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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

Over a five-judge dissent from the denial of rehearing *en banc*, the Ninth Circuit declared unconstitutional a longstanding and cherished veterans memorial because it contains—among numerous symbols of patriotism and sacrifice—a memorial cross. That decision conflicts with this Court's cases, thwarts the will of Congress, and endangers countless veterans memorials throughout the Nation. This Court's review is warranted.

Respondents mount a vigorous defense of the Ninth Circuit's decision holding the Memorial unconstitutional. But they do not, and cannot, dispute three crucial propositions, which confirm the pressing need for this Court's review.

First, there is no dispute that if allowed to stand, the Ninth Circuit's decision will require the permanent and substantial alteration of a longstanding and cherished war memorial that "for over 52 years," Congress found, has been "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, 120 Stat. 770 (2006).

Second, there is no dispute that altering the Memorial as the Ninth Circuit's decision requires will, as that court conceded, inflict "sincere anguish" on veterans, their families, and many others. App. 6.

Third, there is no dispute that the Ninth Circuit's decision exacerbates confusion in the lower

courts about the use of religious imagery in passive displays to commemorate the service and sacrifice of our Nation's veterans. See Br. Texas, *et al.*, as *Amici Curiae* 10-13 (noting the deep confusion and pressing need for guidance).

The Court should grant the Association's petition, reverse the Ninth Circuit's judgment, and effectuate Congress' intent to preserve the Memorial (and thereby protect the many other veterans memorials also at risk).

I. The Ninth Circuit's Decision That The Mount Soledad Memorial Violates The Constitution Warrants Review

Respondents primarily contend (at 2, 19) that review is unwarranted because this case is factbound. But as respondents concede (at 27), *all* Establishment Clause cases necessarily require "factually specific analysis." Under respondents' view, *no* Establishment Clause case would be subject to this Court's plenary review. Merely to state that proposition is to refute it.

As demonstrated in the petition (at 11-22), review is warranted because of the "obvious importance" of the Ninth Circuit's decision in this case, see *Elk Grove Unified School District* v. *Newdow*, 542 U.S. 1, 5 (2004) (granting certiorari), holding the Memorial—"as presently configured and as a whole" —unconstitutional in the face of Congress' "evident desire to preserve" the Memorial. *San Diegans for the Mt. Soledad Nat'l War Mem'l* v. *Paulson*, 548 U.S.

1301, 1304 (Kennedy, Cir. J., 2006). Review is also warranted because the Ninth Circuit's decision conflicts irreconcilably with this Court's cases in at least three ways. First, the Ninth Circuit applied the wrong test and held categorically that religious imagery in passive displays is presumptively unconstitutional. Second, the Ninth Circuit improperly focused on history before the government's involvement, although only the government's actions matter. And third, the Ninth Circuit misapplied this Court's cases in evaluating the purpose and effect of the challenged display. Respondents' contrary arguments misapprehend this Court's cases, misstate the pertinent facts, or both.[1]

A. Most fundamentally, the Ninth Circuit applied the wrong legal test and held categorically that irrespective of use or history, religious symbols in passive displays—even veterans memorials—are presumptively unconstitutional. See App. 129-32 (Bea, J., dissenting from denial of rehearing *en banc*) (objecting to the panel decision because, among other things, it failed to apply the legal-judgment test from Justice Breyer's *Van Orden* concurrence). As even respondents concede (at 16), however, the "principle that the cross represents Christianity is not an absolute one." (Internal quotation marks omitted.) By isolating the religious symbol—here, a cross—from

[1] Respondents take issue with the circuit split asserted by the government in its petition, but do not dispute the general confusion in the lower courts concerning passive displays that contain religious imagery.

the rest of the passive display and only then considering whether its use can sufficiently "transform" it into a non-sectarian symbol (thereby rebutting the Ninth Circuit's presumption of unconstitutionality), the Ninth Circuit got the analysis required by this Court's precedents exactly backwards. See Pet. 11-19; see also Br. VFW, *et al.*, as *Amici Curiae* 15.

The Ninth Circuit's ruling that religious imagery (including Latin crosses) in passive displays (including veterans memorials) is presumptively unconstitutional is nothing short of extraordinary. Not surprisingly, it cannot be reconciled with this Court's cases holding that "[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* v. *Perry*, 545 U.S. 677, 690 (2005) (plurality) (citing cases). As Justice Kennedy's plurality opinion in *Buono* explains:

> [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.

Salazar v. *Buono*, 130 S. Ct. 1803, 1820 (2010). Under the Ninth Circuit's test, however, Latin crosses are *always* "sectarian" *unless* an examination of their use and context subsequently reveals otherwise. Whatever the precise contours of the Ninth Circuit's test, its application in this case cannot be squared either with this Court's cases or with Congress' express

finding that the "memorial cross" at Mount Soledad is "fully integrated as the centerpiece of the multi-faceted * * * Memorial that is replete with secular symbols[.]" 120 Stat. 770. And there is no principled way to limit the reach of the Ninth Circuit's test to Latin crosses (among other religious symbols), or veterans memorials (among other passive displays). This Court's review is warranted for that reason alone.

