V. Berwanger, Gordon and Rees, San Diego, CA, for Real Party in Interest.

A. Stephen Hut, Jr., Jonathan H. Siegelbaum, Wilmer Cutler Pickering Hale and Dorr, Lane Dilg, ACLU Program on Freedom of Religion and Belief, Washington, DC, for Plaintiffs.

U.S. Attorney CV, U.S. Attorneys Office Southern District of California, San Diego, CA, for Defendant.

**ORDER DENYING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT; AND ORDER
GRANTING DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

LARRY ALAN BURNS, District Judge.

I. Introduction

For 54 years, a Latin cross has stood as part of a veterans' memorial atop Mt. Soledad in the San Diego community of La Jolla. In 2006, Congress acquired the site by eminent domain from the City of San Diego, ostensibly to ensure its preservation. The Jewish War Veterans of the United States of America, Inc. ("Jewish Veterans" or "JV") and four individual plaintiffs brought suit against the United States, challenging Congress' taking of the Mt. Soledad site and the presence of the cross on federal property as violations of the Establishment Clause of the First Amendment. In an earlier ruling, this Court dismissed the challenge to the land transfer for lack of standing—a decision that is now final. *Trunk v. City of San Diego*, 547 F. Supp. 2d 1144 (S.D. Cal. 2007), *appeal dismissed*, ___ F.3d ___ (9th Cir. June 11, 2008) (table). Left to decide is whether permitting the cross to remain as part of the veterans' memorial amounts to an unconstitutional establishment of religion. Plaintiffs bear the burden of demonstrating the presence of the cross is unconstitutional. *INS v. Chadha*, 462 U.S. 919, 944, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

All parties¹ agree the record is complete, and the Court may decide the issue on summary judgment. Summary judgment is appropriate if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The Court recognizes and adheres to this standard.

II. Discussion

The history of the Mt. Soledad memorial goes back nearly a century and is documented in large part in *Ellis v. City of La Mesa*, 990 F.2d 1518, 1521 (9th Cir. 1993); see also *Paulson v. Abdelnour*, 145 Cal. App. 4th 400, 407-08, 51 Cal. Rptr. 3d 575 (Cal. App. 4 Dist. 2006) (recounting history after 1993). The memorial is situated on a hill a few miles north of downtown San Diego, and commands a panoramic view of the surrounding area. Visitors come to the site not only to visit the memorial but to enjoy the view. The following facts are uncontested:

A redwood cross was first erected by private citizens on land owned by the City of San Diego on

¹ In addition to the parties’ briefing, the Court has accepted two *amicus* briefs. One was filed on behalf of thirty-three members of the House of Representatives (collectively, the “Congressional *Amici*”), and a second was filed on behalf of the families of two Marines killed in Iraq who are honored with plaques at the memorial (“Martino-Bloomfield *Amici*”).

Mt. Soledad in 1913. Some time afterward, the site was designated as public parkland. The original cross was either stolen or destroyed in 1923, but it was later replaced with a cross made of stucco and wood. The second cross stood on Mt. Soledad until it was blown down on March 13, 1952. A coalition of religious and civic organizations then formed the Mt. Soledad Memorial Association (“MSMA”), with the goal of replacing the second cross with a new one.² The new cross was erected in 1954 and has remained atop Mt. Soledad since. The cross is 29 feet tall (43 feet tall if the base is included), and is made of recessed concrete. A tall metal fence surrounds the cross and prevents access to it. Although the memorial comprises other symbols and objects attesting to the service and sacrifice of war veterans, it is only the cross as part of the memorial that is at issue.³

The Mt. Soledad memorial was officially dedicated on Easter Sunday, 1954, to fallen veterans of World Wars I and II and the Korean War. The La

² The evidence identifies the MSMA as a civic organization, although the MSMA is characterized as friendly to religious organizations and willing to sponsor events with a religious emphasis. There is no evidence the MSMA itself is a religious organization.

³ The parties have submitted photographs of the memorial, depicting the cross and other features from different angles and vantage points. A fair, representative view of the memorial cross can be found at <http://www.lajollalight.com/content/img/f241532/soledad.jpg>.

Jolla town council⁴ sponsored the ceremony and both religious and military leaders participated. Over the years, the site has been used for religious and non-religious events, including Easter sunrise services (some of which have been broadcast to troops overseas), veterans' reunions, memorial services, weddings, and family gatherings.⁵ There is little evidence of events before 1954, except for Easter services, which were held on the site even before the current cross was erected. There is no history of discrimination between religious and nonreligious groups in the issuance of municipal permits to use the site.

After litigation against the City of San Diego over the cross' presence was initiated in 1989, the MSMA began making changes to the memorial. The cross was conspicuously marked with a bronze plaque noting its status as a veterans' memorial, and other features were added to the site. These include six large concentric walls displaying over two thousand

⁴ The La Jolla town council, like other town councils in the City of San Diego, is a volunteer organization of citizens and businesses.

⁵ Besides being an element of the memorial, the United States has offered uncontested evidence the cross has historically been used for surveying and navigation. In 1934, the U.S. Coast and Geodetic Survey adopted the cross as an azimuth marker on the national triangulation control network, and both private and public-entity surveyors frequently use it as a landmark for surveying purposes. (Defs.' Mem. of P. & A. in Supp. of Mot. for Summ. J. at 6:23-25, 6:27-7:3 (citing Decl. of Historian Alan Newell, ¶ 9).) Aircraft and boats also use the easily-identified cross as a marker for navigation. (*Id.*)

engraved, formal black granite memorial plaques recognizing individual veterans, with room for over a thousand more. The plaques contain personal information, pictures, and symbolic elements (both religious and secular) and are installed at a substantial cost to the purchasers. The religious imagery on the plaques includes crosses, the Star of David, and emblems of other religions. Adjacent sidewalks invite visitors to view the plaques up close. Other additions to the memorial include brick paving stones commemorating veterans and supporters, and twenty-three bollards honoring community and veterans' organizations, encircling the walls. Finally, an American flag now flies from a large flagpole at the memorial.

In 2004, Congress passed a resolution recognizing the Mt. Soledad site as a national veterans' memorial, and agreeing to accept the property if the City of San Diego chose to donate it to the federal government. Public Law 108-447, 118 Stat. 2809, 3346 (2004). Congress' offer was apparently motivated by its desire to end the litigation over the presence of the cross that had dragged on in both state and federal courts since 1989. The City's attempt to donate the property was blocked in 2005 by a California Superior Court judge. See *Paulson v. Abdelnour*, 145 Cal. App. 4th at 415, 51 Cal. Rptr. 3d 575. Then in 2006,

while the superior court's decision was on appeal,⁶ Congress exercised its takings power to acquire the site as federal property to be preserved as a veterans' memorial. Public Law 109-272, 120 Stat. 771 (2006). Public Law 109-272 passed the House of Representatives by a vote of 349-74, and the Senate by unanimous consent, and was signed into law by President Bush. The statute directs the Secretary of Defense to enter into a memorandum of understanding with the MSMA to maintain the property as a veterans' memorial. Other than this one general directive, the law does not require the memorial to be maintained in any particular manner.

This Court's Establishment Clause analysis relies heavily on two recent Ninth Circuit decisions, *Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008) and *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008) (amending earlier opinion at 502 F.3d 1069, and denying rehearing en banc), and on the Supreme Court's rulings in *Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005) and *McCreary County v. ACLU*, 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005), on which the two Ninth Circuit rulings relied.

⁶ The ruling of the superior court was ultimately reversed in *Paulson v. Abdelnour*, *supra*, 145 Cal. App. 4th 400, 51 Cal. Rptr. 3d 575.

A. Standing

As a preliminary matter, the Court must determine whether Plaintiffs have standing to bring this lawsuit, more precisely whether they can show they have suffered actual injury owing to the presence of the cross on public land. At oral argument, counsel for the Congressional *Amici* disputed that Plaintiffs have been injured and asserted they lack standing. In Establishment Clause cases, standing requirements are at their nadir.⁷

Jewish Veterans claims associational standing. To establish associational standing, “the entity must show that (1) at least one of its members would have standing to sue in his own right, (2) the interests the suit seeks to vindicate are germane to the organization’s purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members.” *Fleck & Assocs., Inc. v. City of*

⁷ While psychological harm may sometimes be sufficient to confer Article III standing, see *Hudson v. McMillian*, 503 U.S. 1, 16-17, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992) (Blackmun, J., concurring in the judgment) (citing cases), offense taken at government complicity in religion is not ordinarily adequate. *Hein v. Freedom Religion Foundation, Inc.*, ___ U.S. ___, ___, 127 S. Ct. 2553, 2578, 168 L. Ed. 2d 424 (2007) (Scalia, J., concurring in the judgment) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485-86, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)). But differentiating acts and conditions that are merely disquieting or annoying from those that are psychologically harmful, or attempting to gauge the intensity of others’ subjective feelings are not determinations susceptible to bright-line rules.

Phoenix, 471 F.3d 1100, 1105-06 (9th Cir. 2006). Jewish Veterans easily meets prongs two and three of this test, and has submitted the declaration of one of its members, Maurice Eis, to establish the first prong. (JV Mem. of P. & A. in Supp. of Mot. for Summ. J. (“JV Memo”) at 20:19-21:4.) Mr. Eis states he enjoyed frequently visiting the memorial on Mt. Soledad, regardless of the presence of the cross, until the site was designated as a veterans memorial (presumably in 2006). (Eis Decl., ¶ 10.) At that point, he says he stopped coming to the site because he felt the memorial did not represent him: “I do not know if it is a Christian monument, but it does not speak for me.” (*Id.*, ¶ 11.)

The injury claims of the individual plaintiffs are to the same effect. For example, Plaintiff Trunk says he is offended by the memorial because it “sends a message that only Christian war veterans are being honored or remembered.” (Trunk Compl. at 2:25-26.) Because he feels offended, he does not enjoy the memorial. (*Id.* at 3:2-5.)⁸

If Plaintiffs’ claims were based on any theory other than violation of the Establishment Clause, they would likely be out of court for lack of standing. Visitors to Mt. Soledad are, after all, mere “[p]assersby * * * free to ignore [the memorial], or

⁸ Similar declarations were filed by Richard Smith, Mina Sagheb, and Judith Copeland. (Decl. of Richard Smith, ¶¶ 3, 4; Decl. of Mina Sagheb, ¶¶ 3, 4; Decl. of Judith Copeland, ¶¶ 2-4.)

even to turn their backs, just as they are free to do when they disagree with any other form of government speech.” *Allegheny*, 492 U.S. at 664, 109 S. Ct. 3086 (Kennedy, J., concurring in judgment in part and dissenting in part). In the Ninth Circuit, however, merely being ideologically offended, and therefore reluctant to visit public land where a perceived Establishment Clause violation is occurring, suffices to establish “injury in fact.” *Buono v. Norton*, 371 F.3d 543, 546-47 (9th Cir. 2004) (holding that plaintiff, a practicing Roman Catholic who was ideologically offended by the government’s decision to maintain a cross on public land, but not offended by the cross itself, had Article III standing because his opposition to the government’s action led him to avoid the area where the cross was located); *Ellis*, 990 F.2d at 1523 (holding that Catholic and Episcopal residents who avoided using public park where cross was located had Article III standing to challenge its presence, because their disagreement with or embarrassment by the government’s action prompted them either to avoid the area where the cross was located or to lessen their contact with it); *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 784-85 (9th Cir. 2008) (holding lesbian and agnostic parents had suffered injury in fact because they disagreed with Boy Scouts’ religious and moral position and therefore avoided recreational park facilities used by Boy Scouts).

Bound by these precedents, the Court concludes all Plaintiffs have standing to bring this lawsuit.

B. Establishment Clause Analysis

The government's use of religious symbolism violates the Establishment Clause if it has the purpose or effect of endorsing religious beliefs, or favoring one religion over others. The Supreme Court has used two tests to evaluate governmental interaction with religion. The older of the tests, and the one Plaintiffs urge the court to apply, was established in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). To satisfy the Constitution under the three-part *Lemon* test, the government action 1) must have a secular purpose; 2) may not, as its principal or primary effect, either advance or inhibit religion; and 3) must not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13, 91 S. Ct. 2105. The *Lemon* test was recently applied in *McCreary* to a challenge to the presence of a Ten Commandments display in a county courthouse. Although the Supreme Court has opined that *Lemon* is not particularly useful in evaluating passive monuments, *Van Orden*, 545 U.S. at 686, 125 S. Ct. 2854, this Court agrees with Jewish Veterans the test is implicated here.

