

In The
Supreme Court of the United States

MOUNT SOLEDAD MEMORIAL ASSOCIATION,
ET AL.,

Petitioners,

v.

STEVE TRUNK, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE*
DAVID EPSTEIN IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Mount Soledad Veterans Memorial—containing 706 American flags, 134 crosses, 18 Stars of David, 18 Masonic symbols, 12 Medals of Honor, and a passive, memorial cross—violates the Establishment Clause of the United States Constitution.

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BRIEF OF *AMICUS CURIAE*

Amicus curiae David Epstein respectfully requests that this Court consider this Brief in Support of Petitioner.

INTEREST OF *AMICUS*¹

David Epstein is a San Diego resident and retired Colonel from the United States Army, having served nine years of active duty and twenty-one years in the reserves. He is a decorated veteran of the Vietnam War, a lifetime member of the Jewish War Veterans, and a current member of the Board of Trustees of the Mount Soledad Memorial Association. His own service as a veteran is memorialized by a plaque at the Mt. Soledad Memorial site that pays tribute to his service in Vietnam, a plaque depicting both a replica of the Bronze Star he was awarded for service and the Star of David. As an active member in the Jewish community and with organizations that promote and recognize service to their country by veterans, Mr. Epstein has a vested interest in seeing that war memorials appropriately recognize the

¹ The parties were notified ten (10) days prior to the filing of this brief of *amicus* David Epstein's intention to file. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, or his counsel, made a monetary contribution to its preparation or submission. Although Mr. Epstein is a member of the Jewish War Veterans and a trustee of the Mount Soledad Memorial Association, the opinions and positions expressed herein are Mr. Epstein's alone and are not directed by or sponsored by either organization.

service of all veterans, including Jewish veterans, who have served in the Armed Forces.

Mr. Epstein is one of many members of the Jewish War Veterans who oppose the action taken by Respondent Jewish War Veterans of the United States of America, Inc. to remove the Mt. Soledad cross memorial. In Mr. Epstein's view, the cross is a marker commemorating the service of veterans generally, and much like the crosses at Arlington National Cemetery or other veterans' memorials, the cross draws attention to the service and sacrifice of our veterans. The sight of the towering cross at Mt. Soledad attracts visitors to the memorial site where visitors observe thousands of plaques memorializing the service of veterans, plaques which display various secular and religious symbols that veterans or their loved ones chose to place on the plaques. Rather than establishing a religion or excluding the religion or beliefs of anyone, the cross in Mr. Epstein's view is simply the well-recognized marker that draws visitors to the site. The more visitors are drawn to the site, the more the service of all veterans is commemorated, whatever their race, color, creed, or belief. Like Mr. Epstein, the thousands of veterans honored at the Mt. Soledad site fought side-by-side with countrymen of various denominations, creeds, and beliefs for the purpose of protecting the freedom for all. It would be a sad day indeed in the history of our country for courts to now tear down a symbol of the sacrifice that honors these freedom fighters.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although the Latin cross symbolizes to some Christianity, its use as a marker at the Mt. Soledad Veterans Memorial (“Memorial”) is not an endorsement of religion. The Ninth Circuit failed to adhere to this Court’s prior precedent that a cross means much more than religion. Specifically, a cross within a war memorial represents sacrifice, heroism, remembrance, honor, and invites all to commemorate the service of our veterans. Further, the cross at the Memorial symbolizes the Armed Forces themselves and the manner in which so many brave men and women have fought for this country. Just as the cross at the Memorial stands in the midst of thousands of plaques containing Stars of David, Masonic symbols, and other religious and non-religious symbols, America’s soldiers fight side-by-side regardless of religion, race, ethnicity, gender, or belief. This message of service and sacrifice by all rings loud and clear at the Memorial and demonstrates that the Memorial is not an endorsement of religion.

Additionally, the Ninth Circuit failed to give proper deference to the Congressional intent and findings presented in the legislative history surrounding the federal government’s purchase of the Memorial. Specifically, Congress made clear that its intent in purchasing the Memorial in 2006 was not to endorse religion through a cross, but to honor veterans and the Armed Forces.

