No. 11-998

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, ET AL.,
Respondents.

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

BRIEF OF TEXAS, ALABAMA, ALASKA, ARIZONA, COLORADO, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, MICHIGAN, MONTANA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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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INTEREST OF AMICI CURIAE[1]

The States' interest in this case is twofold. First, because the States have monuments and memorials, as well as other public displays, that contain religious elements, it is critical that courts appreciate the displays' civic value. And second, because the States are too frequently defendants in cases raising Establishment Clause challenges, the States have an especially keen interest in the development of a clear, workable Establishment Clause jurisprudence.

INTRODUCTION

Crosses, both large and small, have been used for more than a century to honor the distinguished service and memorialize the sacrifice of the men and women of the U.S. Armed Forces. From the single Argonne Cross in Arlington National Cemetery, to the thousands of modest white crosses that mark, row by row, the graves at places like Flanders Field, Lorraine, and Normandy, these crosses offer a fitting final tribute to Americans who have made the ultimate sacrifice for our Nation. Used in this manner, the cross "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." *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010) (plurality opinion).

In that solemn tradition, the Mount Soledad Veterans Memorial containing the present cross "was

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1. Pursuant to Supreme Court Rule 37.2(a), amici provided counsel of record for all parties with timely notice of the intent to file this brief. Consent of the parties is not required for the States to file an amicus brief. SUP. CT. R. 37.4.

dedicated on April 18, 1954, as 'a lasting memorial to the dead of the First and Second World Wars and the Korean conflict.'" Pub. L. No. 109-272 § 1(2), 120 Stat. 770 (2006). The cross stands at a location where two previous cross monuments had stood, nearly continuously, since 1913. Pet. App. 3. In 2004, Congress designated the Mount Soledad Veterans Memorial as a "national memorial honoring veterans of the United States Armed Forces." Pub. L. No. 108-447, 118 Stat. 2809, 3346 (2004). And in 2006, Congress acquired the Memorial from the City of San Diego to preserve this "historically significant national memorial." Pub. L. No. 109-272 § 1(5). In doing so, Congress recognized the secular purpose of the Memorial: "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).

Today, the Mount Soledad Veterans Memorial includes nearly 3,000 plaques containing the personal information and photographs of honored veterans. Pet. 2; Pet. App. 7, 70–71. The plaques also depict various patriotic symbols (such as American flags and Medals of Honor) and religious symbols (such as Stars of David and crosses). And the Memorial serves, as it has for more than fifty-five 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).

Despite this history, the Ninth Circuit held that the Memorial, "presently configured and as a whole," violates the Establishment Clause. Pet. App. 62.

Because the Ninth Circuit was uncertain whether it was required to apply the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), or the test from *Van Orden v. Perry*, 545 U.S. 677 (2005), it purported to apply both. *See* Pet. App. 13–18. Although the Ninth Circuit recognized that the government's purpose in preserving the Memorial was "predominantly secular," *id*. at 19, it nevertheless found that the Memorial "primarily conveys a message of government endorsement of religion that violates the Establishment Clause," *id*. at 62.

The presence of a cross within a long-standing war memorial satisfies both tests that the Court has used in recent cases when reviewing the constitutionality of a passive display containing religious elements. The Ninth Circuit's decision to the contrary would require the removal of "a historically significant national memorial" that has, for more than fifty-five years, served the solemn task of honoring Americans killed in war; "compelling reasons" most assuredly exist for a grant of certiorari in this case, *see* SUP. CT. R. 10. And because the Ninth Circuit's decision provides a roadmap for like-minded courts and litigants to demand the removal of countless war memorials and markers, it cannot stand. *See Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment) (Requiring the government "to purge from the public sphere all that in any way partakes of the religious" would "promote the kind of social conflict the Establishment Clause seeks to avoid.").

DISCUSSION

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE COURT'S APPLICATIONS OF BOTH THE *VAN ORDEN* AND THE *LEMON* TESTS FOR PASSIVE DISPLAYS CONTAINING RELIGIOUS ELEMENTS.

The presence of a cross within the Mount Soledad Veterans Memorial satisfies both tests that the Court has used in recent cases when reviewing the constitutionality of a passive display containing religious elements: the *Van Orden* test and the *Lemon* test. In *Van Orden*, the Court once again made clear that "[s]imply having religious content . . . does not run afoul of the Establishment Clause." 545 U.S. at 690 (plurality opinion); *id.* at 701 (Breyer, J., concurring in the judgment). And in that case, the plurality abandoned the *Lemon* test in favor of a context-specific review of the display of the Ten Commandments on the grounds of the Texas Capitol. *Id.* at 691–92 (plurality opinion). Justice Breyer also refrained from applying *Lemon*. He explained that although the Court's prior Establishment Clause tests "provide useful guideposts—and might well lead to the same result . . .—no exact formula can dictate a resolution to such fact-intensive cases." *Id.* at 700 (Breyer, J., concurring in the judgment). Instead, Justice Breyer relied upon "consideration of the basic purposes of the First Amendment's Religion Clauses," *id.* at 704, to uphold a long-standing monument that expressed "a mixed but primarily nonreligious purpose," *id.* at 703; *id.* at 703–04.