The second test, taken from *Van Orden*, has been applied to passive monuments on public property. Under the *Van Orden* test, the court determines whether the contested symbol or monument is among the "plainly religious displays that convey a historical or secular message in a non-religious context." *Card*, 520 F.3d at 1016. If so, the display passes constitutional muster. While it may not be spot-on to describe

the Mt. Soledad memorial, viewed as a whole, as a “plainly religious display,” the memorial does contain as one of its prominent elements a universally-recognized religious symbol—the Latin cross. And because the significance and effect of the cross as part of the memorial are precisely what Plaintiffs complain about, this Court finds the *Van Orden* test is also implicated.

Which test should be used to judge the constitutionality of the Mt. Soledad Veterans Memorial? The answer is informed by the Ninth Circuit’s recent decision in *Card*. *Card* attempted to harmonize the three-part *Lemon* test applied in *McCreary* with the more generally-worded *Van Orden* test. *Card* held the *Lemon* test remains the general rule for determining whether the Establishment Clause has been violated. 520 F.3d at 1016. But *Card* also held *Lemon* is not to be used to evaluate the constitutionality of “some longstanding plainly religious displays that convey a historical or secular message in a nonreligious context.” *Id.* As to this category of display, *Van Orden* presumably applies. *Id.* at 1016-17. Adding to the puzzle, *Card* acknowledges *Van Orden* carved out a narrow exception for certain Ten Commandments monuments, *id.* at 1018, but also suggests *Van Orden* is not limited simply to displays of the Ten Commandments. *See id.* at 1016 (referring to “plainly religious displays”). Whether a monument like the one in this case comes within the *Van Orden* exception is not clear; *Card* dealt only with a Ten Commandments display, and the opinion reflects

uncertainty as to the breadth of the exception. *Id.* at 1018.

Guided by *Card*, this Court concludes the proper approach is to analyze the Mt. Soledad memorial under both the *Lemon* and *Van Orden* tests, then “exercise * * * legal judgment to determine whether [the memorial] passes constitutional muster.” 520 F.3d at 1017. That is, the Court must determine under *Lemon* whether Public Law 109-272 had a religious purpose, whether the continuing presence of the cross as part of the memorial has the effect of advancing religion or favoring one religion over others, and whether maintaining the memorial as public property fosters excessive government entanglement with religion. To pass the *Lemon* test, all three questions must be answered “no.”

Alternatively, the Court must evaluate under *Van Orden* whether the presence of the cross as part of the memorial transforms the overall character of the memorial into a “plainly religious display,” and if so, whether the display “convey[s] a historical or secular message in a non-religious context.” 520 F.3d at 1016.

1. *McCreary County v. ACLU* (the *Lemon* Test)

This case dealt with large framed copies of an abridged text of the King James version of the Ten Commandments hanging in the courthouses of two Kentucky counties. Originally, no other elements

were included in the displays. But after a First Amendment challenge was raised, county officials twice ordered the displays to be augmented with other secular texts. 545 U.S. at 850, 853-56, 125 S. Ct. 2722. The Supreme Court found the counties' belated efforts to add secular material were designed to disguise the true objective of the displays all along—to promote the Christian religion. *Id.* at 854-55, 871-73, 125 S. Ct. 2722. The Court applied the *Lemon* test and found a plainly religious purpose. *Id.* at 862, 125 S. Ct. 2722.

Plaintiffs liken this case to *McCreary*, pointing out all the additional features of the memorial (flag-pole and flag, walls, plaques, bollards, paving stones) were added after a legal challenge to the presence of the cross was first brought in 1989. But Mt. Soledad did not become federal property until 2006, and by then all of the changes were in place. Whatever the reasons for the changes made to the memorial by the MSMA and permitted by the City of San Diego beforehand, it is neither logical nor proper to impute the motivation for them after-the-fact to Congress. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 764, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (rejecting argument that activities of outsiders should be attributed to the government defendant as having “no antecedent in our jurisprudence”); *see also Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 975-76 (9th Cir. 2004) (holding religious use of historical site by others was not attributable to the federal government).

Nor is this case, as Plaintiffs alternatively urge, like that hypothetically described in *Allegheny*, where the government had a choice of two methods of promoting a secular purpose and chose the religious one. 492 U.S. at 618, 109 S. Ct. 3086 (citing *Abington School District v. Schempp*, 374 U.S. 203, 295, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (Brennan, J., concurring)). Historic sites and monuments are not fungible, and the government's choices are limited to taking history as it finds it, or rejecting it. No equally historic memorial was available here as a third choice.

Consequently, for Plaintiffs to prevail on their Establishment Clause claim they must show either that Congress acted unconstitutionally when it acquired the memorial, or that the federal government is violating the Constitution by preserving and maintaining the memorial in its present condition.

a. Did Congress Act With Secular Purpose When It Acquired The Memorial?

Government action fails the secular purpose test only when it is clear the statute or activity is "motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (citing *Stone v. Graham*, 449 U.S. 39, 41, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980) (further citations omitted)). On the other hand, it is not enough to simply identify a secular purpose in the

abstract; the Court must be convinced the government's secular purpose is bona fide, and not merely a sham or secondary to a greater religious objective. *McCreary*, 545 U.S. at 864, 125 S. Ct. 2722.

For the United States to recognize the service and sacrifice of its war veterans by preserving a memorial in their honor is laudable and unquestionably secular. Plaintiffs are skeptical this was the real impetus for Public Law 109-272, and they urge the Court to look beyond the ostensible purpose. (JV Memo at 40:11-20.) Congress took the site, Plaintiffs say, not to preserve it as a veterans' memorial but because of political pressure inflamed by local religious and city leaders who didn't want the cross removed from the memorial. (JV Memo at 36:21-23 ("The story leading to the federal taking and display of the Cross confirms the facially obvious religious purpose of the federal government's actions.")) Though this Court dismissed Plaintiff Trunk's claim to invalidate the land transfer, the reasons for the taking remain relevant to the purpose analysis.

Plaintiffs focus heavily on voluminous selected evidence showing, unsurprisingly, that Christian leaders and groups spoke out vehemently against removing the cross, and urged the federal government to take the property instead.⁹ As Plaintiffs see

⁹ The qualification "selected" is important because Defendants cite uncontested evidence that a wider spectrum of society and political leaders also favored leaving the cross on the memorial site. (*See, e.g.*, Defs.' Memo at 6:4-8, citing Cong. Rec.

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it, all of the prior actions of the City and the MSMA, as well as the motives and involvement of particular lobbyists, activists, and community leaders are relevant to show Congress' true purpose.

What we see often depends on what we look for. While the public debate over the memorial informs the Court's general analysis, *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 315, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) (holding courts must be mindful of the circumstances in which legislation was enacted), it provides no direct insight into Congress' motive. The most the Court can deduce from Plaintiffs' evidence that religious lobbying, appeals to government officials, public speeches (both religious and otherwise), public prayer, and various other forms of protected activities were occurring up to the time Public Law 109-272 was enacted is that much of the support for the statute was religiously motivated. This is unremarkable; lobbying and public advocacy by religious and charitable organizations is altogether common, *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 670, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970);

H5423 (letter from Philip L. Thalheimer, stating that "As a practicing Jew, I am pleased to offer you the full support of San Diegans for the Mt. Soledad National War Memorial and any further necessary assistance in preserving this sacred monument on behalf of the people of San Diego and the United States of America.)) And while Public Law 109-272 received outspoken support from local Members of Congress, as Plaintiffs point out, it was also strongly supported by California's two senators, Dianne Feinstein and Barbara Boxer. 152 Cong. Rec. S8364-01.

see also, e.g., United States v. Bichsel, 395 F.3d 1053, 1054 (9th Cir. 2005) (Catholic priest and members of his congregation engaged in prayer vigil and demonstration against the Iraq war), and in any event cannot be regarded as “causing” Congress to take the memorial. *Paulson v. City of San Diego*, 475 F.3d 1047, 1048-49 (9th Cir. 2007); *Chem. Producers & Distribs. Ass’n v. Helliker*, 463 F.3d 871, 879 (9th Cir. 2006) (“Lobbying Congress or a state legislature cannot be viewed as ‘causing’ subsequent legislation * * * * Attributing the actions of a legislature to third parties rather than to the legislature itself is of dubious legitimacy, and cases uniformly decline to do so.”)

Moreover, most of Plaintiffs’ evidence focuses on local activity and local advocacy in favor of preserving the memorial and the cross. While this may be relevant to evaluating the possible motives of a few local members of Congress, it has no bearing on the motives or purposes of Congress as a whole, which is the proper inquiry here. Rather than trying to divine Congress’ motive from the fractious public debate over whether to “save the cross,” this Court will instead concentrate on objective evidence. As the Supreme Court has explained, “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.” *McCreary*, 545 U.S. at 862, 125 S. Ct. 2722 (quoting

Santa Fe, 530 U.S. at 308, 120 S. Ct. 2266) (internal quotation marks and further citations omitted).

The text of Public Law 109-272 is especially relevant because it includes Congress' special findings supporting its desire to preserve the Mt. Soledad memorial, as well as an explicit statement of purpose. Among its findings, Congress recognized the (then) 52-year history of the memorial, Pub. L. No. 109-272 § 1(1), as illustrative of our nation's "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." *Id.* at § 1(3). Regarding the design of the memorial, Congress found that the memorial cross was "fully integrated" as the centerpiece of the "multi-faceted" veterans' memorial "that is replete with secular symbols." *Id.* And characterizing the site as "a historically significant national memorial," *id.* at § 1(5), Congress found "the patriotic and inspirational symbolism of the Mt. Soledad Veterans Memorial provides solace to the families and comrades of the veterans it memorializes." *Id.* at § 1(4)-(5).

Congress' findings are facially non-religious, and relate logically to the law's secular statutory purpose—honoring our country's fallen war veterans by "preserv[ing] a historically significant war memorial." *Id.* at § 2(a). The only arguably religious references in the text are to the cross and to religious symbols as grave markers. But even those references have to do with commemorating the dead, rather than promoting any religious purpose. Furthermore, the statute

is not directed to the cross *per se*, nor does it require the continued presence of the cross as part of the memorial; it simply requires the Mt. Soledad site be maintained as a veterans' memorial.¹⁰ In this respect, Public Law 109-272 is quite unlike the challenged legislation in *Buono*, which was specifically aimed at protecting "a five-foot-tall white cross." See *Buono*, 527 F.3d at 769 n.3, 770. Courts may not lightly impute impermissible motives to the legislative and executive branches, *Stenberg v. Carhart*, 530 U.S. 914, 1008 n.19, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000) ("We do not assume unconstitutional legislative intent even when statutes produce harmful results * * * *") (citations omitted); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution."), and this Court, in particular, does not share Plaintiffs' cynical assumption that a commanding majority of the House of Representatives and the entire U.S. Senate didn't mean what they said.¹¹

¹⁰ If in the future, for example, the cross becomes structurally unsound and must be removed for safety reasons, the statute does not require that it be replaced.

¹¹ Plaintiffs point to cases where courts inferred illicit legislative motives, see, e.g., *McCreary*, 545 U.S. at 862, 125 S. Ct. 2722 (county governments); *Edwards v. Aguillard*, 482 U.S. 578, 586-90, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987) (state legislature); *Wallace v. Jaffree*, 472 U.S. 38, 57-58, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985) (state legislature); *Stone*, 449 U.S.

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Legislative history also informs whether a statute has secular purpose. This includes the history and implementation of the bill, as well as any relevant circumstances related to its passage, such as timing. With little debate, Public Law 109-272 passed by an overwhelming vote in the House of Representatives and by unanimous consent in the Senate. President Bush then promptly signed the bill into law. This Court considers the relatively uncontroversial history of the bill and the wide margin by which it passed in both houses of Congress as important additional indicators of its secular purpose. Congress is a large, heterogeneous body consisting of members of different religious faiths and, in some cases, no faith at all. *See Religions in the 109th*, CQ TODAY, Nov. 4, 2004, at 63; Jonathan Tilove, *Diversity Under the Dome*, CHURCH & STATE, Feb. 1, 2007, at 8. It is unlikely such a diverse group would unite to support religious legislation cloaked with a secular agenda, particularly legislation as insular as Plaintiffs suggest.

And paying heed to the presumption that Congress acts constitutionally, *Rostker v. Goldberg*, 453 U.S. 57, 64, 101 S. Ct. 2646, 69 L. Ed. 2d 478 (1981); *Kong v. Scully*, 341 F.3d 1132, 1137 (9th Cir. 2003), it is reasonable to assume the bill would have attracted fierce debate and significant opposition had

at 41, 101 S. Ct. 192 (state government), but these were state and local legislatures and government entities, not Congress.

legislators perceived preserving the memorial was a ploy to disguise a religious purpose. While Plaintiffs offer snippets of evidence showing individual legislators made isolated statements arguably suggesting their own religious motives for supporting the bill, (JV Memo at 13:2-7, 42:1-10 and n.30; JV Mem. of P. & A. in Supp. of Opp'n. to Mot. for Summ. J. ("JV Opp'n") at 28:3-6), there is simply no evidence that Congress as a whole was so motivated. Even so, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) answers this point:

Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.