Finally, the Ninth Circuit’s opinion evinces government hostility towards religion that is not

compelled by the Establishment Clause. Through numerous opinions, this Court has approved many religious symbols located on federal land that are legitimate under the Constitution. Under the Ninth Circuit's opinion, all symbols of any connection to religious content are subject to challenge. The Founding Fathers never intended for America to be a land void of all religious symbols and the Ninth Circuit's opinion was incorrect.

ARGUMENT

I. THE NINTH CIRCUIT'S OPINION DIRECTLY CONTRADICTS THIS COURT'S OPINION IN *SALAZAR V. BUONO*.

Justice Kennedy's plurality opinion in *Salazar v. Buono* compels the conclusion that the Memorial does not violate the Establishment Clause. 130 S. Ct. 1803 (2010). Indeed, in *Buono*, the plurality upheld a land-transfer statute permitting the Government to transfer a portion of land with a Latin cross to the Veterans of Foreign Wars. *Id.* at 1821.

The Ninth Circuit's decision is at odds with Justice Kennedy's plurality opinion in two ways: (1) by disregarding the civic message of sacrifice, honor, remembrance, and invitation inherent in the cross located at the Memorial; and (2) by failing to respect Congressional intent in acquiring the Memorial in 2006 for purposes of preserving it.

A. *Buono* Demonstrates that a Cross is More than a Religious Symbol of Christianity.

"The fight to save 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.” *Trunk v. City of San Diego*, 660 F.3d 1091, 1100 (2011) (Bea, J., dissenting) (citing 152 Cong. Rec. H5422 (daily ed. July 19, 2006)). Of course, no one will deny that the cross is a symbol of Christianity. However, as this Court acknowledged in *Buono*, the Latin cross is a symbol of much more than Christianity in certain contexts. *Buono*, 130 S. Ct. at 1820 (“But a Latin cross is not merely a reaffirmation of Christian beliefs.”).

Like the Latin cross in *Buono*, the cross at the Memorial evokes far more than religion. *Id.* In the context of war memorials, a cross represents the sacrifice and heroism displayed in battlefields around the world where brave men and women laid down their lives for the very freedoms guaranteed by First Amendment. *See id.* (“[A Latin cross] is a symbol 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.”). A cross serves to reflect the solemn honor and due respect we as a Nation give to those who have fought in wars across the world and serves as a powerful reminder to never forget the cost of freedom. *See id.* (“[A Latin cross] 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”). A cross can be used to find peace amidst tragedy and comfort in the midst of sadness. *Trunk v. City of San Diego*, 660 F.3d 1091, 1100 n.10 (9th Cir. 2011) (Bea, J., dissenting) (explaining that, in 1994, President Bill Clinton visited the beach at

Normandy in memory of D-Day and stopped on the beach to arrange some stones on a cross in memory of the soldiers who died there).

Importantly, the cross at the Memorial represents not only the gratitude and respect we have as a Nation for our veterans, but it also provides a marker of invitation for the public to visit the Memorial. The cross invites patrons into the Memorial to observe and to commemorate the sacrifices of many brave men and women, some of whose plaques are specifically placed on the Memorial.

Moreover, the setting and environment of the entire Memorial evokes the tradition of shared sacrifice of this country's Armed Forces. In every branch of the military, soldiers fight together, regardless of their background. Soldiers are not assigned to trenches, units, or battlefields based on any set of beliefs, but serve collectively for the common good. Men and women in the Armed Forces fight together, regardless of race, religion, gender, or ethnicity. They unite behind a common purpose of defending this country's freedom and the Constitution.

This message of common sacrifice rings loud and clear at the Memorial where nearly 3,000 black granite plaques on the Memorial walls honor Presidents, Medal of Honor recipients, Admirals, Generals, and thousands of men and women of diverse backgrounds and heritage. Moreover, the plaques contain symbols representing diverse religions, or no religion at all, including 706 American flags, 134 crosses, 18 Stars of David, 18

Masonic symbols, and 12 Medals of Honor. Some plaques contain a Star of David along with military honors symbolized by a cross, such as the Distinguished Service Cross. No other Memorial claims to represent the sacrifice of veterans from all wars like the Memorial in San Diego.²

One person who clearly understands the Memorial's universal message of appreciation for the sacrifice of all veterans is David Epstein. After nine years in the Army, twenty-one years in the reserve, and service during the Vietnam War, Mr. Epstein sees the Memorial not as an endorsement of religion, but as a reverent symbol of this nation's Armed Forces and the sacrifices made by so many. Mr. Epstein's beliefs are unchanged even though he is a lifetime member of the Jewish War Veterans of the United States of America and himself displays the Star of David on his plaque of remembrance.³ The open participation of all veterans in the Memorial quiets the accusation that the Memorial is an endorsement of any one religion.

