

No. 11-998

IN THE
Supreme Court of the United States

MOUNT SOLEDAD MEMORIAL ASSOCIATION,
Petitioner,

v.

STEVE TRUNK, PHILIP K. PAULSON, JEWISH WAR
VETERANS OF THE UNITED STATES OF AMERICA,
INC., RICHARD A. SMITH, MINA SAGHEB,
AND JUDITH M. COPELAND,
Respondents.

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

**BRIEF OF *AMICI CURIAE* THE
AMERICAN LEGION, VETERANS OF FOREIGN
WARS OF THE UNITED STATES, AND MILITARY
ORDER OF THE PURPLE HEART, INC.
SUPPORTING PETITIONER MOUNT SOLEDAD
MEMORIAL ASSOCIATION**

VAN H. BECKWITH
CHAD M. PINSON
RYAN L. BANGERT
BAKER BOTTS L.L.P.
2001 Ross Avenue, Ste. 600
Dallas, Texas 75201
(214) 953-6500

AARON M. STREETT
Counsel of Record
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
(713) 229-1855
aaron.streett@bakerbotts.com

JULIE MARIE BLAKE
BAKER BOTTS L.L.P.
1299 PENN. AVE., N.W.
WASHINGTON, D.C. 20004
(202) 639-7700

*Counsel for Amici Curiae The American Legion,
Veterans of Foreign Wars of The United States, and
Military Order of The Purple Heart, Inc.*

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

Amicus The American Legion was chartered by Congress in 1919. It is a community service organization

¹ Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for petitioner and respondents were timely notified of *amici*'s intent to file this brief. Consents from counsel for respondents have been filed with this brief. Petitioner has filed a blanket consent with this Court.

representing approximately 2.4 million members—plus an Auxiliary of almost 1 million members—in nearly 14,300 American Legion Posts throughout the United States, its territories and 20 foreign countries, including England, Australia, Germany, Japan, Mexico, and the Philippines. Since its inception, The American Legion has maintained an ongoing commitment to veterans and their families. The Legion helps military veterans survive economic hardship and secure government benefits. It drafted and obtained passage of the first G.I. Bill and its members were among the primary contributors to the Vietnam Veterans Memorial. It works to promote social stability and well-being for those who have honorably served our Nation's common defense. And it strives to ensure that those veterans who have sacrificed their lives for our country are properly remembered in local, state, and national veterans memorials. In 2006, the American Legion advocated in favor of Congressional action to acquire and preserve the Mt. Soledad Veterans Memorial as a memorial to America's veterans of all wars.

Amicus Veterans of Foreign Wars of the United States (VFW) is a Congressionally chartered veterans service organization established in 1899 that represents over 2.1 million members. The VFW was instrumental in establishing the Veterans Administration, creating the World War II GI Bill and the Post-9/11 GI Bill, and developing the national cemetery system. The VFW helped fund the creation of the Vietnam Veterans Memorial, the Korean War Memorial, the World War II Memorial, the Women in Military Service Memorial, and numerous other memorials in and around the Nation's capital. In 2006, the VFW advocated in favor of Congressional action to acquire and preserve the Mt. Soledad Veterans Memorial as a memorial to America's veterans of all wars.

Amicus Military Order of the Purple Heart, Inc. is a non-profit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Purple Heart is a combat decoration awarded only to those members of the armed forces of the United States wounded by a weapon of war in the hands of the enemy. It is also awarded posthumously to the next of kin in the name of those who are killed in action or die of wounds received in action. Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization whose membership is limited to combat veterans. The Order conducts welfare, rehabilitation, and service work for hospitalized and needy veterans and their families. It has also erected at least one memorial to the recipients of the Purple Heart in every state in the nation.

Each *amicus* is a non-profit organization that seeks to honor the heroic sacrifices made by America's veterans. The Mt. Soledad Veterans Memorial advances that common goal by solemnly commemorating those veterans who laid down their lives in service to their country. Each *amicus* is concerned with the outcome of this case as it will directly affect the continued survival of a long-standing and historically significant veterans memorial, and will determine the continued validity of many other non-sectarian veterans memorials that incorporate the Latin cross as a symbol of military death, honor and sacrifice.