See also Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226, 249, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990) (explaining even if some legislators were motivated by a purpose to favor religion, that would not invalidate the legislation "because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law").¹²

¹² In their brief, the 33 Congressional *Amici* take pains to separate themselves from individual legislators' remarks Plaintiffs now suggest demonstrate the thinking of the entire Congress. For reasons outlined in the text, the Court must

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The timing of the bill is also noteworthy. The enactment of Public Law 109-272 followed on the heels of Justice Kennedy's highly unusual order staying the injunction of a court of this District that would have required removal of the cross from the memorial. *San Diegans for Mt. Soledad Nat'l War Memorial v. Paulson*, ___ U.S. ___, 126 S. Ct. 2856, 165 L. Ed. 2d 941 (2006). This Court presumes Congress was aware of Justice Kennedy's order, *see Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676, 683-84 ("[W]e presume that Congress is aware of the legal context in which it is legislating.") (citations omitted), which signaled the view that at least four members of the Supreme Court did not necessarily believe (as previous litigation might have suggested) the presence of the cross as part of the memorial violates the Establishment Clause. *See* 126 S. Ct. at 2857-58 (explaining standard for granting stay and predicting four members of the Supreme Court would vote to review decision below).

Because a series of government actions culminating in passage of legislation can serve as evidence of government purpose, courts should also examine the legislative context for other comparable acts. *McCreary*, 545 U.S. at 866, 125 S. Ct. 2722. Here, the only previous action by Congress was its designation of the site as a veterans' memorial, and its offer to

largely ignore the statements of individual legislators respecting their own motives for either supporting or opposing particular legislation.

accept the site, should the City of San Diego choose to donate it to the federal government. Congress' entreaty to the City followed years of litigation over the presence of the cross, and numerous unsuccessful efforts by City officials and voters to resolve the issue. Congress later cited the interminable litigation and the City's frustrated efforts to settle the controversy in its findings supporting taking the memorial. Pub. L. No. 109-272, § 1(6)-(7).

Plaintiffs infer a religious motive from Congress' expression of dissatisfaction with the protracted litigation, and what it apparently perceived as the undemocratic intervention of the state superior court invalidating a runaway vote by San Diego citizens in favor of donating the memorial to the federal government.¹³ But Congress is certainly entitled to criticize or disagree with state law, and may freely seek to avoid or override it. *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991) (explaining Congress may override state law when it stands as an obstacle to the full purposes and objectives of Congress in

¹³ The Congressional *Amici* particularly associate themselves with this stated purpose:

Like all democratically-elected bodies, Congress has a great interest in giving effect to the will of the people on issues of public importance. The widespread support among San Diego voters for the federal government's operation of the Memorial cut across religious, political, and cultural lines.

(Brief of Congressional *Amici* at 4:16-20.)

enacting federal legislation) (citing *Hines v. Davidowitz*, 312 U.S. 52, 61, 61 S. Ct. 399, 85 L. Ed. 581 (1941)).¹⁴ Here, all of the litigation preceding the enactment of Public Law 109-272 had questioned the constitutionality of the Mt. Soledad memorial under the California constitution, whose “No Preference” clause is significantly more restrictive than the U.S. Constitution’s Establishment Clause. See *American Family Ass’n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1123 (9th Cir. 2002); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir. 1994).¹⁵

¹⁴ In any event, criticism of state law, even a law relating to religion, is a non-religious purpose. See *Mergens*, 496 U.S. at 249, 110 S. Ct. 2356 (holding that Congressional purpose to prevent discrimination against religious speech was “undeniably secular”).

¹⁵ Compare, e.g., *Access Fund v. U.S. Dep’t. of Agriculture*, 499 F.3d 1036, 1044 (9th Cir. 2007) (deeming federal protection of religious sites—even those sites in active use—Constitutional), with *Frohlinger v. Richardson*, 63 Cal. App. 209, 217, 218 P. 497 (Cal. App. 1 Dist. 1923) (holding California constitution forbids public maintenance of California’s missions, in spite of their obvious historic significance). In contrast to what the Establishment Clause permits, as explained in *Access Fund*, California’s stringent “No Preference” clause would presumably prevent the state from protecting or maintaining in any way a historical religious site or edifice that happened to be located on state property. And the rule urged by Plaintiffs would render automatically suspect the federal government’s decision to take such sites in order to preserve them. The effect would be unwarranted interference by the federal courts with Congress’ power to take property for public use, as well as the needless loss of cultural and historical resources.

It was within Congress' prerogative to enact legislation that would effectively require resolution of the lingering issues under the federal Constitution.

In sum, the Court's close, objective scrutiny of the record turns up no persuasive evidence Congress meant to advance religion or favor a particular religion when it acquired the Mt. Soledad memorial. Just the opposite, it readily appears Congress acted with the clear-cut and bona fide secular purpose to preserve the site as a veterans' memorial. The "purpose" prong of the *Lemon* test is met.

b. Does Maintaining The Cross As Part Of The Memorial Have The Effect Of Advancing Religion?

Lemon next asks whether government action has the principal or primary effect of either advancing or disapproving of religion. *Lemon*, 403 U.S. at 612, 91 S. Ct. 2105. An action advances religion if it conveys a message that religion or particular religious beliefs are preferred. *Allegheny*, 492 U.S. at 593, 109 S. Ct. 3086. The question here is whether viewers of the Mt. Soledad memorial would fairly understand the continuing presence of the cross as a message the federal government favors religion, and in particular the Christian religion. *See id.* at 595, 109 S. Ct. 3086. The question is to be analyzed from the point of view of an intelligent, well-informed "reasonable observer," who represents both Christians and non-Christians, *id.* at 620, 109 S. Ct. 3086, and is "aware of the history and context of the community and forum in

which the religious display appears.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995). A reasonable observer would be aware of the uncontested facts recited above.

Two additional ground rules guide the effect analysis. First, the Supreme Court has stressed that individual elements of monuments and memorials should not be considered in isolation, because to do so would always result in a finding of unconstitutionality. *Lynch*, 465 U.S. at 679-82, 104 S. Ct. 1355 (“Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.”) Justice Kennedy’s order in *Paulson* emphasizes this point, referring throughout to the memorial as a whole, and not to the cross in isolation. *See, e.g., Paulson*, 126 S. Ct. at 2856-57. *See also Van Orden*, 545 U.S. at 701, 125 S. Ct. 2854 (“[T]o determine the message that the [religious] text here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the display.”) (Breyer, J., concurring in the judgment). In this respect, this case differs markedly from earlier cases like *Buono* and *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 619 n.2 (9th Cir. 1996), where each memorial consisted exclusively of a cross marked with a plaque.¹⁶

¹⁶ Plaintiffs also cite other cases in which crosses designated as monuments were found to have violated California law. *See, e.g., Ellis*, 990 F.2d 1518. Because the federal government

(Continued on following page)

Second, in assessing the Mt. Soledad memorial, the Court must be mindful of its responsibility to avoid evincing a hostility to religion. *Van Orden*, 545 U.S. at 683-84, 125 S. Ct. 2854 (plurality opinion); 704 (Breyer, J., concurring in the judgment). Because this responsibility is just as great as the duty to guard against advancing religion, *id.* at 683-84, 125 S. Ct. 2854, the Court should not indulge any presumption in favor of either retaining or removing the cross. *Van Orden*, *Card* and other cases prove that at least some monuments with religious elements are permissible, *see* 545 U.S. at 689, 125 S. Ct. 2854 (noting, with approval, “a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia”), and the Court must take care to evaluate the memorial here in its particular physical setting and according to its own unique circumstances. *Allegheny*, 492 U.S. at 595, 109 S. Ct. 3086 (citing *Lynch*, 465 U.S. at 694, 104 S. Ct. 1355). The inquiry demands a sense of proportion and is fact-sensitive.

Plaintiffs rely on *Buono* to support their initial argument that displays with crosses ought to be analyzed differently from displays with other religious symbols or texts. They suggest the Court need not

is not subject to state law, and California law is much more restrictive than federal law in this area, these cases are not binding nor are they particularly persuasive.

engage in a detailed analysis of the evidence, but should simply conclude the Latin cross necessarily conveys an exclusively religious message. (JV Opp'n at 24:8-16. (“[C]ourts have invariably found that the Latin cross is a Christian symbol.”)¹⁷ But unlike *Buono*, where no one apparently disputed that the cross is exclusively a Christian symbol, here it is disputed. *Cf. Buono*, 527 F.3d at 769. And, contrary to Plaintiffs’ suggestion, precedents dealing with public displays of crosses in the Establishment Clause context suggest Latin crosses should not be assumed to be primarily or exclusively religious symbols. *See Pinette*, 515 U.S. at 770, 115 S. Ct. 2440 (Thomas, J., concurring) (observing that erection of a cross could be a “a political act, not a Christian one”); *City of Eugene*, 93 F.3d at 626 n.12 (O’Scannlain, J., concurring) (“While a crucifix is an unmistakable symbol of Christianity, an unadorned Latin cross need not be.”) (citing *Lynch*, 465 U.S. at 676, 104 S. Ct. 1355 (further citation omitted)). *See also Weinbaum v. Las Cruces Public Schools*, 465 F. Supp. 2d 1182, 1192-93 (D.N.M. 2006) (holding that a cross could have both religious and secular meaning) (citing *Van Orden*, 545 U.S. at 690-91, 125 S. Ct. 2854); *American Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245, 1253 (D. Utah 2007) (rejecting suggestion that

¹⁷ Jewish Veterans modified their stance somewhat at oral argument, conceding the Argonne Cross and Canadian Cross of Sacrifice at Arlington National Cemetery did not convey an exclusively religious message and did not violate the Establishment Clause.

“the stand alone Christian crosses” installed by the sides of roadways in memory of fallen highway patrolmen were, “as a matter of law, exclusively religious symbols”).

The Latin cross is, to be sure, the preeminent symbol of Christianity, but it does not follow the cross has no other meaning or significance. Depending on the context in which it is displayed, the cross may evoke no particular religious impression at all. A current example makes the point. Veterans for Peace is a national organization of military veterans who oppose the war in Iraq. Each weekend, the anti-war group organizes well-publicized exhibits on public beaches and in public parks erecting thousands of crosses to represent the number of U.S. military dead in Iraq. *See, e.g.,* Bruce V. Bigelow, *Beach Exhibit Calls Attention to Fallen*, SAN DIEGO UNION-TRIBUNE, Nov. 11, 2007, at N1, *available at* http://www.signonsandiego.com/uniontrib/20071111/news_1mc11crosses.html and <http://photos.signonsandiego.com/gallery1.5/album48/year09> (photographs of recent exhibits in San Diego County); Michael R. Blood, *Memorial Can't Keep Pace With War Dead*, Associated Press, Dec. 12, 2006, *available at* <http://www.msnbc.msn.com/id/16177168/from/RS.3/> (as *It's Getting Out of Hand/Volunteers at California Beach Memorial Can't Keep Pace With Iraq War Toll*). In the anti-war context of the displays, the crosses alternatively symbolize the cost of war, sacrifice and honor, and repose in death—specifically, military death. But the objective observer perceives no obvious or explicit religious message in the

displays. Jewish Veterans' able counsel acknowledged this point at oral argument, but maintained that any display containing a Latin cross is inherently religious because "[i]f there is a * * * quasi-secular message that the cross communicates, it is a message that has resonance only by virtue of its derivation from Christian doctrine." (Tr. of Oral Argument at 17:19-21.)

Under Plaintiffs' analysis, no idiom is safe. In other words, a religious allusion or symbol could never be used to convey a secular meaning, as Plaintiffs see it, because any such reference would necessarily rely on underlying religious belief or doctrine. How then does one explain the result in *Van Orden*, where the monument's clear reference to the Ten Commandments received by Moses on Mt. Sinai as described in the book of Exodus was determined to have secular import? See 545 U.S. at 700, 125 S. Ct. 2854 (emphasizing the text of the Ten Commandments "undeniably has a religious message, invoking, even emphasizing, the Deity.") (Breyer, J., concurring). Or in *Lynch*, where a city was permitted to erect and display a crèche? 465 U.S. at 687, 104 S. Ct. 1355 ("We hold that, notwithstanding the religious significance of the crèche, the City of Pawtucket has not violated the Establishment Clause of the First Amendment.") Or in *Allegheny*, where a menorah was allowed to stand outside a public building? 492 U.S. at 613, 109 S. Ct. 3086 ("The menorah, one must recognize, is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah's message is not exclusively

religious.”) The answer must be that, depending on the context and the particular physical setting, a symbol that is ordinarily seen as religious can convey an ancillary secular message.