After concluding that the Ten Commandments display was constitutional, Justice Breyer admonished

that any other result would "lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions." *Id.* at 704. And he warned that requiring the removal of one Ten Commandments display "might well encourage disputes concerning the removal of [additional] 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." *Id.*

As the Mount Soledad Memorial Association's certiorari petition explains, the Ninth Circuit acknowledged *Van Orden*'s treatment of Establishment Clause challenges to passive displays, but it failed to adhere to *Van Orden*'s principles. Pet. 11. The Association's petition demonstrates that the Mount Soledad Cross satisfies the Establishment Clause under *Van Orden*. *Id.* 11–17; *see also* Pet. App. 129–35 (Bea, J., dissenting from denial of rehearing en banc) (explaining that the panel erred in failing to apply *Van Orden* and in failing to uphold the constitutionality of the Mount Soledad Memorial). Amici States fully support the Association on these points and do not re-argue them here.

Rather, the States would show that even if the *Lemon* test was the proper framework for the Ninth Circuit's analysis, its erroneous application of that test to strike down the Memorial conflicts with this Court's cases.

Under *Lemon*'s familiar three-part test, government conduct satisfies the Establishment Clause if: (1) it has

a secular purpose; (2) the primary effect neither advances nor inhibits religion; and (3) the conduct avoids excessive entanglement with religion. *Lemon*, 403 U.S. at 612–13. On occasion, the Court has modified the primary-effect prong by asking instead whether a "reasonable observer" would view the challenged conduct as an "endorsement" of religion. *See, e.g.*, *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592–94 (1989).

The Mount Soledad Veterans Memorial satisfies each part of the *Lemon* and endorsement tests. First, in acquiring the Mount Soledad Veterans Memorial, Congress expressed dual secular purposes: preserve a "historically significant" "National Veterans Memorial," Pub. L. No. 109-272 § 1(5), and memorialize "American veterans of all wars, including the War on Terrorism," *id.* § 1(2). When Congress acts, its stated purpose is entitled to deference, *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 864 (2005), and to a "presumption of legitimacy," *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). Here, there can be no real debate that Congress's actions to acquire and preserve intact this veterans memorial were born of secular purposes.

Second, the primary effect of the Memorial does not advance religion, nor can the Memorial be seen as a government endorsement of religion. As explained in *Buono*, the cross itself serves secular purposes when it is used to memorialize those killed in war. *Buono*, 130 S. Ct. at 1820 (plurality opinion) (The cross "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."). Moreover, this particular cross "is fully integrated as the centerpiece of the multi-faceted Mt. Soledad Veterans Memorial that is replete with secular symbols." Pub. L. No. 109-272 § 1(3). As such, the cross does not primarily advance religion, nor does it convey a message of endorsement of religion. *Cf. County of Allegheny*, 492 U.S. at 616–18 (Blackmun, J.); *id.* at 632–35 (O'Connor, J., concurring); *id.* at 656 (Kennedy, J., concurring in the judgment in part and dissenting in part) (finding that within the context of the holiday display, a menorah did not advance or endorse religion); *Lynch v. Donnelly*, 465 U.S. 668, 681–83 (1984) (holding that within the context of the display, the creche did not advance religion). The Mount Soledad Cross instead conveys the civic message of respect and honor for our Nation's veterans.

Finally, the continued preservation of the Memorial does not entangle the federal government with religion. The government is not involved in any religious practice or worship. And the Memorial is maintained by the Mount Soledad Memorial Association, a private civic organization. Pet. App. 7; *see also* Pub. L. No. 109-272 § 2(c).

The Ninth Circuit began its analysis of the Mount Soledad Memorial with the assertion that a cross is a "sectarian, Christian symbol," Pet. App. 40, and then stated that the cross would be permitted only if there were sufficient "secular elements" to transform the "sectarian" message of the cross into a secular one, *id.* at 41–44. But this approach wholly ignores the fact

that the cross itself—when used to memorialize service members killed in battle—conveys a permissible secular message of "honor and respect" for the fallen veterans. *Buono*, 130 S. Ct. at 1820 (plurality). This approach is also inconsistent with *Lynch* and *County of Allegheny*. In those cases, the Court did not require the secular elements of a display to sanitize the religious element of its religious meaning. Instead, the display as a whole was analyzed to determine whether, within the context it was used, it advanced or endorsed religion.

The Ninth Circuit then compounded its error by (1) focusing its analysis of the monument's history on privately conducted activities, such as Easter services, that took place near the monument before the government acquired it, Pet. App. 44–52, and (2) trivializing the importance of the memorial plaques honoring thousands of veterans, calling them "less significant secular elements," *id.* at 25, because of their relative placement and size, *id.* at 54–59.

In sum, even if *Lemon*/endorsement was the appropriate test, the Ninth Circuit's failure to properly apply the test conflicts with this Court's precedents.