SUMMARY OF ARGUMENT

Frankly, I am shocked in a time of war, a time when our men and women are out exchanging deadly fire with the enemy, that we are talking about destruction of a war memorial.

— Rep. Brian Bilbray, 152 Cong. Rec. H5425 (daily ed. July 19, 2006).

The Mt. Soledad Veterans Memorial (Memorial) commemorates veterans who gave their lives in service to their country. The Memorial reminds current and future generations of the high cost of freedom exemplified by the sacrifices of those veterans. Like many other veterans memorials, the Memorial contains a Latin cross. The Latin cross is a well-known and universally recognized symbol of military death and sacrifice, and communicates honor and respect for those who died in military service. This fact is confirmed by even a casual review of military cemeteries, such as those located in Normandy, France; Tunisia; and Flanders Field, Belgium—all of which are adorned by row on row of white Latin crosses quietly marking the final resting places of veterans who laid down their lives for the cause of freedom.

Despite this unbroken—and historically uncontroversial—tradition, the court of appeals held that the cross within the Memorial gives rise to an Establishment Clause violation. The court of appeals did so despite Congress' express statement of a secular purpose for acquiring the Memorial. Congress directed the President to act to preserve a historically significant monument that honors and memorializes America's veterans—a historical veterans memorial that, as Congress recognized, features a “fully integrated” memorial cross as its “centerpiece.” The court of appeals' decision that this historically-rooted use of the cross was a mere cloak for promoting religion contradicts the considered judgment of

both elected branches of government. The court of appeals disregard for solemn acts of our Nation's political branches warrants this Court's review.

Review is also appropriate because the court of appeals' decision addresses a recurring question—whether veterans memorials on public land are rendered unconstitutional because they contain Latin crosses—that bears special significance for *amici* and America's military. Tens of thousands of crosses appear in U.S. military cemeteries and memorials in America and throughout the world. In addition, the cross has historically been used in medals awarded by the U.S. military to recognize valor and extraordinary service. The court of appeals' decision threatens this well-established and historically uncontroversial practice of using crosses to recognize military valor and sacrifice.

If allowed to stand, the court of appeals' decision will require the dismantling of a cherished monument to America's fighting men and women. The American Legion, the VFW, and the Military Order of the Purple Heart respectfully submit this brief to provide a definitive statement by America's largest veterans service organizations concerning the serious affront to generations of soldiers, their families, and patriotic Americans that would be caused by the forced removal of the cross—a widely recognized symbol of military honor, valor, and sacrifice—from the Mt. Soledad Veterans Memorial.

ARGUMENT

I. The Court Of Appeals' Decision Contravenes The Will Of Congress And Therefore Warrants This Court's Review.

The court of appeals' decision effectively invalidates the considered judgment of Congress and the President

that the Memorial is a “historically significant national memorial” suitable for acquisition and preservation by the United States Government. See Act of Aug. 14, 2006 (2006 Act), Pub. L. No. 109-272, § 2(a), 120 Stat. 770 (16 U.S.C. § 431 note) (directing the Executive to acquire, maintain, and preserve the Memorial). For that reason alone, review is warranted in this case.

This Court frequently reviews lower-court decisions holding a federal law unconstitutional, even in the absence of a circuit split. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *United States v. Stevens*, 130 S. Ct. 1577 (2010); *United States v. Williams*, 553 U.S. 285 (2008); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *United States v. Morrison*, 529 U.S. 598 (2000); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). That practice is consistent with the Court’s recognition that judging the constitutionality of an Act of Congress is “the gravest and most delicate duty that this Court is called upon to perform.” *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)).

Although the court of appeals’ decision here does not directly strike down an Act of Congress, it effectively accomplishes that result by requiring the demolition of a significant part of the war memorial that Congress sought to preserve by acquiring the land on which it sits. Congress’ express findings that the Memorial commemorates and honors America’s veterans—without promoting religion—makes review particularly appropriate here. Congress identified the Memorial as a “tribute to the members of the United States Armed Forces who sacrificed their lives in the defense of the United States.” § 1(1), 120 Stat. 770. Congress found that the “Memorial was dedicated on April 18, 1954, as ‘a lasting memorial to

the dead of the First and Second World Wars and the Korean conflict’ and now serves as a memorial to American veterans of all wars, including the War on Terrorism.” § 1(2), 120 Stat. 770. And it emphasized 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.” § 1(3), 120 Stat. 770.