Consideration of other religious structures and sites supported by federal funds and protected by federal law—such as cathedrals, synagogues, and churches—buttresses this conclusion. The National Cathedral in Washington, D.C.; the Touro synagogue, America’s oldest standing synagogue, dedicated in 1763; the Sixteenth Street Baptist Church in Birmingham, Alabama, a landmark of the civil rights movement in the United States; and the Old North Church in Boston, Massachusetts, where two lanterns warned of the impending British advance—all have religious origins and are in active use as religious sites, but are also recognized secular cultural and historic landmarks. See *Access Fund*, 499 F.3d at 1044 (noting “secular motivations” lay behind government protection of various religious sites, including the National Cathedral, the Touro Synagogue, and numerous churches). That these familiar national landmarks were first recognized and are perhaps still seen as primarily religious sites neither abrogates their secular symbolism nor renders them “off limits” to government support. Similarly, that the Mt. Sole-dad memorial includes a cross as one of its elements and has been used as the site of religious services—however frequently—does not by itself strip it of any wider social or historical meaning or prevent the federal government from being involved with the

property. *Access Fund*, 499 F.3d at 1044; *Cholla Ready Mix*, 382 F.3d at 976.

While the cross is the tallest and highest element in the memorial and, it is uncontested, the most visible from a distance, it is not the largest.¹⁸ Nor are the other elements of the memorial insubstantial. The various photographs submitted as evidence by the parties show the cross takes on a greater or lesser degree of prominence depending on viewing conditions and angle. Both parties have submitted evidence showing, unsurprisingly, that experts reached different conclusions regarding the overall effect of the memorial.

Plaintiffs' principal evidence on this point consists of declarations by art historian Lawrence Nees, Ph.D., and historian G. Kurt Piehler, Ph.D. Dr. Nees provides a long history of the use of the cross as a Christian symbol, a fact Defendants do not contest. Dr. Piehler provides a history of American war monuments and memorials. He recounts the federal government's increased interest in building war

¹⁸ The size of a cross or other symbol, in absolute terms, is not dispositive. Relatively large crosses and other displays can be permitted to stand on public property, such as the 24-foot Canadian Cross of Sacrifice at Arlington. Plaintiffs agree is Constitutionally permissible or the 12-foot roadside crosses at issue in *Duncan*. On the other hand, fairly small crosses or other symbols have been struck down, including a sign containing a 4-inch-high crucifix, *Granzeier v. Middleton*, 955 F. Supp. 741, 743, and n.2, 746-47 (E.D. Ky. 1997), *aff'd on other grounds*, 173 F.3d 568, 576 (6th Cir. 1999).

memorials following World War I, noting Congress vested responsibility for overseas military cemeteries in the American Battle Monument Commission, which oversaw the completion of cemeteries and monuments. (Piehler Decl. in Supp. of Mot. for Summ. J., ¶ 14.) In these cemeteries, the cross was adopted as the default gravestone. (*Id.*, ¶¶ 25, 26.)¹⁹

¹⁹ Dr. Piehler's declaration implicitly recognizes the generic use of crosses as grave markers, particularly for the graves of fallen service members. This concept is also well-attested to in literature, cinema and the visual arts.

One example is John McCrae's poem "In Flanders Fields," commemorating the allied military dead of World War I and memorized by several generations of schoolchildren:

In Flanders fields the poppies blow
Between the crosses, row on row,
That mark our place * * * *
We are the dead.

The opening and final scenes of a popular recent movie, *SAVING PRIVATE RYAN* (DreamWorks SKG 1998), provide another example, depicting the Normandy American Cemetery and Memorial where seemingly endless rows of crosses (and occasional Stars of David) mark the graves of American servicemen who died in the D-Day invasion.

A final example is John Atherton's famous World War II poster *A CARELESS WORD* (OWI Poster No. 23) (U.S. Government Printing Office, 1943) (*available at* Posters of the Second World War in the Kittleson Collection at the Minneapolis Public Library, <https://www.mplib.org/wpdb/index.asp?exact=MPW00497>). The poster depicts a soldier's helmet and ammunition belt hanging from a cross planted in desert sand, with the motto "a careless word * * * another cross." The poster's message is one of vigilance, and the context, then and now, makes the cross instantly recognizable as a symbol of military death.

While recognizing American war memorials sometimes include religious symbols, Dr. Piehler concludes most do not focus on religious imagery. (*Id.*, ¶¶ 18, 19, 21, 23, 29, 30.)

Dr. Piehler acknowledges two of the war memorials mentioned by the dissent in *Buono*, 527 F.3d at 765 n.6, the Argonne Cross and the Canadian Cross of Sacrifice, both at Arlington. He describes the Argonne Cross as part of a larger display dedicated to servicemen who died in the campaign for the Argonne Forest. (Piehler Decl. in Supp. of Mot. for Summ. J. at 12:19-22.) Apparently, he is referring to the grove of trees in which the cross is located.²⁰ He does not provide a description of the Canadian Cross of Sacrifice, dedicated to the memory of American citizens who served in the Canadian armed forces during World Wars I and II and the Korean War.²¹ Notwithstanding these two prominent crosses at Arlington, Dr. Piehler concludes the memorial on Mt. Soledad is an aberration among war memorials

²⁰ A description of the monument and photograph are available online at http://www.arlingtoncemetery.org/visitor-information/Argonne_Cross.html. This photograph is identified in the Brief of Congressional *Amici* at 9 n.8.

²¹ This memorial consists of a 24-foot granite cross adorned with a bronze sword. Inscriptions on the faces of the monument's base honor those who served. A description and photograph are available online at http://www.arlingtoncemetery.org/Visitor_information/Canadian_Cross.html (citing James Edward Peters, *Arlington National Cemetery: Shrine to America's Heroes* (Woodbine House 2000)). This photograph is also identified in the Brief of Congressional *Amici* at 9 n.8.

and, in his eyes, represents an attempt to promote the Christian religion.

Defendants in turn present evidence showing widespread use of the cross in honoring military dead, and point to other examples of monuments incorporating crosses as the sole or primary element. In addition to those already cited, Defendants identify the Mexico Civil War Memorial at Arlington;²² the Irish Brigade Monument at Gettysburg National Military Park; a memorial in Taos, New Mexico to American servicemen who endured the Bataan Death March; and an American Legion war memorial in La Mesa, California (a few miles from Mt. Soledad). (Decl. of Edward Linenthal, Ph.D. ¶ 24.) Defendants also cite evidence showing Latin crosses frequently appear in memorials, including war memorials, as symbols of sacrifice without reference to the religious beliefs of those whom the memorials commemorate. (Defs.' Mem. of P. & A. in Supp. of Mot. for Summ. J.) ("Defs.' Memo") at 11:2-10 (citing expert evidence); *see also* Linenthal Decl. ¶ 24 (noting the cross was used to commemorate service and secondarily to symbolize sacrifice). Plaintiffs' evidence, without elaboration, agrees the Latin cross is not invariably a sectarian symbol (Piehler Decl. in Supp. of Opp'n to Mot. for Summ. J. ¶ 7) ("Efforts to make the Cross into a

²² A photograph of this monument is available online at http://www.arlingtoncemetery.org/images/ANC_surroundings/PAGES/image49.html.

unifying symbol free of sectarian association have usually failed.”)

While the Court does not weigh evidence at the summary judgment stage, it is likewise not obliged to accept an expert witness’s legal conclusions, particularly to the extent they conflict with governing legal standards or fail to take into account factors the Court must consider. Here, the Court finds the Piehler declaration circumscribes its focus on an individual element of the memorial—the cross—rather than looking at the memorial as a whole as the case law requires. *Allegheny*, 492 U.S. at 597, 109 S. Ct. 3086; *Lynch*, 465 U.S. at 679-82, 104 S. Ct. 1355. The Court also finds the Piehler declaration fails to fully consider other well-recognized meanings of the Latin cross, in particular its symbolic references to military service, sacrifice, and death.²³ By contrast, the Court must take into account both the secular and religious meanings of symbols and icons in evaluating their effect. 492 U.S. at 598-600, 613-14, 109 S. Ct. 3086, 465 U.S. at 680, 104 S. Ct. 1355. Because Dr. Piehler’s analysis of the memorial’s effect largely considers the cross in isolation and almost entirely fails to address its recognized secular meaning—which he agrees exists—his opinion is not

²³ See, e.g., Piehler Decl. in Supp. of Mot. for Summ. J. ¶ 6 (noting “[S]everal military medals do make use of the Cross, but nationalize them and sufficiently strip them of a sectarian character,” without further attempting to explain what meaning remains).

particularly helpful to the Court's legal analysis, and to this extent must be discounted.

Context is crucial to the effect analysis, as *Allegheny* emphasized. There, a huge menorah had been placed in front of Pittsburgh's city hall. Opponents argued the display conveyed the message the city endorsed Judaism, yet the Supreme Court sustained the placement because a nearby Christmas tree withdrew any reasonable implication of religious advancement or favoritism. 492 U.S. at 614, 617, 109 S. Ct. 3086. The context of the Mt. Soledad memorial is similarly telling in its effect. Unlike *Buono* and *City of Eugene*, where Latin crosses standing alone were the memorials, the cross on Mt. Soledad is, as Congress accurately described it, "fully integrated" as the centerpiece of a "multi-faceted" veterans' memorial "that is replete with secular symbols." In fact, in terms of the number of elements the memorial comprises, secular symbols predominate with over two thousand individual memorial plaques, twenty-three military bollards, numerous inscribed paving stones, a tall flagpole and large American flag, and a bronze plaque commemorating the dedication of the memorial in 1954. And except for the cross, there are no other religious elements such as altars, statues [sic], religious texts, or a chapel. When the cross is considered in the context of the larger memorial and especially the numerous other secular elements, the primary effect is patriotic and nationalistic, not religious.

The physical setting of the memorial, moreover, neither compels nor encourages religious devotion. For one thing, physical access to the cross is blocked by an iron fence. Also, there are no benches immediately adjacent to and facing the cross, nor any other fixtures or devotional trappings inviting veneration of the cross. Visitors can sit on the stairs leading up to the memorial platform, but the view from the stairs while seated is of the panorama and away from the cross. Finally, the location of the memorial makes it an unlikely venue for government indoctrination. Located away from the hub of downtown and the seat of government, Mt. Soledad park is more a destination than a way station. *Compare Van Orden*, 545 U.S. at 681, 125 S. Ct. 2854 (monument located on state capitol grounds); *Card*, 520 F.3d at 1010 (monument located on sidewalk adjacent to police headquarters). Unlike other places such as public schools where student attendance is compulsory, or public buildings like courthouses, post offices, and city, county, state and federal office buildings where citizens must often enter to transact business, no one is compelled to visit the memorial.

The secular effect of the memorial as a whole is borne out by other evidence. As noted, the memorial is a popular site for ceremonies honoring veterans. Martino-Bloomfield *Amici* describe a non-religious plaque-dedication ceremony at the memorial in which Captain Michael Martino and Major Gerald Bloomfield II, who were killed in action in Iraq, were

honored. The photographic evidence of the heavily-attended ceremony shows attention focused on the dedication of the plaques honoring the two fallen soldiers in a solemn and patriotic fashion. (Brief of Martino-Bloomfield *Amici* Exs. 1-6.) The cross plays no noticeable role in the ceremony itself.²⁴ An objective observer happening upon such a ceremony would immediately perceive its patriotic and military character and meaning, and would not take away a religious message.

Finally, the venerable history of the memorial also informs the Court's effect analysis. To the objective observer who knows the background of the Mt. Soledad site, the 54-year-old veterans' memorial is an important part of San Diego history. San Diego has long been known as a "Navy town" with a strong military presence, and it retains that image and reputation today even though it is one of America's largest cities. The Court finds the objective observer, mindful of the age of the memorial and recognizing its relationship and significance to San Diego's history (especially the City's military history), would regard the federal government's decision to acquire it and leave it intact as an effort to preserve an important regional landmark. *See Cholla Ready Mix*, 382 F.3d at 976 ("The Establishment Clause does not require governments to ignore the historical value of

²⁴ The briefing suggests the families of the men understand the cross to be analogous to a grave marker. *Id.* at 2:17-20, 6:11-21.

religious sites.”) In other words, the objective observer would take Congress at its word that it acquired “a historically significant national memorial” to preserve it as a place of “solace to the families and comrades of the veterans it memorializes.”