² Such diversity at the Memorial serves to further illustrate the lack of any endorsement of religion at the Memorial. *Buono*, 130 S. Ct. 1803, 1823 (Alito, J., concurring) ("One possible solution [to the issue of the Latin cross] would have been to supplement the monument on Sunrise Rock so that it appropriately recognized the religious diversity of the American soldiers who gave their lives in the First World War.").

³ The Memorial maintains an electronic database of the images of the various plaques, including Mr. Epstein's own plaque. *See* Mt. Soledad Veterans Memorial, <http://www.soledadmemorial.com/plaque/1293656150.jpg> (last visited Mar. 13, 2012).

Of course, the assertion that a cross represents more than Christianity is not only borne out through *amicus*' own views, but in the countless examples of the use of the cross around the world. As Judge Bea stated in his dissent to the Ninth Circuit's decision denying a petition for re-hearing *en banc*,

114 Civil War monuments include a cross; the fallen in 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 this 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.'

Trunk v. City of San Diego, 660 F.3d at 1100 (Bea, J., dissenting). As Judge Bea went on to explain, "[t]he 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." *Id.*

Although the cross in some contexts represents Christianity, its symbolic significance reaches beyond the boundaries of any single religious creed. *Buono*, 130 S. Ct. at 1822 (Alito, J. concurring) ("[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.").

Congress acknowledged this fact when it passed the Act purchasing the Memorial. *Trunk*, 660 F.3d at 1100 (“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.”).

Here, the Ninth Circuit ignored the depth and breadth of the symbolic meaning of the cross. The Ninth Circuit began with a proposition that the cross was the preeminent symbol of Christianity (based on its own precedent), and refused to stray from its own assumption, despite this Court’s abundant precedent to the contrary. *Trunk*, 629 F.3d 1099, 1110 (9th Cir. 2011). Instead, the Ninth Circuit chose to characterize the other examples of crosses as “non-dominant.” *Id.* at 1114. However, as this Court’s precedents make clear, the Latin cross has multiple civic meanings in America. *Trunk v. City of San Diego*, 660 at 1095 (Bea, J., dissenting) (In *Buono*, “Chief Justice Roberts and Justice Alito, Justice Kennedy 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.”).

Just as this Court criticized the lower court in *Buono* for divorcing a Latin cross from its background and context, the Ninth Circuit has employed the very same reasoning and failed to give due consideration to the entire context of a Memorial dedicated to the Armed Forces. *Buono*, 130 S. Ct. at 1820 (“[T]he District Court concentrated solely on the religious

aspects of the cross, divorced from its background and context.”).

This case represents a critical opportunity to reverse the reasoning of the Ninth Circuit in order to preserve other crosses and religious symbols used in this country. *See Van Orden v. Perry*, 545 U.S. 677, 695 (2005) (“If a cross in the middle of a desert establishes religion, then no religious observance is safe from challenge.”) (Thomas, J., concurring); *Trunk v. City of San Deigo*, 660 F.3d at 1100 (Bea, J. dissenting) (“Removing this long recognized and respected landmark is an insult to the men and women memorialized on its walls and the service and sacrifice fo those who have worn a uniform in defense of our nation.”) (citing 152 Cong. Rec. H5422 (daily ed. July 19, 2006)).

As a result, the Court should grant certiorari to prevent this Nation from losing a memorial honoring and commemorating those who fought in wars abroad. Such an unpatriotic result cannot be the purpose of the Establishment Clause.

B. *Buono* Mandates that Courts Give Deference to Congressional Findings and Intent.

Second, the Ninth Circuit paid short shrift to Congress’s findings and intent when it purchased the Memorial in 2006. Instead, the Ninth Circuit exchanged Congressional findings and statements of purpose for the opinion of one expert. This lack of deference to Congressional expressions of purpose runs contrary to the guidance provided in *Buono*.