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The Court could thus grant certiorari, reverse the Ninth Circuit's judgment, and uphold the constitutionality of inclusion of a cross within the Mount Soledad Veterans Memorial under either *Van Orden* or *Lemon*. And, at a minimum, the Court should do so because the erroneous decision below requires the destruction of "a historically significant

national memorial" and provides a template for those who would seek to remove countless other monuments and memorials from public lands. *See* Pet. 19–22; *see also Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment) (warning that a decision requiring the removal of one longstanding monument will "encourage" legal challenges to other monuments).

Yet, the Ninth Circuit's decision is merely the latest symptom of a lingering problem that only this Court can solve: the Court's Establishment Clause jurisprudence remains in "hopeless disarray," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring in the judgment), and it is in need of "[s]ubstantial revision," *County of Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) ("Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test."). This case offers an appropriate vehicle for the Court to provide a solution that is long overdue. *See infra* Part II; *see also* Pet. 18 n.4.

II. AMICI STATES AND THEIR CITIZENS WOULD BENEFIT GREATLY FROM AN ESTABLISHMENT CLAUSE JURISPRUDENCE THAT IS CLEAR, WORKABLE, AND FAITHFUL TO THE TEXT OF THE FIRST AMENDMENT.

Since 1791, the Constitution has compelled that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. Despite the clarity of these ten words, modern Establishment Clause jurisprudence is anything but clear. As Justice Thomas wrote just a few months ago: "Our jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 14 (2011) (Thomas, J., dissenting from denial of certiorari).

Indeed, one would be hard pressed to find an area of the law plagued with greater uncertainty. Each time the Court has employed a new Establishment Clause test, it has added it to the list of options rather than offered it as a permanent replacement. *See, e.g.*, *Van Orden*, 545 U.S. at 686 (plurality opinion) ("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 [a] passive monument . . . . "). Thus, (1) the *Lemon* test; (2) the *Lemon*/endorsement test; (3) the coercion test, *see Lee v. Weisman*, 505 U.S. 577, 592 (1992); and (4) the *Van Orden* legal-judgment test seemingly remain options for this Court and the lower courts when reviewing an Establishment Clause challenge.

The *Lemon* test, in particular, has been treated inconsistently—even when it is being shelved in favor of another test. Sometimes the Court ignores it completely, *e.g.*, *Marsh v. Chambers*, 463 U.S. 783 (1983), other times it has been described as "useful" but non-binding, *e.g.*, *Lynch*, 465 U.S. at 679; *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Perhaps most perplexingly, on the same day that the Court upheld Texas's Ten Commandments monument in *Van Orden*, the Court used the *Lemon*/endorsement test to invalidate a different Ten Commandments display. *See McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859–66 (2005). Additionally, five current Justices have questioned the continued use of the *Lemon*/endorsement test. *See, e.g.*, *Utah Highway Patrol Ass'n*, 132 S. Ct. at 17 (Thomas, J., dissenting from denial of certiorari) (agreeing with the assessment that "the endorsement test amounted to unguided examination of marginalia using little more than intuition and a tape measure") (internal quotation marks omitted); *Buono*, 130 S. Ct. at 1818–20 (plurality opinion of Kennedy, J., joined in full by Roberts, C.J., and in part by Alito, J.) (criticizing the workability of the endorsement test); *id.* at 1824 (Alito, J., concurring in part and concurring in the judgment); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995) (plurality opinion of Scalia, J.) (The endorsement test "supplies no standard whatsoever."); *County of Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[T]he endorsement test is flawed in its fundamentals and unworkable in practice."); *see also McCreary County*, 545 U.S. at 890

(Scalia, J., dissenting) (noting that "a majority of the Justices on the current Court . . . have, in separate opinions, repudiated the brain-spun '*Lemon* test'").

The current confusion among the lower courts is especially pronounced in religious-display cases in the wake of *Van Orden* and *McCreary*. *E.g.*, *Am. Civil Liberties Union of Ky. v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005) (noting that after *McCreary* and *Van Orden*, "we remain in Establishment Clause purgatory"); *see also Skoros v. City of New York*, 437 F.3d 1, 13 (2d Cir. 2006) ("[W]e confront the challenge of frequently splintered Supreme Court decisions" and Justices who "have rarely agreed—in either analysis or outcome—in distinguishing the permissible from the impermissible public display of symbols having some religious significance."). Thus, some courts have continued to follow *Lemon*/endorsement in display cases, *e.g.*, *Am. Civil Liberties Union of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 431 (6th Cir. 2011), including in a case involving a Ten Commandments monument similar to the display upheld in *Van Orden*, *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784, 796–97 (10th Cir. 2009). And other courts have followed *Van Orden*, *e.g.*, *Am. Civil Liberties Union Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 & n. 8 (8th Cir. 2005) (en banc), including in a case that did not involve a religious display, *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 402 & n.8 (4th Cir. 2005).

As a result, States, as well as local governments and the American people, are left only to guess whether a particular action might be deemed a

violation of the Establishment Clause. Only this Court can provide the solution to this lingering problem. And this case, in which the Ninth Circuit has required the removal of a long-standing veterans memorial, provides the Court with the opportunity to do so.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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