Having considered all of Plaintiffs’ evidence and arguments, the Court finds the Mt. Soledad Veterans Memorial passes the effect test because: the cross has a broadly-understood ancillary meaning as a symbol of military service, sacrifice, and death; it is displayed along with numerous purely secular symbols in an overall context that reinforces its secular message; and it is historically significant. As a result, the specter of government endorsement of religion or favoring a religion is not apparent, let alone obvious and primary.

c. Excessive Entanglement

Excessive government entanglement can occur when the government is required to be involved in matters such as inquiries into religious doctrine, delegation of state power to religious bodies, or detailed monitoring and close administrative contact. *Hernandez v. Comm’r*, 490 U.S. 680, 696-97, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989). None of that is implicated here because, as the Court has found, the memorial does not advance religion. In any event, allowing the MSMA—a civic organization—to operate the site effectively insulates the government from any

impermissible relationships. The monument clears the third prong of *Lemon*.

2. *Van Orden v. Perry*

Under *Van Orden*, the Court conducts a general, fact-intensive analysis. *Card*, 520 F.3d at 1017-18. Much of this analysis mirrors the discussion of purpose and effect under the *Lemon* test, but it is not precisely the same. In *Card*, the Ninth Circuit considered three factors it had gleaned from *Van Orden*: the monument's secular purpose; whether it suggested a religious or a secular message; and a historic lack of complaints. *Id.* at 1019-21. The plurality and concurring opinions in *Van Orden* suggest other relevant considerations, including whether the monument is located close to other government buildings (which might reinforce an inference of government endorsement), 545 U.S. at 690-91, 125 S. Ct. 2854; who donated the monument, *id.* at 701-02, 125 S. Ct. 2854; and whether it is passive or proselytizing in its effect. *Id.* at 691, 125 S. Ct. 2854.

a. Secular Purpose

The Court's discussion of Congress' purpose under the *Lemon* test applies here, and the conclusion that Congress acquired the memorial for a secular purpose is the same. But *Card* intimates *Van Orden*'s secular purpose inquiry is broader in the context of passive monuments. That is, the Court should examine not just how government came to be

involved with the monument, but should also ask whether its continued display implies religious purpose. *Card*, 520 F.3d at 1013 n.5 (“[B]ecause we conclude that the City’s display of the monument was not motivated by a religious purpose * * * its display does not violate [the state constitution.]”) Answering this question, according to *Card*, requires first answering two subsidiary questions: 1) What is the actual purpose of the monument; and 2) What are the perceptions of that purpose by viewers? *Id.* at 1019.

Reiterating an earlier finding, this Court accepts Congress’ explicit statement of purpose that it acquired the Mt. Soledad site “in order to preserve a historically significant war memorial * * * *” The actual purpose of the monument is, as Congress said, to inspire patriotism and recognize those who died while serving our country, and to provide solace to the families of the veterans it memorializes. Because the Court has found Congress’ articulation of its purpose was bona fide, and not a sham to disguise ulterior religious motives, the actual purpose of the memorial continues to be secular as Congress intended.

Less clear is how viewers perceive the purpose of the memorial. This value-laden question is difficult because an answer either way is likely to be regarded as failing to respect fully religious belief or disbelief. *Van Orden*, 545 U.S. at 696-97, 125 S. Ct. 2854 (Thomas, J., concurring) (observing a “[c]ourt’s foray into religious meaning either gives insufficient weight to the views of nonadherents and adherents alike, or it provides no principled way to choose between those

views.”) Any answer is also likely to implicate judicial aesthetic judgments and be influenced by the judge’s personal views, which might render the outcome suspect. *Id.* at 697, 125 S. Ct. 2854 (quoting *Harris v. Zion*, 927 F.2d 1401, 1425 (7th Cir. 1991) (Easterbrook, J., dissenting) (“Line drawing in this area will be erratic and heavily influenced by the personal views of the judges.”)) To guard against these risks, the Court assumes (consistent with *Lemon*) it must again analyze the question from the point of view of an objective, reasonable person, not from the standpoint of the hypersensitive or easily offended, and must consider the overall context of the memorial.

Two contexts are important here: the context of the memorial display itself, and the memorial’s overall historical context. Mt. Soledad’s memorial display consists of an assortment of elements and symbols, all but one of which are indisputably secular. The cross, having both religious and secular meaning, is ensconced within and immediately surrounded by the array of non-religious, military, and patriotic elements. It is conceivable that an objective observer could initially perceive a religious purpose in the display, given the prominence and centrality of the cross. But as he or she surveyed the plaque-lined dedication walls, passed the military bollards, walked on the inscribed paving stones, looked up at the large American flag, and read the inscription at the base of the cross declaring the display to be a veterans’ memorial, the initial perception of religious purpose would quickly give way to a secular one. In the eyes

of the objective observer, the other elements of the display would dilute the religious meaning of the cross, and reinforce its secular meaning of military service and death. Considering all of the architectural elements in combination, the objective observer would readily perceive the purpose of the memorial was to honor veterans.²⁵

The historical context of the memorial also supports the conclusion an informed observer would perceive its secular purpose. Had the memorial been erected on or close by the Camp Pendleton Marine Base, the North Island Naval Center, the Miramar Naval Air Station, the Marine Corps Recruiting Depot, Fort Rosecrans National Cemetery or any of the numerous other federal military enclaves in San Diego, there would be no question as to its secular purpose. An objective observer, aware of San Diego's historical relationship with the military, would readily recognize its purpose was to honor veterans. The

²⁵ This is not to disparage or discount the honest and deeply-felt offense Plaintiffs take at the Mt. Soledad Veterans Memorial. But the legal standard the Court must apply is an objective one. That some person or group might be uncomfortable with the presence of the cross as part of the veteran's memorial is not enough to require its removal. "[T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of faith to which they do not subscribe." *Pinette*, 515 U.S. at 779, 115 S. Ct. 2440 (O'Connor, J., concurring). It would be asking the impossible to require government to ensure no one will be offended before taking property containing religious elements in order to preserve it.

placement of a display containing religious elements can signal its purpose, *Allegheny*, 492 U.S. at 599-600, 109 S. Ct. 3086, but here there was no choice. Congress took the memorial where it found it—a fact that would be well understood by the informed objective observer aware of the history. To that observer, the memorial's fortuitous placement on Mt. Soledad fifty-four years ago would not bespeak contemporary religious purpose.

b. Religious or Secular Message

To resolve the message question, the *Card* court focused on the particular setting of the monument in that case—a six-foot-tall granite block inscribed with Ten Commandments. The monument was located on a sidewalk adjacent to an old city hall building, which was in use as the city's police headquarters. 520 F.3d at 1010. About ten feet away from the monument were three eight-foot-tall granite tablets inscribed with the names of city residents who died in military service. *Id.* at 1011. Several other war-related monuments were located across the street. *Id.*

Card pointed out the Ten Commandments monument was the only one of the several monuments that had facially-religious significance, but at the same time rejected the notion a “quota system” determines the nature of the monument's message. *Id.* at 1020. The court also found it important the monument had no benches in front of it, and the setting

did not lend itself to meditation, genuflection, or other religious activity. *Id.* at 1022.

The situation here parallels that in *Card*. Although there were additional secular monuments in the vicinity in that case, here there are additional secular elements to the memorial that in combination with the cross create a larger, multi-faceted display. The close proximity of patriotic and militarily symbolic elements to the cross is much more apt to spell out a non-religious message here than in *Card* where all but one of the other monuments were across the street. And, as in *Card*, the physical setting of the memorial—here, the inaccessibility of the cross itself and the absence of other religious trappings or closely-adjacent benches—does not readily lend itself to religious genuflection.

The Court does not ignore the uncontested evidence that religious observances and mixed religious and secular events, such as the dedication ceremony in 1954, have taken place at Mt. Soledad. Uncontroverted evidence also shows the memorial has been extensively used for non-religious events, and there is no history of religious discrimination. *Cf. Buono v. Norton*, 371 F.3d at 550 (holding a reasonable observer would be aware of religious discrimination in administering the site). The point is, however, overall, the memorial is not designed for worship services and there is no evidence the cross, which is surrounded by a tall fence and not approachable by visitors, is—or is intended to be—the object of religious devotion. Understanding that deciphering the

message conveyed by a passive monument does not depend on tallying-up a scorecard of secular and sectarian objects or elements, the Court reiterates its earlier finding and conclusion that the primary effect of the Mt. Soledad memorial is patriotic and nationalistic. This is but another way of saying the message the objective observer takes away from the memorial is a secular one.

c. History of Complaints

In both *Van Orden* and *Card*, the courts examined whether there was a history of complaints by citizens protesting the monument's apparent religious message. That issue must also be examined here. For purposes of the analysis, the Court will consider the history of the existing cross at the memorial, rather than beginning with one of the earlier two crosses. This is the most appropriate time period in the longevity analysis since only the current cross was ever officially recognized as memorializing veterans. In any event, there is no history of complaints about the other crosses.

From the dedication of the Mt. Soledad memorial in 1954 to the commencement of litigation in 1989, no record of complaints concerning the current cross can be found.²⁶ This is significant to the Court's analysis

²⁶ Plaintiffs attempt to shorten the span by pointing to an investigation in 1969 or 1970 by San Diego Councilwoman Helen Cobb (JV Opp'n at 40:22-41:10). But the councilwoman's inquiry
(Continued on following page)

because the 35-year complaint-free period here is close to the 40-year period found to be determinative in Justice Breyer's concurrence in *Van Orden*, and exceeds the 30-year period in *Card*. As Justice Breyer explained:

[T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote

was not a complaint. Rather, as Plaintiffs themselves state, Councilwoman Cobb wondered whether the cross violated the Establishment Clause, conducted her own investigation, and determined it did not. The Court finds no evidence the councilwoman herself had any complaint, or raised any. Plaintiffs also argue this “shows that the display of the Cross did not go undisputed and helps explain why other challenges did not then take place.” *Id.* at 41:10-11. It does nothing of the sort. Councilwoman Cobb's bare inquiry—subsequently resolved without a call for action—can't possibly explain the absence of complaints from anyone else.

At oral argument, Plaintiffs also attempted to explain the lack of complaints by arguing that the La Jolla community historically maintained anti-Semitic policies, which caused all Jewish citizens to fear making complaints. Even assuming this to be true, it does not explain why there were no other complaints, nor why Jewish citizens waited to complain until decades after the alleged anti-Semitic policies were ended. Nor does it explain why Plaintiff Jewish Veterans, a national organization, would have been intimidated for 45 years. Nor, finally, does it explain why today, as pointed out at oral argument, all three local chapters of the Jewish War Veterans declined to join Plaintiffs' lawsuit.

religion over nonreligion, to engage in any religious practice, to compel any religious practice, or to work deterrence of any religious belief. Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage.

Id. at 702-03, 125 S. Ct. 2854 (Breyer, J., concurring in the judgment).

As an adjunct to this point, the Court acknowledges the uncontested evidence that public support for or opposition to the memorial cuts across religious lines. While it is doubtless true “we do not count heads before enforcing the First Amendment,” *McCreary*, 545 U.S. at 884, 125 S. Ct. 2722 (O'Connor, J., concurring), the demographics here do not suggest the debate has much to do with faith or religious messages. Significant numbers of Christians, Jews, and members of other religions, as well as atheists, agnostics, and adherents of no religion can be found on both sides. *See* note 9, *ante*. While the named Plaintiffs and at least some of Jewish Veterans' members oppose the memorial, honestly perceiving it does not represent them, many non-Christian or non-religious veterans' families have purchased plaques in honor of their relatives and have had them installed there. Public officials (including, notably, most of Congress), representing constituencies with a diversity of religious views, have also

largely supported maintaining the memorial intact. The Court deduces from this evidence that the memorial is apparently acceptable to a large segment of the public who, were they to perceive its message as a religious one, could be expected to oppose it. *See Van Orden*, 545 U.S. at 702-03, 125 S. Ct. 2854 (Breyer, J., concurring in the judgment) (considering a lack of public opposition).

d. Location of the Memorial

The majority opinion in *Van Orden* referred to earlier cases in which the high court determined the location of the display was an important factor. 545 U.S. at 690-91, 125 S. Ct. 2854 (citing cases). For example, because the risk of indoctrination is great among school children, the Supreme Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. *Id.* at 691, 125 S. Ct. 2854 (citing *Aguillard*, 482 U.S. at 583-84, 107 S. Ct. 2573). Justice Breyer's concurrence in *Van Orden* also called attention to "the physical setting of the monument"—there state capital grounds. *Id.* at 702, 125 S. Ct. 2854. And as a final example, Justice Blackmun noted in *Allegheny* that when a challenged display is located near the seat of government, the implication of government endorsement is especially strong. *Allegheny*, 492 U.S. at 599-600, 109 S. Ct. 3086. These references suggest the Court should reevaluate the location of the monument as part of the *Van Orden* analysis.