Perhaps recognizing as much, respondents try to downplay the implications of the Ninth Circuit's ruling by limiting it to the facts of this case—arguing, for example, that there is no conflict with *Buono* because the memorial cross here is taller than the one at issue there. Opp. 12. But that argument only confirms the irreconcilable tension between the Ninth Circuit's decision and this Court's cases—such as *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. Like the Ninth Circuit, respondents' view of the law would absurdly reduce *Allegheny* to a measuring-stick test. Respondents do not even attempt to address the conflict with *Allegheny*. In all events, respondents' efforts to distinguish *Buono* now are in sharp tension with their representations to the Court then, when respondent Jewish War Veterans, appearing as *amicus curiae* in *Buono*, argued that the memorial cross at issue here is "not dissimilar fact[ually]" from the memorial cross at issue there.

Br. Jewish War Veterans of the United States of Am., Inc., as *Amicus Curiae* Supporting Respondent, *Salazar* v. *Buono*, No. 08-472, 2009 WL 2406367, at *1 n.2. (U.S. Aug. 3, 2009).

Taking another tack, respondents try to downplay the implications of the Ninth Circuit's decision by pointing to the court's statement that "*a* 'cross can be part of this veterans' memorial.'" Opp. 6-17 (emphasis added). That assurance rings hollow.

For one thing, it only highlights that *the* memorial cross, in its current form, *cannot* be "part of this veterans' memorial." But Congress expressly 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[.]" 120 Stat. 770. Given that finding—which respondents ignore—their contention that altering the memorial cross would not thwart congressional intent cannot be taken seriously. Even the Ninth Circuit recognized—and respondents do not dispute—that its decision holding the Memorial unconstitutional would inflict "sincere anguish" on veterans and their families.

Respondents attempt to downplay (at 20-25) the significance of the Ninth Circuit's holding that the Memorial—"as presently configured and as a whole"—is unconstitutional by emphasizing that Congress did not expressly require that the cross remain part of the Memorial. It would be strange, however, for Congress to have acted in the face of an order to *remove* the memorial cross, and to have made

an express finding that the memorial cross is "fully integrated as the centerpiece of the multi-faceted * * * Memorial that is replete with secular symbols[,]" if it did not intend the memorial cross to be part of the Memorial as a whole. See 120 Stat. 770. Although it is true that Congress did not specifically require the government to maintain the memorial cross, the same thing was true of the land-transfer statute at issue in *Buono*. See Pub. L. No. 108-87, 117 Stat. 1100, § 8121(e) (2003) (transferring the "property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war[,]" but not mentioning the cross). Respondents' efforts to avoid review by insisting that altering or removing the memorial cross would not thwart Congress' purpose in preserving the Memorial as a whole must be rejected—particularly given the Ninth Circuit's determination that the Memorial, "as presently configured and as a whole," violates the Establishment Clause.

B. Respondents try to get around that problem by focusing—as the Ninth Circuit did—almost exclusively on history that pre-dates the government's involvement with the Memorial. But neither the Ninth Circuit's decision nor respondents cite any authority for the proposition that that history is relevant, and we are aware of none. If anything, this Court's cases suggest the opposite is true. E.g., *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 477 (2009) (the meaning of a display or monument may change over time depending on use). That only makes sense. After all,

as Judge Bea noted in his dissent, the issue in this case is whether "the *present* use by the government—the precise use which plaintiffs seek to enjoin—constitutes an endorsement of religion." App. 137 (Bea, J., dissenting from denial of rehearing *en banc*) (emphasis in original).

In all events, we know from Justice Breyer's *Van Orden* concurrence that the most relevant history for Establishment Clause purposes is the length of time a passive display like the Memorial has stood without legal challenge—and respondents do not dispute that in this case, the Memorial (including the memorial cross) stood unchallenged for 35 years, roughly the same amount of time as the 40 years the monument in *Van Orden* stood unchallenged. Under *Van Orden*, that history should have been "determinative." 545 U.S. at 702 (no Establishment Clause violation where Ten Commandments monument went unchallenged for 40 years).

Although respondents insist that the Memorial has long been a source of "contention," they do not dispute that the "controversy" here is essentially the same lawsuit by more or less the same small group of plaintiffs—just as in *Van Orden*.[2] The Ninth Circuit's

[2] Respondents address the relevant post-government history of the Memorial only to assert that the Memorial "continues * * * to serve[ ] its traditional role as the focal point for Easter services." Opp. 7. But that assertion is belied by the record, which respondents tellingly do not cite. According to the record,

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decision cannot be squared with *Van Orden*, and this Court should grant the petition and resolve the conflict concerning the appropriate role of history in Establishment Clause challenges to longstanding passive displays that contain religious imagery.

