No. 11-998

IN THE
Supreme Court of the United States

MOUNT SOLEDAD MEMORIAL ASSOCIATION,
Petitioner,
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* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

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.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law (the Foundation),[1] is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of crosses and of the Ten Commandments, legislative prayer, and other public acknowledgments of God.

The Foundation has an interest in this case because religious symbolism in the public sphere does not violate the Constitution. Moreover, the Foundation is concerned that government officials may be forced to disavow or renounce any "religious purpose" merely to justify the display of religious symbols, leaving the use of religious symbols only to

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[1] *Amicus curiae* Foundation for Moral Law files this brief with consent from all parties, copies of which are on file in the Clerk's Office. Counsel of record for Petitioner granted blanket consent to all *amici*, and the United States of America received timely notice of the Foundation's intention to file this brief, although other parties received notice fewer than 10 days before the due date for this brief. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

those government officials that have demonstrated indifference, ignorance, or disdain toward them. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the display of the Mt. Soledad Cross Memorial violates the Establishment Clause of the First Amendment.

SUMMARY OF ARGUMENT

The Mt. Soledad Cross Memorial does not violate the Establishment Clause of the First Amendment because such symbols do not violate the text thereof as it was historically defined by common understanding at the time of the Amendment's adoption. The Memorial is therefore constitutionally unobjectionable.

This Court should exercise judicial authority under the United States Constitution to do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon court-created case *tests* rather than the Constitution's *text*. The result of these judicial tests is a modern Establishment Clause jurisprudence that is consistently inconsistent and confusing, and often hostile to religion and its adherents. *Amicus* urges this Court to return to first principles by embracing the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI.

The Establishment Clause states that "Congress shall make no law respecting an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). As

applied to this case, the placement of this Memorial is not a law, it does not dictate religion, and it does not represent a form of an establishment.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE MT. SOLEDAD CROSS MEMORIAL SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The Ninth Circuit below misapplied the Establishment Clause of the First Amendment in ruling that the Mt. Soledad Cross Memorial is unconstitutional and in doing so has only perpetuated the hopeless disarray in which this Court found this area of the law a decade ago.

A. The Constitution is the "supreme Law of the Land."

Our Constitution dictates that *the Constitution itself* is the "supreme Law of the Land." U.S. Const. Art. VI. All judges take their oath of office to support *the Constitution itself*—not a person, office, government body, or judicial opinion. *Id.* *Amicus* respectfully submits that this Constitution and the solemn oath thereto are still relevant today and should control the decisions of federal courts above all other competing powers and influences.

Chief Justice John Marshall observed that the very purpose of a *written* constitution is to ensure that

government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* …. Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison, a leading architect of the Constitution, insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to

> ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by 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). That same year, this Court confirmed that the constitutional words deserve deference and precise definition: "In expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

This Court reaffirmed this approach in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 2788 (2008):

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague,* 282

U.S. 716, 731 (1931); *see also Gibbons v. Ogden,* 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or most clever judges and lawyers: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 128 S. Ct. at 2821.

B. Substitutionary judicial tests contradict and obscure the text of the "supreme Law of the Land."

The Ninth Circuit observed that the *"Lemon* test" of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), is widely used as an analytical framework for analyzing Establishment Clause cases but noted other tests have been used in various cases and said that "In recent years, the Supreme Court essentially has collapsed these last two prongs [of *Lemon*] to ask 'whether the challenged government practice has the effect of endorsing religion.'" *Trunk v. City of San Diego*, 629 F.3d 1099, 1106 (9th Cir. 2011), quoting *Access Fund v. U.S. Dep't of Agric.,* 499 F.3d 1036, 1043 (9th Cir. 2007) (reviewing cases).

The Supreme Court's jurisprudential rejection of the First Amendment's text—indeed, its rejection of *any* one firm standard—and lower court cases attempting to build on these shifting sands continues the erosive slide away from the Constitution and into ever-increasing jurisprudential disarray.

The courts' abandonment of fixed, *per se* rules

results in the application of judges' complicated substitutes for the law. James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62, at 323-24 (James Madison) (George W. Carey & James McClellan eds., 2001). The "law" in Establishment Clause cases is so voluminous, incoherent, and incessantly changing that it "leaves courts, governments, and believers and nonbelievers alike confused . . . ." *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky., v. ACLU of Ky.*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting). By adhering to judicial tests rather than the legal text in cases involving the Establishment Clause, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead decide cases agreeably to judicial precedent. *See Marbury*, 5 U.S. at 180; U.S. Const. art. VI.