The Court incorporates its earlier discussion and conclusions from the effect analysis section here, but adds two observations. First, the Mt. Soledad memorial is found far off the beaten path. This differentiates it even from the monuments found Constitutional in *Van Orden* and *Card*, both of which were close to government buildings. If there is an inverse relationship between the proximity to government buildings and the implication of government endorsement, as *Allegheny* implies, the risk of endorsement here can hardly be considered strong.

Second, the “history and ubiquity,” *Allegheny*, 492 U.S. at 630, 109 S. Ct. 3086 (O’Connor, J., concurring), of the Latin cross as part of veterans’ memorials has been generally established, and the memorial cross on Mt. Soledad is neither novel nor unique. The declaration of Jewish Veterans’ representative, Maurice Eis, attests to as much. Mr. Eis says he visited the memorial for years knowing he would encounter the cross. (Eis Decl., ¶ 10.) The longstanding and well-known presence of the cross on Mt. Soledad is relevant “because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.” *Id.* Though the Latin cross has undisputed religious significance, its history on Mt. Soledad as a memorial commemorating veterans contradicts any contemporary perception it is strategically placed there to tout religion.

e. Donation of the Memorial

The cross was donated to the City of San Diego by the MSMA in 1954. The MSMA also added the plaques and paving stones after individuals and groups purchased them. Although it is not clear from the record whether the other elements of the memorial were added by the MSMA or by the City of San Diego, all were in place when Congress took the site. What amount, if any, the United States has paid or will pay the City in just compensation is not in evidence. An objective observer, however, would know of the City's attempt to donate the memorial to the United States, and would also be aware of the bronze plaque at the base of the cross stating it was dedicated by the MSMA.

In *Van Orden*, the plurality opinion took special note of the Fraternal Order of Eagles' status as a social, civic, and patriotic organization, and that it had designed and paid for the Ten Commandments memorial. 545 U.S. at 682, 125 S. Ct. 2854. Justice Breyer's concurring analysis also emphasized the private civic and primarily secular status of the organization. *Id.* at 701, 125 S. Ct. 2854.

The monument in *Card* was donated by the same organization, and the Ninth Circuit's analysis took this into account. 520 F.3d at 1019. *Card* relied particularly on Justice Breyer's point that it was proper to differentiate between the goals of the donating organization and the goals of the city. *Id.* at 1019-20. A city's goals, *Card* recognizes, might diverge

somewhat from those of the organization, and include such additional goals as showing appreciation for the organization's efforts, or even "obtain[ing] inexpensive works of art on a scale large enough to decorate public property * * * * " *Id.* at 1020 (citation omitted). Although the donating organization's goals are to be considered, *Card* emphasizes "[t]he City's intent is the key here * * * * " *Id.*

Card also noted the circumstances of the donation and dedication, including the City of Everett's stated secular reasons for accepting the donated monument, which the court found plausible. 520 U.S. at 1020, 117 S. Ct. 1865. The involvement of clergy in the dedication of the monument, discussed as a factor in *McCreary*, 545 U.S. at 869, 125 S. Ct. 2722, was not enough to render *Van Orden* inapposite. *Id.* at 1020 n.15, 117 S. Ct. 1865. Finally, as in *Van Orden*, the prominent inscription showing the monument was donated by a private organization, "serves to send a message to viewers that, while the monument sits on public land, it did not sprout from the minds of City officials and was not funded from City coffers." *Id.* at 1020, 117 S. Ct. 1865.

The history of the donation of the Mt. Soledad Memorial is similar in almost every significant respect to that of *Van Orden* and *Card*. The cross and other elements of the memorial were privately donated, just as in *Van Orden* and *Card*. As in *Card*, the plaque at the base of the cross announces it was dedicated by the MSMA long before the federal government acquired the memorial, which should make

clear to the public the cross's inclusion in the memorial was not the federal government's idea, nor did the federal government finance it. Here too, as in *Card*, the dedication ceremony of Mt. Soledad was privately organized; but unlike *Card*, the City of San Diego did not participate in the 1954 ceremony. 520 F.3d at 1020. Taking all of this into account, an objective observer would attribute any religious emphasis or participation in the dedication ceremony to private organizers and donors, rather than to the absent and passive recipient, the City of San Diego. *Id.* at 1020 and n.15.

Moreover, it is even clearer in this case than in *Van Orden* or *Card* the government entity that owns the property on which the memorial sits had no part in designing or financing it. In those cases, the defendant governments received monuments directly from the donor organization. Here, in contrast, the federal government is a step removed in the chain of ownership, having acquired the memorial not from the MSMA, but from its donee, the City of San Diego.

Because the Mt. Soledad memorial was taken by the United States government rather than donated to it, issues surrounding the original donation of the monument to the City of San Diego are less relevant here. But even to the extent the Court considers the original 1954 donation, there is nothing about it or the attendant ceremony that suggests an abiding religious association.

f. Passive or Proselytizing Effect

Van Orden described the Ten Commandments monument as passive, 545 U.S. at 686, 125 S. Ct. 2854, unlike other more confrontational displays which were meant to indoctrinate. *Id.* at 691, 703, 125 S. Ct. 2854 (citing *Stone*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199). The gist of this observation is that passive monuments are less likely to violate the Establishment Clause.

Much of what is relevant here is subsumed within the Court's effect analysis under *Lemon*; the Court incorporates that discussion with this part of the *Van Orden* analysis. *Van Orden* explained that, while the Ten Commandments are religious, they also have "undeniable historical meaning." 545 U.S. at 690, 125 S. Ct. 2854. More so than the Ten Commandments, the cross has an established secondary meaning, and as the evidence demonstrates, it is non-religious. As the Court's discussion of the monument's purpose and effect establishes, particularly when it appears in military memorials, the cross is likely to convey a non-religious meaning.

Unlike the Ten Commandments memorials, which begin with the express directive "I AM the LORD thy God. Thou shalt have no other gods before me," an unadorned cross issues no commands, instructions, or teachings, nor does it express acknowledgment of anything. Indeed, the absence of an explicit message most likely explains the various subjective interpretations of the memorial in this

case. The only verbal elements in the Mt. Soledad memorial are contained in the plaques, bollards, and paving stones, and Plaintiffs do not challenge these. Because of its physical setting, the memorial itself does not even implicitly encourage any particular religious response to the cross. By contrast, the sidewalks adjacent to the walls appear to invite visitors to view the plaques, and secondarily the bollards and paving stones. Any exhortation emanating from this passive monument pertains to remembering the veterans who are recognized there.

g. *Van Orden* Conclusion

Van Orden instructs courts to exercise reasoned judgment in drawing lines in Establishment Clause cases. When the symbol at issue—here a Latin cross—conveys not simply a religious message but also a secular message, drawing a sharp line can be hard to do. That said, and with all respect to the Plaintiffs in this case, whose views the Court has carefully and respectfully considered, the Court finds the memorial at Mt. Soledad, including its Latin cross, communicates the primarily non-religious messages of military service, death, and sacrifice. As such, despite its location on public land, the memorial is Constitutional.

C. Additional Considerations

The Congressional *Amici* have also raised concerns that an adverse decision would imperil numerous publicly owned and controlled veterans' memorials and cemeteries, creating a wide-ranging

impact. (Brief of Congressional *Amici* at 9:3-20.) This is a valid concern, bearing in mind the large number of crosses in military memorials. *See Van Orden*, 545 U.S. at 704, 125 S. Ct. 2854 (Breyer, J., concurring in the judgment) (citation omitted) (expressing concern that ordering the monument removed “might well encourage disputes concerning the removal of long-standing depictions of the Ten Commandments from public buildings across the Nation [and] thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid”). In view of the Court’s conclusion that the Mt. Soledad Veterans Memorial does not violate the Establishment Clause, the Court need not address this point.

III. Conclusion and Order

For reasons set out above, the Court finds Plaintiffs have failed to meet their burden of showing they are entitled to summary judgment, and their motion is **DENIED**. Because Plaintiffs fail to raise a triable issue of material fact as to the Constitutionality of the Mt. Soledad Veterans Memorial, Defendants are entitled to judgment as a matter of law. Defendants’ motion for summary judgment is **GRANTED**. Plaintiffs’ request for declaratory and injunctive relief is **DENIED**, and the complaints, now consolidated, are **DISMISSED WITH PREJUDICE**. All other pending motions are **DENIED AS MOOT**.

IT IS SO ORDERED.

660 F.3d 1091

United States Court of Appeals,
Ninth Circuit.

Steve TRUNK, Plaintiff,
and

Jewish War Veterans of the United States of
America, Inc.; Richard A. Smith; Mina Sagheb;
Judith M. Copeland, Plaintiffs-Appellants,

v.

CITY OF SAN DIEGO; United States of America;
Robert M. Gates, Secretary of Defense,
Defendants-Appellees.

Steve Trunk, Philip K. Paulson, Plaintiffs-Appellants,
and

Richard A. Smith; Mina Sagheb; Judith M. Copeland;
Jewish War Veterans of
The United States of America, Inc., Plaintiffs,

v.

City of San Diego; United States of America; Mount
Soledad Memorial Association, Real parties in
interest; Robert M. Gates, Secretary of Defense,
in his official capacity, Defendants-Appellees.

Nos. 08-56415, 08-56436.

Oct. 14, 2011.

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D.C. Nos. 3:06-cv-01597-LAB-WMC, 3:06-cv-01728-LAB-WMC, Southern District of California, San Diego.

Before HARRY PREGERSON, M. MARGARET McKEOWN, and RICHARD A. PAEZ, Circuit Judges.

ORDER

A majority of the panel has voted to deny the petitions for rehearing. A judge of the court called for a vote on the petitions for rehearing en banc. A vote was taken, and a majority of the active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35(f). The petitions for rehearing and for rehearing en banc are DENIED.

BEA, Circuit Judge, dissenting from the denial of rehearing en banc, joined by O'SCANNLAIN, TALLMAN, CALLAHAN, and IKUTA, Circuit Judges:

“A rose is a rose is a rose.”

—Gertrude Stein, *Sacred Emily*, 1913.

Stein wrote this sentiment to express the flower's indescribable, unchangeable essence. The panel appears to have transmogrified Stein's ode to a rose into a new rule of law—“a cross is a cross is a cross.” Alas, that is neither good poetry nor valid law. Unlike roses, religious symbols can have multiple meanings,

just as the Ten Commandments monument did in *Van Orden*:

Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate. Simply having a religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.

Van Orden v. Perry, 545 U.S. 677, 690, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005); *see also McCreary County v. ACLU*, 545 U.S. 844, 867-68, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005).

Van Orden tells us that the proper test to determine whether the government has violated the Establishment Clause by erecting or maintaining a religious symbol on public grounds depends on: (1) the government's use of the religious symbol; (2) the context in which that symbol appears; and (3) the history of the symbol while under government control, including how long it has stood unchallenged.¹

¹ Additionally, just what is the new test the panel invented: the test for "borderline" cases? *See Jewish War Veterans v. City of San Diego*, 629 F.3d 1099, 1108 (9th Cir. 2011). The panel

(Continued on following page)

See *McCreary County*, 545 U.S. at 867-68, 125 S. Ct. 2722 (2005); *Van Orden*, 545 U.S. at 681, 125 S. Ct. 2854.

As to use, 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. The site has been used solely for the purpose of memorializing fallen soldiers, consistent with the Cross's "undeniable historical meaning," *Van Orden* at 690, 125 S. Ct. 2854, evoking the memory of fallen soldiers.

As to context, the record evidence is also undisputed that at the time the federal government bought the Mt. Soledad Memorial site, the Cross was surrounded with over 2,100 plaques commemorating veterans of various faiths or of no faith, and 23

opinion concludes that whether we use *Lemon* or *Van Orden* depends on whether a case is "borderline." First, the panel fails to tell us how to determine whether a case is borderline. Is a case borderline when judges can disagree? When it comes to Establishment Clause cases involving religious symbols, I have yet to see one on which all judges agree. This cannot be the desiderata in these cases. Rather, which test we apply must be determined by which test logically fits the type of case, whether it be a publicly-displayed symbol like the Ten Commandments in *Van Orden*, or a governmental practice, such as opening Congressional sessions with a prayer. See *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983). To allow judges to pick which of the Establishment Clause tests they apply according to whether they think it is a "borderline" case or not—without defining what is "borderline"—is a recipe for uncertainty in our law.

bollards² commemorating some particularly valiant units who had taken casualties and various secular community groups.