One basis for this Court's reversal of the lower court's opinion in *Buono* was that the appellate court failed to give due regard to Congress's intent behind enacting the land-transfer statute. *Buono*, 130 S. Ct. at 1816 ("By dismissing Congress's motives as illicit, the District Court took insufficient account of the context in which the statute was enacted and the reasons for its passage."). Indeed, the Latin cross at issue in *Buono* was involved in legal and legislative struggles for several years leading up to Congress's decision that transferring the land would constitute the best resolution. *Id.* at 1813.

Such struggles demonstrated the necessity for a court to pay due respect to Congressional judgment. This Court explained that, "Congress's prerogative to balance opposing interests and its institutional competence to do so provide one of the principal reasons for deference to its policy determinations." *Id.* at 1817. The land-transfer statute in *Buono* represented Congress's legislative judgment as to a framework and policy for how the dispute could best be resolved. *Id.* at 1818 ("The land-transfer statute embodies Congress's legislative judgment that this dispute is best resolved through a framework and policy of accommodation for a symbol that . . . has complex meaning beyond the expression of legal views."). The lower courts mistakenly assumed that they could simply dismiss the Congressional intent as an evasion. *Id.*

Here, as in *Buono*, the Memorial has been involved in several years of legal and legislative wrangling. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1102-05 (9th Cir. 2011). However, in 2006,

Congress passed an act authorizing the federal government to acquire the Memorial not to endorse religion, but, “in order to preserve a historically significant war memorial, designated the Mt. Soledad Veterans Memorial in San Diego, California, as a national memorial honoring the veterans of the United States Armed Forces.” Mt. Soledad Veterans Memorial Acquisition, Pub. L. No. 109-272, 120 Stat. 770, § 2(a) (2006).

Further, Congress found that 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 multi-faceted Mt. Soledad Veterans Memorial that is replete with secular symbols.” *Id.* § 1(3).

Additionally, Congress found that the Memorial had stood as a tribute to U.S. veterans for over fifty-two years and “now serves as a memorial to American veterans of all wars.” *Id.* § 1(1)-(2). Congress further reasoned that, “patriotic and inspirational symbolism of the Mt. Soledad Veterans Memorial provides solace to the families and comrades of the veterans it memorializes.” *Id.* § 1(4).

The Act acquiring the Memorial was passed overwhelmingly in the House of Representatives by a vote of 349 to 74 and unanimously in the Senate. *Salazar v. Buono*, 130 S. Ct. 1803, 1823 (2010) (“[I]t is noteworthy that Congress, in which our country’s religious diversity is well represented, passed this law by overwhelming majorities.”) (Alito, J., concurring). And there is no evidence in the record

that any religious ceremonies have occurred at the Memorial since the federal government acquired the property in 2006. *Trunk*, 660 F.3d 1091, 1097 (9th Cir 2011).

In his concurrence in *Buono*, Justice Alito stated, “[t]he singular circumstances surrounding the monument on Sunrise Rock presented Congress with a delicate problem, and the solution that Congress devised is true to the spirit of practical accommodation that has made the United States a Nation of unparalleled pluralism and religious tolerance.” *Buono*, 130 S. Ct. at 1822 (Alito, J., concurring). Here, Congress was faced with a similar “delicate problem” and arrived at a solution respecting the Establishment Clause of the Constitution. Absent some proof of ulterior motive or nefarious intent, the Court of Appeals was not simply free to ignore Congressional intent and it should have granted the deference which is due to the policy decisions made by Congress.

II. REMOVING THE MEMORIAL WOULD AMOUNT TO CLEAR GOVERNMENT HOSTILITY TOWARDS ANY RELIGIOUS SYMBOLS.

Contrary to the result compelled by the Ninth Circuit’s opinion, the goal of the Establishment Clause is not total eradication of all religious symbols in the public realm. *Buono*, 130 S. Ct. at 1818; *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (“But the Establishment Clause does not compel government to purge from the public sphere all that in any way partakes of the religious); *Lynch*

v. Donnelly, 465 U.S. 668, 673 (1984) (“[The Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”). Rather, the Establishment Clause leaves room to accommodate divergent values and seeks to avoid the divisiveness based upon religion that promotes social conflict. *Buono*, 130 S. Ct. at 1819; *Van Orden*, 545 U.S. at 698.