C. Judicial tests often foster hostility to the historically important role religion has played in our country.

"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." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984); *see also Van Orden*, 545 U.S. at 686-90 (listing numerous examples of "rich American tradition" of government acknowledging God and religion). The primary author of the Declaration of Independence, Thomas Jefferson, observed that, "No nation has ever existed or been governed without religion. Nor can be." T. Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). George Washington similarly declared that, "While just government protects all in their religious rights, true religion affords to government its surest support." *The Writings of George Washington* 432, vol. XXX (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered, like the Declaration of Independence, to be part of this nation's organic law, declared that, "Religion, morality, and knowledge [are] necessary to good government." Northwest Ordinance, Article III, July 13, 1787, *reprinted in* 1 *The Founders' Constitution*, 28 (Phillip B. Kurland & Ralph Lerner eds. 1987). The United States Congress affirmed these sentiments in an 1853 Senate Judiciary Committee report concerning the constitutionality of the congressional and military

chaplaincies:

> [The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of "atheistical apathy."

Senate Rep. No. 32-376 (1853). The Supreme Court itself has noted that "religion has been closely identified with our history and government." *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 213 (1963).

Religious symbolism in government buildings and property abounds across the country, including in the Supreme Court building and courtroom's multiple representations of the Ten Commandments. *See Van Orden*, 545 U.S. at 688. Our nation's capitol is replete with monuments and buildings acknowledging God and religion, including "a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross" that stands outside a District of Columbia courthouse. *Id.* at 689 & n.9. Cities across the land, and particularly in the West,

have names and symbols that reflect the faith of the Spanish and American setters.[2]

II. THE NINTH CIRCUIT RULING IN THIS CASE DISTORTS AND EXTENDS EVEN THE *"LEMON"* TEST IN FORCING SECULARISM UPON THE AMERICAN PEOPLE.

Amicus believes the so-called *"Lemon"* test does not reflect the true meaning of the Establishment Clause and should not be used in this case. But this Court should recognize that the Ninth Circuit has stretched the *"Lemon"* test beyond even what its authors intended.

First, the Court said in *Lemon,* "the statute must have a secular legislative purpose." The Court did not say that had to be the *only* purpose, or even the *primary* purpose. It simply had to have *a* secular legislative purpose.

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[2] The Ninth Circuit gave *carte blanche* approval to an expert witness the district court discounted, and dismissed the evidence of expert witnesses the district court relied upon, simply because one expert supported the conclusion the Ninth Circuit wanted to come to, while the others did not. It is true that the white cross is commonly used to mark the graves of American soldiers in U.S. government-owned military cemeteries in other parts of the world, but the common marker on the graves of soldiers in military cemeteries within the United States is a rounded white slab. However, the overwhelming majority of these white slabs in military cemeteries in the United States prominently display a white cross near the top of the slab.

Then, in *Aguillard v. Edwards,* 482 U.S. 578 (1987), the Court refined the first prong of the *Lemon* test. Holding that the stated purpose of the Louisiana Balanced Treatment Act (ensuring balanced treatment of different scientific theories) was a "sham" and that the real purpose was to advance religion, the Court said the secular legislative purpose must be a genuine purpose, not a sham. But it still did not have to be the only purpose or even the primary purpose.

Now, even though the Ninth Circuit has agreed that the City has met the "secular purpose" prong of the *Lemon* test, the court stretched the prong further. The Ninth Circuit said, supportive Congressional "floor statements support the text's demonstration of Congress's predominantly secular purpose in acquiring the Memorial." *Trunk*, 629 F.3d at 1109.

Notice the subtle shift:

- *Lemon* 1972: "a secular legislative purpose."
- *Aguillard* 1987: a secular legislative purpose that is genuine and not a "sham."
- Ninth Circuit, 2011: a "predominantly secular purpose."

With each subtle change, the test becomes more difficult, and the religious aspect of this nations's history and culture are pushed further and further out of the public arena.

Second, the Ninth Circuit has compressed the second prong of *Lemon*—whether the statute has a

primary effect that neither advances nor inhibits religion—with the "endorsement test." As framed by Justice O'Connor in *Capitol Square Review and Advisory Board v. Pinette,* 515 U.S. 753, 780 (1995), the question is whether an "informed and reasonable" observer who is "familiar with the history of the government practice at issue" would conclude that symbol constitutes government endorsement or disapproval of religion.