As to history, it is again undisputed that the history of the Mt. Soledad Cross has changed as its use has changed.

For the same reason that the Ten Commandments stand today in that park in Austin, Texas, the Cross should continue to stand on Mt. Soledad: a religious symbol is not always used to promote religion. Whether it promotes religion depends on the context in which the symbol is displayed, how it is used, and its history. Here, that display, use, and history are secular and require affirmance of summary judgment for the federal government.

Second, were the panel to eschew the *Van Orden* rule, for a test as to whether a reasonable observer, aware of all relevant circumstances, would believe the Cross constituted a government endorsement of

² A bollard is a symbolic representation of a nautical feature commonly described as a post fixed to a quay or a vessel for securing mooring ropes. The bollards have been dedicated to, for example, the American Legion and the VFW Post Mission Bay. Some of the group plaques have been dedicated to military ships, including the USS Hanson, used in World War II, Korea and Vietnam, and brigades and platoons, including “Echo Company,” which proudly calls itself “The Magnificent Bastards.” For further information and examples, see http://www.soledadmemorial.com/web/pages/view_example_plaques/group_war_plaques.htm.

religion, it erred by failing to recognize a triable issue of material fact: that there was conflicting evidence in the record as to whether that reasonable observer would necessarily conclude the federal government was trying to endorse religion by maintaining the Mt. Soledad Memorial Park, including the Cross at its entrance.

I. The panel applied the wrong test.

Establishment Clause jurisprudence does not have a nice, neat, one-test-fits-all pattern. Which test the Supreme Court applies varies depending on what fact pattern is involved. When it comes to religious symbols in the public square, the Court questions the applicability of the *Lemon* test:³

Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.

³ Under the *Lemon* test, to be constitutional (1) the challenged governmental action must have a secular purpose; (2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and (3) it "must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

Van Orden, 545 U.S. at 686, 125 S. Ct. 2854 (plurality op.). Notice too that the Court in *Van Orden* also did not choose to use the Endorsement Test from *County of Allegheny v. ACLU*, 492 U.S. 573, 578-79, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989), to test the Ten Commandments monuments.

It is precisely because the federal government has eliminated any religious exercises at the Mt. Soledad memorial site that *Van Orden* applies. Although the Supreme Court did not state the factors to consider when evaluating a religious symbol on government land in one concise sentence,⁴ reading the entire *Van Orden* opinion it is clear the Court looked at three elements to determine whether the government has violated the Establishment Clause by erecting or maintaining a monument that has religious significance.

First, the Court looked at the government's *use* of the religious symbol:

On the one hand, the Commandments' text unquestionably has a religious message, invoking, indeed emphasizing, the Deity. On the other hand, focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather, to determine the

⁴ Indeed, the Court specified that "[n]o exact formula can dictate a resolution to fact-intensive cases such as this." *Van Orden*, 545 U.S. at 690, 125 S. Ct. 2854. This is true, but I see no reason why the test applied in *McCreary County* and *Van Orden* would not also be the applicable test here.

message that the text here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the display.

Van Orden, 545 U.S. at 700-01, 125 S. Ct. 2854 (Breyer, J., concurring) (emphasis in original). On this factor, it is undisputed that the *use* of the Mt. Soledad Cross by the federal government sought to be enjoined has been exclusively secular.

Second, the Court looked at the *context* in which the symbol appears:

Despite the Commandments' religious message, an inquiry into the context in which the text of the Commandments is used demonstrates that the Commandments also convey a secular moral message about proper standards of social conduct and a message about the historic relation between those standards and the law. The circumstances surrounding the monument's placement on the capitol grounds and its physical setting provide a strong, but not conclusive, indication that the Commandments' text as used on this monument conveys a predominantly secular message.

Van Orden, 545 U.S. at 691, 125 S. Ct. 2854. On this factor, only plaques commemorating veterans and bollards commemorating secular groups have been placed around the Cross at Mt. Soledad. The Cross stands at the entrance to the memorial, next to a

giant American flag, making it clear the site marks the entrance to a veterans' memorial.

None of the groups listed on either the bollards or group plaques are religious groups.

Third, the Court examined the history of the symbol while under government control, including how long it has stood unchallenged. *Van Orden*, 545 U.S. at 686-91, 125 S. Ct. 2854 and *passim*. See also *McCreary County*, 545 U.S. at 867-68, 125 S. Ct. 2722. There had been no court challenge to the Cross from 1913 until 1989, roughly 76 years.

II. The Government's use of the Mt. Soledad Memorial and the context in which the Cross appears are both secular.

Both *McCreary County* and *Van Orden* involved a monument with unquestionably Judeo-Christian religious text—the Ten Commandments. But the Court's analysis did not stop there. “[T]he question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity, turns upon the context in which the contested object appears.” *McCreary County*, 545 U.S. at 867-68, 125 S. Ct. 2722 (citation omitted). In *McCreary County*, the Ten Commandments were displayed alone in the entrance to the Kentucky courthouse; they were being used as a symbol of God's teaching and a set of rules that all should live by. Thus, the setting in Kentucky conveyed a message along the lines of, “Thou shalt follow these Judeo-Christian laws or be in violation

of the laws that are enforced in this courthouse.” By contrast, in Texas, that same text was displayed on one of many monuments, all of which had some historical significance. Thus, the message in Texas was more along the lines of, “Here is a text that has helped to shape our state’s history and laws.” The text in both cases was the same, but the setting made all the difference.

Here, we have a Cross, an unquestionably Christian symbol. In a previous case, this court held that due to its strong religious connotations, a Cross standing alone on federal land in the Mojave National Preserve—even a Cross erected as a memorial to fallen soldiers—violated the Establishment Clause. *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004).

But *Buono v. Norton* does not determine this case, for two reasons. First, it was handed down a year *before* the Ten Commandment cases, and understandably did not discuss either.

Second, in its next iteration, *Salazar v. Buono*, ___ U.S. ___, 130 S. Ct. 1803, 176 L. Ed. 2d 634 (2010), the Court did not hold the lone Cross to be such an inherently religious symbol that it violated the Establishment Clause. If the Cross were ineluctably only a religious symbol, there would have been no need for the Court’s remand in *Buono* to the district court for it to consider whether the transfer of the land on which the Cross sat to a private party from the federal government was significant for the purposes of determining whether an Establishment Clause violation had occurred.

Writing for himself, Chief Justice Roberts and Justice Alito, Justice Kennedy⁵ recognized the unique history of the Cross as a symbol of respect for fallen soldiers (of all faiths or no faith) and criticized the district court for conducting the very same analysis the panel employs in this case:

[T]he District Court concentrated solely on the religious aspects of the cross, divorced from its background and context. 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. Here, one Latin cross in the desert evokes far more than religion. 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.

Buono, 130 S. Ct. at 1820. In his concurrence, Justice Alito also recognized that crosses have a secular significance, particularly in the military realm, and thus they do not need to be removed from the public domain simply because they are also the symbol of Christianity:

⁵ Justices Scalia and Thomas wrote a separate concurrence in *Salazar v. Buono* that in their opinion the plaintiff did not have standing to bring this challenge. *See* 130 S. Ct. at 1824. They did, however, join in the judgment in *Van Orden*. *See* 545 U.S. 647, 125 S. Ct. 2854.

[T]he original reason for the placement of the cross was to commemorate American war dead and, particularly for those with searing memories of The Great War, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict * * * * The demolition of this venerable if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage.

Id. at 1823 (Alito, J., concurring).

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. Sole-dad Cross, surrounded by more than 2100 memorial plaques, bollards commemorating groups of veterans, and a gigantic American flag, can be viewed as a memorial as well.

III. History can change the use of a symbol and its meaning.

History is important, in part because things change over time. The Spanish government of the day endorsed the Inquisition until the early years of the 19th Century. Would a reasonable observer therefore

consider the edicts of King Ferdinand VII in determining whether today's Socialist government endorses the Inquisition? Of course not.

The panel concentrated its analysis on the history of the Cross as a religious symbol. Not on how *this* Cross at Mt. Soledad has been used by *this* government, but on the cross in general. Were the panel's analysis the correct one to determine whether the challenged symbol is religious in nature, then many a Supreme Court case would have come out differently. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 687, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984). In *Lynch*, the Court upheld a Christmas display that included a Nativity crèche, another unquestionably Christian symbol:

To forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted *overreaction* contrary to our history and to our holdings. If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

465 U.S. at 686, 104 S. Ct. 1355 (emphasis added). Here too, removing the Cross, which has stood on Mt. Soledad since 1913, would be an over-reaction. Similarly, in *McGowan v. Maryland*, the Court upheld laws that originated from one of the Ten Commandments: a prohibition of sales of merchandise on Sunday. 366 U.S. 420, 431-40, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961). Each of these cases involved something that was religious in nature. But none violated the Establishment Clause. Why? Because the context in which they existed and the relevant history made it clear that they had not only a religious element to them, but they also served a secular purpose.

The principal defect of the panel's decision is its concentration on facts which occurred between 1913 and 2006. The City of San Diego is no longer the owner of the property. The federal government now owns the property. Thus, the use to which the City of San Diego put the Mt. Soledad Cross from 1954 to 2006, just as the use to which the private group put the Cross from 1913 to 1954,⁶ is not relevant as to whether the *present* use by the government—the precise use which plaintiffs seek to enjoin—constitutes an endorsement of religion.

⁶ The actions of private parties are particularly irrelevant because only a governmental entity can violate the Establishment Clause, not the actions of private citizens. "Congress shall make no law respecting an establishment of religion * * * *"
U.S. Const. amend. I.

True, local and state governments can also violate the First Amendment, and at times in the past, they have owned the Memorial site and the Cross. But they do not own or control the site and Cross now and the only relief Plaintiffs seek is an injunction against the federal government. Were this an action for damages against private owners and the City of San Diego, perhaps we could look backward at what they did. But it isn't.

Note that in all other cases where the Court discusses the history of a monument in general, the monument in question had always been on government land. Thus, the question whether the use of a symbol when under private control was not presented. In the only case where the symbol changed hands, from the federal government to a private group, the Court held that change in ownership should be considered. *See Buono*, 130 S. Ct. 1803 (plurality op.). Here we have the contrary situation of land that has been conveyed from a private group to the government. What happened while the land was privately held hardly seems relevant to the issue whether the government acted to establish religion.

The panel also made a mistake when it decided that the use of the Mt. Soledad Cross at this memorial in the last five years does not make a difference. The ownership of the memorial has changed. *Buono*, 130 S. Ct. at 1803. The evidence on this issue is undisputed—the federal government has used this land *only* as a memorial to our fallen soldiers and

veterans. The government has not conducted religious services at the Cross.

Further, there is no evidence here that the war memorial was an attempt by the federal government to save an otherwise solely religious symbol. The non-religious symbols put up on the Kentucky courthouse walls in *McCreary County* were found to be pretextual attempts to change the meaning of the symbol by the same persons who had installed the Ten Commandments in the first place. *See McCreary County*, 545 U.S. at 862, 125 S. Ct. 2722. The non-religious plaques and bollards installed by private parties at Mt. Soledad in 2000, however, cannot serve as evidence of pretext on the part of the federal government that had nothing to do with the placement of these objects, and indeed did not even acquire the land upon which the objects had been placed until six years later.

The history and use of the site have changed, from sunrise Easter services to use solely for secular services, primarily military ceremonies. For example, in 2004 the following ceremonies took place at the Memorial: two military reunion group gatherings, two Navy retirement ceremonies, a ceremony dedicating a bollard for the Kaneohe Klippers, and about thirteen ceremonies honoring veterans. In 2005, there were sixteen ceremonies honoring veterans, one re-enlistment ceremony, one change of command ceremony, and one military reunion group gathering. In 2006, there were two reenlistment ceremonies, one commission ceremony, two military reunion group gatherings, and about twenty-eight ceremonies honoring veterans.

There is no evidence in the record that any religious ceremonies have taken place at the Memorial since the federal government acquired the property.

Despite this evidence, the panel held that the message the Mt. Soledad Cross conveyed did not change over time. 629 F.3d at 1117. This is contrary to Supreme Court precedent, which when looking at a case involving a display of the Ten Commandments on public land, held “people ‘reinterpret’ the meaning of these memorials as ‘historical interpretations’ and ‘the society around them changes.’” *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S. Ct. 1125, 1137, 172 L. Ed. 2d 853 (2009) (citation omitted). *Pleasant Grove’s* language is particularly apt where, as here, the central inquiry is, “What is the present government owner expressing by its use of the Cross?” and not what a previous “creator or donor” expressed:

[I]t frequently is not possible to identify a single “message” that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.