Here, removal of the cross at the Memorial would evoke clear government hostility towards religion that is expressly forbidden by the Constitution. *Van Orden v. Perry*, 545 U.S. at 684 (“We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.”) (citing *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

Specifically, removal of the cross would send an undeniably negative message about religious belief that Justice Alito warned of in his concurrence in *Buono*. As Justice Alito stated, “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.” *Buono*, 130 S. Ct. at 1823 (Alito, J. concurring). Similarly, demolition of the cross at the Memorial will evidence government hostility towards any symbol of religion and will promote challenges to arise seeking to

completely eradicate any religious symbols from the public sphere.

Such open hostility to symbols which serve both as secular and religious expression is entirely inconsistent with this country's history and the clear acknowledgements by this Court and other branches of government that this country is a "religious people whose institutions presuppose a Supreme Being." *Lynch v. Donnelly*, 465 U.S. at 676 ("There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.").

Indeed, this Court's opinions have historically protected historical landmarks, religious symbols, and expressions of religious thought in public forums. In *Van Orden*, for example, this Court discussed George Washington's proclamation directly attributing a young nation's success to a "Supreme Being." *Van Orden*, 545 U.S. at 686-87. The Court cited the Establishment Clause's allowance of prayers by a chaplain paid by the state to open daily sessions in state legislatures. *Id.* at 688. The Court looked in its own courtroom where, since 1935, a depiction of Moses has stood holding two tablets revealing portions of the Ten Commandments. *Id.* at 688. Finally, the Court acknowledged various memorials in the Nation's Capital including murals depicting Moses and the Apostle Paul overlooking the rotunda of the Library of Congress's Jefferson Building, the Ten Commandments and a cross outside the federal courthouse for the Court of Appeals and the District Court for the District of Columbia, and explicit invocations of God's

importance located in the Washington, Jefferson, and Lincoln Memorials. *Id.* at 689, 689 n.9.

Similarly, in *Lynch v. Donnelly*, the Court notes that, “[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.” 465 U.S. at 674. The Court noted the widespread evidence of religious expression in public life, including President Roosevelt’s 1944 Proclamation of Thanksgiving giving thanks with “special fervor to our Heavenly Father,” the religious art located in the National Gallery, Presidential Proclamations and messages commemorating Jewish Heritage Week and the Jewish High Holy Days, and the fact that during the week that Congress approved the Establishment Clause as part of the Bill of Rights, Congress also enacted legislation to employ chaplains to offer daily prayers in the Congress. *Id.* at 674-77.

As these and numerous other examples demonstrate, “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” *Van Orden*, 545 U.S. at 690-91. Specifically, if the depiction of a tablet with the words “I AM the LORD thy God” is not a government endorsement of religion, then a Memorial dedicated to the men and women who fought for this country cannot be considered an endorsement of religion. Likewise, if the display of a nativity scene containing the Baby Jesus, Mary, and Joseph does not constitute an endorsement of religion, then a Memorial with a passive cross and thousands of plaques

commemorating other religions cannot be an endorsement of religion. *Lynch*, 465 U.S. at 687.

Simply stated, the Ninth Circuit failed to recognize that “not every law that confers an indirect, remote, or incidental benefit upon religion is, for that reason alone, constitutionally invalid. *Id.* at 683. The Ninth Circuit’s opinion calls for government hostility towards religious symbols across the Nation, even if such religious symbols contain secular messages.

Therefore, to avoid the government hostility towards religion expressly forbidden by the Establishment Clause, this Court should grant certiorari.

CONCLUSION

Justice Story characterized the Constitution as “the language of the people, to be judged according to common sense and not be mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.” Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840). Here, common sense dictates that a Memorial, dedicated to thousands in the Armed Forces, containing a passive cross and thousands of plaques commemorating other religions, is not an endorsement of religion. The Ninth Circuits’ intrusive attempt to destroy the Memorial and ignore Congressional action to balance competing interests should not stand, and this Court should grant certiorari.

Respectfully submitted,

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