Now, quoting only itself in *Vernon v. City of Los Angeles,* 27 F.3d 1385, 1398 (9th cir. 1994)—a decision that predated this Court's decision in *Capitol Square*—the Ninth Circuit frames the question as 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."

Again, the shift is subtle but highly significant. The Supreme Court's test in *Capitol Square* is whether a reasonable and informed observer *would* perceive the government action as an endorsement of religion. Now, the Ninth Circuit's test is whether it would be "reasonable" to construe the government action as an endorsement of religion.

A governmental action such as placing a cross in Capitol Square or placing a cross on Mt. Soledad could have several, even many, reasonable constructions. And ten reasonable and informed observers might each reasonably construe the government action in a

different way.

Using the *Capitol Square* test, the court would ask what was the most likely construction of the government action. But under the Ninth Circuit's test, if only one of these ten observers construed the government action as an endorsement of religion, and if that construction is "reasonable," the government action fails the test and the action is unconstitutional.

With these subtle shifts, the *Lemon* effect/endorsement test is being tightened to squeeze religion out of the public arena. As Justice Scalia noted in his dissenting opinion in *Wabaunsee County v. Umbehr,* 518 U.S. 668 (1996), "Day by day, case by case, [the Court] is busy designing a Constitution for a country I do not recognize." That country appears to be a secular nation in which religion, if it exists at all, is marginalized and has no place in the public arena.

But this is not the country our Founders designed, and it is not the role of the courts to re-design it.

And consider another factor: Although "excessive entanglement" is no longer a separate prong of the *Lemon* test, it remains a factor to consider in determining whether a government action has the primary effect of advancing or inhibiting religion. *Agostini v. Felton,* 521 U.S. 203 (1997). But the Ninth Circuit has taken upon itself the task, not only of deciding whether a cross on public property is an establishment of religion, but what types of crosses are permissible and what types are not. The Ninth Circuit

makes much of the fact that the Mt. Soledad Cross is a "Latin cross," although there is no evidence that those who placed the cross on Mt. Soledad, much less those who observe it there, were aware that it is a Latin cross, or how a Latin cross differs from other crosses, or what special significance a Latin cross has that other crosses do not have. But the Ninth Circuit, arrogating to itself an expertise in comparative theology and a host of other subjects, notes that the French cross "commemorates French soldiers" (fn 14), the Celtic cross "may celebrate the Irish origin of the soldiers instead of their religion" (fn 15) and the Canadian Cross of Sacrifice, the Argonne Cross, and a cross commemorating the Mexican Civil War may have special significance for other than religious reasons, unlike the Latin cross that is distinctively a symbol of Christianity. Justice Scalia has noted that when judges balance the size and prominence of manger scenes versus that of Santa's sleigh and reindeer, they have gone beyond the role of judges and have assumed the role of interior decorators, *Lee v. Weisman,* 505 U.S. 577, 636 (1992) Scalia, J. dissenting). But in this case the Ninth Circuit judges have gone beyond the role of interior decorators and have assumed the roles of theologians and church historians, determining which types of crosses are distinctively religious and which types have other significance. The judiciary has neither the jurisdiction nor the competence to determine matters like this.

III. THE MOUNT SOLEDAD CROSS MEMORIAL DOES NOT CONSTITUTE A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides, in relevant part, "Congress shall make no *law* respecting an *establishment* of *religion*, or prohibiting the free exercise thereof." U.S. Const. amend I (emphasis added). Even if the Cross Memorial is a religious symbol, its placement could not be considered a "law respecting an establishment of religion."[3]

A. The placing of a memorial cross in a park does not constitute a "law."

The First Amendment begins with the words, "Congress shall make no law...." Unless the placement of these Memorials is a "law," then it could not violate the text of the Establishment Clause.

At the time of the ratification of the First Amendment, Sir William Blackstone defined a "law" as "a rule of civil conduct . . . commanding what is right and prohibiting what is wrong." I W. Blackstone,

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[3] *Amicus* will not address herein the compelling argument that the Establishment Clause, with its restriction upon only "Congress," should not be "incorporated" against the states and local governments through the guise of the Fourteenth Amendment. Such an argument is a worthy pursuit for another brief (or book), but is hardly necessary to the textual argument raised in this brief.