Pleasant Grove, 129 S. Ct. at 1136. Here, the same can be said. The federal government’s “thoughts or sentiments” may be quite different from those of the Memorial Association (the creator) and the City of San Diego (the donor), former owners of the Memorial site.

The evidence of the changing use from a religious symbol in 1913 to exclusively a memorial symbol before the federal government acquired the land in 2006 was particularly relevant for determining whether the federal government has violated the Establishment Clause. After all, religious symbols can and do change. St. Nicholas of Bari (270-343, A.D.), the Catholic Bishop of Myra, was famous for putting coins in the shoes of persons who left them out for him and for making anonymous gifts to children. See <http://www.newadvent.org/cathen/11063b.htm>; http://en.wikipedia.org/wiki/Saint_Nicholas (both last visited August 17, 2011). Over the years, he became the model of present day Santa Claus. That he is still revered as the patron saint of repentant thieves hardly affects his jolly and beneficent image to countless children and adults.

IV. At the very least, the case should be remanded for trial.

When the opposing party fails to produce evidence on an essential element of his claim—here, that the federal government’s *use* of the Cross was for religious purposes rather than for secular, memorial purposes—our case law is well settled that summary judgment should be granted to the movant. *Lopez v. Pacific Maritime Ass’n*, 636 F.3d 1137, 1201-02 (9th Cir. 2011). Here, the district court correctly granted summary judgment to the government.

If, in determining whether a reasonable observer aware of all the circumstances would conclude the Cross constituted a governmental endorsement of religion, evidence other than the use by the federal government is considered relevant, then at the very least the conflict in such evidence in our record requires that the case be remanded for trial. The panel erroneously ordered that the district court should have granted appellants's motion for summary judgment.

In its "fact intensive" analysis,⁷ the panel's opinion failed to discuss the expert evidence presented by the federal government in support of its cross-motion for summary judgment. Of course, we must consider this evidence when deciding whether the government raises a triable issue of material fact. Many of the factors relevant to determining the government's use of the site, the physical setting, and the history are set forth in the declaration of Alan S. Newell, President of, and a Senior Associate Historian with, Historical Research Associates, Inc. and a professor of

⁷ The panel also considered such irrelevant material as the anti-Semitic practice of realtors in La Jolla to bar Jewish buyers from settling there during the early part of the century, when the Cross was in private hands—a practice that has nothing to do with Mt. Soledad or this Cross—while at the same time it discounted the relevant evidence of how the federal government has used this Memorial.

history at the University of Montana. He points to the following:⁸

- (1) the elimination at Mt. Soledad Memorial Park of Easter and other religious services since 1998;
- (2) the fact that when the Cross was replaced in 1954, the Mt. Soledad Memorial Association (“MSMA”) continued efforts already begun by American Legion Post 275, a secular organization, to erect a new Cross “as a war memorial”;
- (3) the newspaper accounts describing the site to the public as “a memorial to all those who have died in all our wars.” Several newspaper reports emphasized the Memorial aspect of the Cross. The *North Shores Sentinel* stated in February 1954 that the rebuilt Cross would be dedicated ‘as a memorial to American war dead’ while the *La Jolla Journal* reported in April 1954 that the Cross ‘will be a memorial to those who died in the last three wars.’ Other newspapers noted that Admiral Miller would ‘dedicate the Cross to the memory of all those who have given their lives in the nation’s wars and that the Cross ‘is meant to be a lasting

⁸ I beg the reader’s pardon for the following rather lengthy relation of evidence in the record, but I thought it necessary to point out just how clear is the basis for a trial of the basic issue of fact: would the “reasonable observer” necessarily view the Cross as a government endorsement of religion or as marking the site of a war memorial?

memorial to the dead of the two world wars and the Korean fighting’”;

(4) the memorial services held increasingly from 1972 onwards on Veterans’ Day and other secular memorial days, weather permitting;

(5) the placement of the more than 2,100 individual, permanent memorial plaques and 23 bollards to servicemen and women who fell in the country’s service, since the 1970s;

(6) the view of the monument, not from the freeway where only a portion of the monument can be seen, but on the ground at the monument, where the plaques, bollards, flag and walls, as well as the dedication and name of the Memorial, can be seen; and, most importantly,

(7) the Congressional enactments under which the land was condemned and taken from the MSMA, with explicit statements of the purpose the land and symbol be taken for the public good of establishing a federal memorial to the memory of the fallen soldiers.

Similarly, the panel found the declaration of Professor Edward T. Linenthal, the government’s expert on military history, to be merely conclusory, and summarily dismissed it as bearing no proof on the issue whether the Cross has achieved a secular, memorial meaning, quite apart from its religious meaning. *See Jewish War Veterans*, 629 F.3d at 1112, n.12. But this surely is an inaccurate and somewhat

unfair reading of Professor Linenthal's declaration, particularly when it is entitled to every inference in its favor as proffered by the nonmoving party in opposition to Jewish War Veterans' motion for summary judgment.⁹

On the issue whether the Cross has acquired a secular meaning, Professor Linenthal was hardly "merely conclusory"; he cited several crosses used in American soldiers' memorials: "the Canadian Cross of Sacrifice [commemorating American fallen in Canada's forces before America's entry into World War I], the Mexico Civil War Memorial and 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; an American Legion War Memorial in La Mesa, California; the Mojave Desert Cross in Mojave National Preserve; and the Father Junipero Serra statue (holding [a] cross) in the U.S. Capitol." In concluding that the Cross lacks a broadly understood meaning as a symbol of memorialization, the panel discounted certain important record facts: 114 Civil War monuments include a cross; the fallen in

⁹ As the panel recognized but, alas, failed to follow, "We must determine, viewing the evidence in the light most favorable to * * * the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the [relevant] substantive law." *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

World Wars I and II are memorialized by thousands of crosses in foreign cemeteries; Arlington Cemetery is home to three war memorial crosses, and Gettysburg is home to two more; and military awards often use the image of a cross to recognize service, such as the Army's Distinguished Service Cross, the Navy Cross, the Air Force Cross, the Distinguished Flying Cross, and the most famous cross meant to symbolize sacrifice—the French “Croix de Guerre.”¹⁰

The history behind these crosses and the simple fact that a cross has been used throughout this Nation's history as a symbol of respect for veterans and fallen soldiers and their valor is significant. In *Van Orden*, the Court looked to the role of the Ten Commandments in our Nation's history as one deciding factor in its analysis. See 545 U.S. at 688-90, 125 S. Ct. 2854.

Just as important, the statute by which the federal government acquired ownership of the Memorial expressly states that Congress sought “to preserve a historically significant war memorial.” Pub. L. No. 109-272 § 2(a). Congress specifically made the following findings about Mt. Soledad:

¹⁰ In 1994, when President Bill Clinton visited the beach at Normandy in memory of D-Day, he stopped on the beach and arranged some stones into a cross in memory of the soldiers who died there. Maureen Dowd, *On Washington; Beached*, N.Y. Times, June 19, 1994, available at <http://www.nytimes.com/1994/06/19/magazine/on-washington-beached.html?scp=1&sq=bill+clinton+normandy&st=nyt>. For a photograph, see http://farm5.static.flickr.com/4131/4846400853_798d649a4a.jpg.

The United States has a 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, and a memorial cross is fully integrated as the centerpiece of the multifaceted Mt. Soledad Veterans Memorial that is replete with secular symbols.

The patriotic and inspirational symbolism of the Mt. Soledad Veterans Memorial provides solace to the families and comrades of the veterans it memorializes.

The Mt. Soledad Veterans Memorial has been recognized by Congress as a National Veterans Memorial and is considered a historically significant national memorial.

An Act to Preserve the Mt. Soledad Veterans Memorial in San Diego, California, by Providing for the Immediate Acquisition of the Memorial by the United States, Pub. L. No. 109-272, § 1, 120 Stat. 770, 770 (2006).

The legislative history also contains a letter from the leaders of this country's four largest veterans service organizations, which explains that the potential destruction of the Memorial is considered an affront to veterans. 152 Cong. Rec. H5423-24 (daily ed. July 19, 2006).¹¹ As Representative Hunter—one of

¹¹ A point also made by Justice Alito in *Buono*. See 130 S. Ct. at 1822-23.

the co-sponsors of the House's version of the bill—stated when introducing the Mt. Soledad Veterans Memorial Protection Act:

The fight to save the Mt. Soledad Veterans Memorial is not about religion. It's about protecting a symbol of our freedom and honoring those who have chosen to defend it [at] all costs. Removing this long recognized and respected landmark is an insult to the men and women memorialized on its walls and the service and sacrifice of those who have worn a uniform in defense of our nation.

As Representative Hunter explained on the House floor, the Memorial is “without question a world-class war memorial, dedicated to all of those, regardless of race, religion or creed, who have served our armed services.” 152 Cong. Rec. H5422 (daily ed. July 19, 2006).

Any person acquainted with all the relevant evidence and wishing to determine whether the government meant for the Cross to have a religious or secular use would take Congress's findings into account.¹² Surely Congress's findings are far more relevant than the anti-Semitic practices of realtors in

¹² Certainly Justice Kennedy took into account Congress's findings that the Cross was part of a memorial in his stay order entered in this case, noting Congress “deemed the monument ‘a national memorial honoring veterans of the United States Armed Forces.’” *San Diegans for Mt. Soledad War Memorial v. Paulson*, 548 U.S. 1301, 1312, 126 S. Ct. 2856, 165 L. Ed. 2d 941 (2006).

the county in the early part of the last century. Yet the panel emphasized the latter and failed to consider the former.

When determining the issue 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. *See Buono*, 130 S. Ct. at 1818 (Congress has the discretion to enact “a framework and policy of accommodation for a symbol [a cross] that * * * has complex meaning beyond the expression of religious views”); *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 320, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985) (“deference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted” is unconstitutional).

One would think that following our long-stated rule requiring all inferences to be given in favor of the non-moving party’s evidence (here, the federal government), the panel would recognize there is at least a triable issue of fact as to whether the federal government has used the site for religious purposes, whether the Cross conveys a predominantly religious or secular message given its setting, and the relevant history of the site. After all, the conflicting expert witnesses on this issue have not been cross-examined as to possible prior inconsistent statements, bias or

motive. Their qualifications and demeanor have not been assessed by the trier of fact.¹³

Conclusion

Removal of the Cross at this stage would pose a different Establishment Clause problem: hostility towards the role religion has played in our history, and in particular to the history of the Armed Forces. As Justice Breyer warned:

¹³ We should allow the trier of fact in this case to determine the *Van Orden* elements just as a trier of fact determines what a reasonable man would do in a negligence case. Indeed, even if the *Lemon* test is used, courts have analogized the “reasonable observer” or “objective observer” in the Endorsement Test to the reasonable man standard in tort law. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-81, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O’Connor, J., concurring in part and concurring in the judgment) (“In this respect, the applicable observer is similar to the ‘reasonable person’ in tort law, who ‘is not to be identified with any ordinary individual, who might occasionally do unreasonable things,’ but is ‘rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.’”) (*quoting* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 175 (5th ed. 1984)).

Again, when determining whether a display has the impermissible effect “of communicating a message of governmental endorsement or disapproval” of religion, we “look[] through the eyes of an objective observer who is aware of the purpose, context, and history of the symbol. The objective or reasonable observer is kin to the fictitious ‘reasonably prudent person’ of tort law.” *American Atheists, Inc. v. Davenport*, 616 F.3d 1145, 1159-60 (10th Cir. 2010) (citations omitted).

[T]o reach a contrary conclusion here, based primarily on the religious nature of the tablets text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.

Van Orden, 545 U.S. at 704, 125 S. Ct. 2854.

Except for a brief two-year period, there has been a cross on the site since 1913. No challenge was brought to the Cross until 1989; it stood unchallenged for 76 years. This is significant because in *Van Orden* the Court found it “determinative” that the Ten Commandments monument had stood in the Texas park unchallenged for 40 years. Justice Breyer said this “suggest[ed] more strongly than any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significant detrimental way, to a government effort to favor a particular religious sect [or] primarily to promote religion over nonreligion.” *Id.* Justice Breyer reasoned that the passage of 40 years suggests that visitors would simply consider the religious aspect of the display as part of “a broader moral and historical message reflective of a cultural heritage.” *Id.*

San Diego is heavily influenced by and dependant on the Armed Forces. Situated between Camp Pendleton and Naval Base San Diego, Mt. Soledad is a memorial to the sacrifice made by many soldiers who have protected this country over the years, regardless of their religion. And it is a promise to those current soldiers, a promise that we appreciate the sacrifice they are willing to make for our freedom and that, if they pay the ultimate price, we will remember them. The Cross has stood at the entrance to this memorial for almost 100 years. It has taken on the symbolism of marking the entrance to a war memorial. We should leave it be.