C. The Ninth Circuit's decision conflicts with this Court's cases in yet another way. As *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844, 883-84 (2005) (O'Connor, J., concurring), and *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring), make clear, the government's purpose is crucial to the Establishment Clause analysis because, among other things, it informs the message conveyed to the reasonable observer and thereby contributes to the effect of that message. *Van Orden*, too, teaches that purpose and effect must be considered *together* in determining whether there is any impermissible endorsement. See 545 U.S. at 701-02 (Breyer, J., concurring). Here, the Ninth Circuit held—and respondents do not dispute—that the government's purpose in acquiring the Memorial, including the memorial cross, was "predominantly secular." App. 19.[3]

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the "service" respondents reference was not an Easter service, but a National Day of Prayer Service. See ER 617-18.

[3] Respondents contend (at 1) that the Memorial was "erected for an avowedly religious purpose," but concede (at 5) that the Memorial has honored war dead since at least the dedication of the memorial cross in 1954.

The Ninth Circuit went on, however, to give little (if any) weight to Congress' purpose in its analysis of effect. Before this Court, respondents argue that purpose is entitled to *no* weight in that analysis. Opp. 25. That cannot be right. At a minimum, this Court's guidance is needed to resolve the uncertainty and clarify the proper role of purpose in the effect analysis.[4]

As to that analysis, respondents cannot explain why, in the Ninth Circuit's view, a reasonable observer would recall purported anti-Semitism among Palo Alto realtors during the 1950s, but not findings in a statute passed by Congress in 2006. Respondents' attempt to prop up the Ninth Circuit's decision by trivializing the thousands of tributes comprising the Memorial—such as the memorial plaques, large American flag, and commemorative paving stones—fares no better. See Opp. 11, 23-25.[5]

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[4] Respondents rely on this Court's statement that "reasonable observers have reasonable memories," *McCreary*, 545 U.S. at 866, in arguing that the government's purpose has little relevance. But that maxim only begs the question as to what is "reasonable."

[5] Respondents contend (at 26) that this case is a "poor vehicle" for review because the district court has not yet fashioned a remedy for the Establishment Clause violation found by the Ninth Circuit. Opp. 26. That is wrong. Where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern, *et al.*, SUPREME COURT PRACTICE 281 (9th ed. 2008) (citing cases). The only

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II. The Association Is A Proper Party To These Proceedings

Just as they unsuccessfully argued in the Ninth Circuit, respondents argue in this Court that the Association is not a proper party to these proceedings.

Respondents make this argument even though the Association appeared in the district court and answered the amended complaint in which it was named. See *Trunk, et al.* v. *City of San Diego, et al.*, 3:06-cv-01597-LAB-WMC, ECF No. 71 (S.D. Cal. filed Nov. 29, 2006). They make this argument even though the Association appeared in the court of appeals—filing a petition for panel or *en banc* rehearing (which the Ninth Circuit denied) and a motion to stay the mandate pending petition for certiorari (which the Ninth Circuit granted). And they make this argument even though the Ninth Circuit necessarily rejected it in denying respondents' motion to strike the Association's rehearing petition, which motion made the same argument. This Court should reject that argument as well.[6]

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remedy left open by the Ninth Circuit's ruling is to permanently alter the Memorial as it currently stands. As a result, there is no possibility that proceedings in the lower court may obviate the need for the Court's intervention. But this Court's intervention may obviate the need for further proceedings below.

[6] The government advances the same argument in its petition, relying primarily on *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928 (2009), and other cases regarding the need for *non-party plaintiffs* to intervene formally in a case.

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As detailed above, the proceedings below establish that the Association is a proper party. But there is more. Congress directed the Secretary of Defense to "enter into a memorandum of understanding [("MOU")] with the [Association] for the continued maintenance" of the Memorial "by the Association." 120 Stat. 770, 771, sec. 2(c). The MOU, in turn, not only cedes day-to-day operation of the Memorial to the Association, but also recognizes the Association's stake in the present configuration of the Memorial by instructing that the government "may not alter" the "Memorial property" unless the government consults the Association and uses "best efforts" to ensure that the changes are not inconsistent with the "Association's improvement plans." The MOU thus confirms

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Those cases are inapposite because the Association became a party to this case when it was named as a defendant and served with a complaint. Moreover, the Association respectfully suggests that its continued involvement in this case is necessary given the government's apparent reluctance to defend the Memorial. In its second request for an extension of time in which to file a petition, for example, the government averred that it needed still more time to determine the "significance" of the Ninth Circuit's decision that the Memorial is unconstitutional and "whether this Court's review" of that decision is "warranted." In all events, as the government itself expressed most recently in its motion for divided argument (at 3) in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, No. 10-553 (U.S. filed Aug. 5, 2011), "federal and private respondents bring distinct perspectives" on the issues that come before this Court. The issues in this case are no exception.

that the Association has a tangible interest in the outcome of this case.

CONCLUSION

For the foregoing reasons, the Association's petition for a writ of certiorari should be granted.

Respectfully submitted,

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