Commentaries on the Laws of England 44 (U. Chi. Facsimile Ed. 1765). Only decades later, Noah Webster's 1828 Dictionary stated that "[l]aws are *imperative* or *mandatory*, commanding what shall be done; *prohibitory*, restraining from what is to be forborn; or *permissive*, declaring what may be done without incurring a penalty." N. Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828) (emphasis in original). Alexander Hamilton explained what is and is not a law in *Federalist No. 15*:

> It is essential to the idea of a law, that it be attended with a sanction; or in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.

The Federalist No. 15 at 72 (Alexander Hamilton) (Carey & McClellan eds. 2001).

The transfer of the monument from the City of San Diego to the U.S. Government was done to avoid an establishment of religion problem, not to cause one, and it therefore cannot be considered a "law respecting an establishment of religion."

B. The Mt. Soledad Cross Memorial does not "respect[] an establishment of religion."

Moving along the constitutional text, one sees that the Memorial does not "respect," *i.e.*, concern or relate

to, "an *establishment* of *religion*." U.S. Const. amend. I (emphasis added).

1. The definition of "religion"

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance* in 1785, was referenced in the North Carolina, Rhode Island, and Virginia ratifying conventions' proposed amendments to the Constitution, and was echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[4] In all these instances, "religion" was defined as follows:

> **The duty which we owe to our Creator, and the manner of discharging it.**

Va. Const. of 1776, art. I, § 16 (emphasis added); *see also*, James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785,

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[4] Later in *Torcaso v. Watkins*, the U.S. Supreme Court reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent. *See Torcaso*, 367 U.S. 488, 492 n.7 (1961).

reprinted in 5 *Founders' Constitution* at 82; *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

In *Beason*, the Supreme Court held that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned by the Supreme Court,[5] quoted from *Beason* in defining "the essence of religion." *See Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting).

As the constitutional definition makes clear, not everything that may be termed "religious" meets the definition of "religion." "A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God." H.R. Rep. No.

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[5] *Macintosh* was overturned by the United States Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946).

83-1693 (1954). For example, from its inception in 1789 to the present, Congress has opened its sessions with prayer, a plainly religious exercise; yet those who drafted the First Amendment never considered such prayers to be a "religion" because the prayers do not mandate the duties that members of Congress owe to God or dictate how those duties should be carried out. *See Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983). To equate all that may be deemed "religious" with "religion" would eradicate every vestige of the sacred from the public square. The Supreme Court as recently as 2005 stated that such conflation is erroneous: "Simply having *religious* content or promoting a message consistent with *religious* doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 678 (emphasis added).

> [Even *Lemon*] does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

County of Allegheny v. ACLU Greater Pittsburgh

Chapter, 492 U.S. 573, 576 (1989).

Even assuming, *arguendo*, that the Mt. Soledad cross memorial could in some sense be a "law," such an act could not be considered a law respecting "religion" because, even though the cross is a religious symbol sacred to Christians, the symbol of the cross does not address the *duties* owed to the Creator or the *manner* of discharging those duties. The cross is certainly "religious" to some but it is not a "religion," properly defined, to anyone.

A religious symbol displayed on government property, even with a religious purpose, still does not a religion make. The Mt. Soledad cross memorial does not meet the constitutional definition of the term "religion."

2. The definition of "establishment"

In *Engel v. Vitale,* 370 U.S. 421, 427-28 (1962), Justice Black noted that "As late in time as the Revolutionary War, there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five." To avoid entanglements with the states' policies on religion and to prevent fighting among the plethora of existing religious sects for dominance at the national level, the Founders, via the Establishment Clause of the First Amendment, sought to prohibit Congress from setting up a national church "establishment." *See, e.g.*, Story, *A Familiar Exposition*, *supra,* § 441 (Establishment Clause cannot be attributed to "an

indifference to religion in general, especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution)").

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). For example, in Virginia, "where the Church of England had been established [until 1785], ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches." *Newdow*, 542 U.S. at 52 (Thomas, J., concurring in the judgment). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Cong.* 757 (1789) (Gales & Seaton's ed. 1834). Justice Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should

give to an [sic] hierarchy the exclusive patronage of the national government." II Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion"

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these.*

H.R. Rep. No. 33-124 (1854) (emphasis added). At the time of its adoption, therefore, "establishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'" *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (citations omitted).

Like the inscription of the motto "With God All Things Are Possible" on the Ohio Statehouse, the Mt. Soledad Cross Memorial

> involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious

> denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches.

ACLU of Ohio v. Capitol Sq. Review and Advisory Bd., 243 F.3d 289, 299 (6th Cir. 2001) (*en banc*).

The often overlooked word "establishment" in the First Amendment was meant by the Founders to communicate the idea of a compulsory and state-sponsored religious orthodoxy on a comprehensive level. Just like the Ohio Motto in *Capitol Square*, *supra*, the Mt. Soledad Cross Memorial does not violate the Establishment Clause because it does not create, involve, or concern an "*establishment* of religion."

IV. THE PUBLIC ARENA MUST NOT DISCRIMINATE AGAINST RELIGIOUS EXPRESSION.

A. All ideas, including religious ideas, should be on an equal footing in the public arena.

America's commitment to freedom of expression is based in large part upon the belief that truth is most likely to win out in competition in the marketplace of ideas. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissent); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). In the 221 years since the ratification of the First Amendment, the public arena has expanded exponentially. At that time schools were mostly private or parochial; now public

schools and universities are the norm. At that time, except in cities and towns, roads were relatively few and often privately owned; today public streets, roads and highways interlace the nation. Add to this public parks, theaters, coliseums, museums, office buildings, national forests, public radio and television, and a host of other publicly-owned entities, and we find that the public arena has become the primary arena for the exchange of ideas.

The marketplace of ideas involves competition among many ideas—some religious, some secular, some a combination of both. Sometimes religious ideas compete with other religious ideas; sometimes they compete with secular ideas. Sometimes they involve alternative explanations, approaches, or solutions to the same underlying problems.

If government gives secular expression full access to the public arena, but restricts or prohibits religious expression in the public arena, then government has placed religious ideas at a distinct disadvantage. This has always been true, but the more the public arena expands, the more severe this disadvantage becomes.

B. A requirement that religious symbols, and only religious symbols, must be balanced by other symbols, constitutes discrimination against religion.

Cases involving religious symbols in the public arena, like the *Van Orden* Ten Commandments case cited above, often turn on whether the religious

symbol is balanced with secular symbols—whether a Ten Commandments display is balanced by other historical displays, whether a manger scene is balanced by Santa Claus or other figures. However, this balancing requirement is itself hostile to religion, because it singles out religious symbols for discriminatory treatment.

Religious symbols, and religious symbols only, must be "balanced" by other symbols. A Ten Commandments display must be balanced by something like the Bill of Rights, but a Bill of Rights display need not be balanced by the Ten Commandments. A manger scene must be balanced by something like Santa Claus, but Santa Claus need not be balanced by a manger scene. A portrait of Abraham Lincoln need not be balanced by a portrait of Jefferson Davis, and a portrait of George Washington need not be balanced by a portrait of King George III. Singling out religious symbols, and religious symbols only, for this balancing requirement, discriminates against religion and communicates a message of hostility toward religion, a message that religious symbols are highly disfavored and will be allowed in the pubic arena, if at all, only under very restrictive conditions.

The Ninth Circuit cited *County of Allegheny v. Greater Pittsburg ACLU,* 492 U.S. 573 (1989), as holding that a manger scene, standing alone, "convey[ed] a message to nonadherents of Christianity that they are not full members of the political

community." *Trunk,* 629 F.3d at 1117 (quotations omitted). *Amicus* does not believe it conveys this message, nor does *Amicus* believe that is what the First Amendment was intended to prevent. But the Court does not appear to have considered that excluding religious symbols from the public arena sends a message of exclusion to the *religious* citizen: it says the symbols that are of utmost concern to him are unwelcome in the public arena and will be allowed, if at all, only under very restrictive and censorious conditions.

Acknowledgements of God should not be removed simply because they have a religious meaning or because they originate from those with religious purposes. A policy that allows display of purely secular symbols on public property but prohibits display of a cross, constitutes the hostility to religion Justice Clark warned of in *Abington Township v. Schempp*, 374 U.S. 203, 294 (1963), when he said, "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion."

The Mt. Soledad Cross Memorial may or may not be religious expression, but it is a form of expression. We respectfully urge the Court not to interpret the First Amendment in a way that places certain forms of expression at a disadvantage simply because that expression employs symbols that have a religious origin or meaning for someone.

CONCLUSION

"When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, [the courts] should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting). Such a clash exists in this case between the never-amended words of the Establishment Clause on the one hand and the ever-changing Establishment Clause jurisprudence on the other. The proper solution is to fall back to the foundation, the text of the Constitution.

For the reasons stated, this Honorable Court should grant Petitioner's writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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