Congress further found that the “patriotic and inspirational symbolism of the Mt. Soledad Veterans Memorial provides solace to the families and comrades of the veterans it memorializes.” § 1(4), 120 Stat. 770. Congress had previously designated the Memorial “as a National Veterans Memorial” because of its historical significance and role as a veterans memorial. § 1(5), 120 Stat. 770; see Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, div. J, § 116(a), 118 Stat. 3346 (16 U.S.C. § 431 note) (“The Mt. Soledad Veterans Memorial * * * is hereby designated as a national memorial honoring veterans of the United States Armed Forces.”). Congress observed that the City of San Diego and 76 percent of San Diego voters supported federal ownership of the Memorial. 2006 Act § 1(6)–(7), 120 Stat. 770.

The legislative history of the 2006 Act confirms Congress’ understanding that federal ownership of the Memorial would preserve a well-known veterans memorial in a manner consistent with the Constitution. Senators Barbara Boxer and Diane Feinstein of California both supported the Act because of the Memorial’s history and significance to veterans. 152 Cong. Rec. S8364–S8365 (daily ed. July 27, 2006). Senator John McCain, a war hero himself, described the bipartisan Act as a “legislative solution” saving a “remarkably popular landmark”

from “legal wrangling.” *Id.* at S8365. Senator Jeff Sessions observed that acquisition of the Memorial “wouldn’t be unconstitutional under Federal law,” and “does not establish a religion.” *Id.* at S8365. The Department of Justice likewise recommended the 2006 Act to Congress as a “needed” measure, and the President strongly supported the Act’s “important goal of preserving the integrity of war memorials.” *Id.* at S8364; 152 Cong. Rec. H5423 (daily ed. July 19, 2006).

The legislation requiring federal acquisition of the Memorial received overwhelming support from Congress, the Executive Branch, veterans’ groups (including *amici*), and millions of Americans. 152 Cong. Rec. H5422–H5426. It passed the House of Representatives by a 349-74 vote. *Id.* at H5433–H5434. It was unanimously adopted by the Senate. 152 Cong. Rec. S8550 (daily ed. Aug. 1, 2006); cf. *Salazar v. Buono*, 130 S. Ct. 1803, 1823 (2010) (Alito, J., concurring) (“[I]t is noteworthy that Congress, in which our country’s religious diversity is well represented, passed this law by overwhelming majorities.”).

Congress’ unique ability to balance opposing interests when establishing federal policy is “one of the principal reasons for deference to its policy determinations.” *Id.* at 1817–1818 (opinion of Kennedy, J.). As in this case, Congress often makes practical accommodations for religious aspects of historical monuments, at once complying with the Establishment Clause while also “avoiding the disturbing symbolism associated with the destruction of [a] historic monument.” *Id.* at 1823 (Alito, J., concurring); *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring) (arguing that tearing down longstanding monuments with religious symbolism could encourage future disputes and create “religiously-based divisiveness”). Deference to Congress’ judgment is especially

warranted here given Congress' broadly supported intervention to preserve a longstanding veterans memorial from destruction and its express findings of secular reasons for doing so.

One Justice of this Court previously observed that "Congress' evident desire to preserve the [M]emorial makes it substantially more likely that four Justices will agree to review the case in the event the Court of Appeals affirms the District Court's order." *San Diegans For Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1304 (2006) (Kennedy, J.) (granting petition for a stay). The court of appeals has now effectively overruled the will of Congress, disregarded its express findings of legislative purpose, and ordered that the cross within the Memorial be removed. This Court should therefore review the "issues created by the federal statute" out of "the respect due * * * to Congress." *Id.* at 1304; see *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004) (granting certiorari to review the Ninth Circuit's order striking down the federal, statutorily-created Pledge of Allegiance "[i]n light of the obvious importance of that decision.").

II. This Case Presents A Substantial And Recurring Issue Of National Importance.

The legal question at issue here is substantial and recurring. The Tenth Circuit recently adopted a legal analysis very similar to the court of appeals in striking down memorial crosses honoring fallen Utah state troopers. See *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010). The judgments of these two courts of appeals cast a shadow over all other memorial crosses in the nation. See Pet. 19–22 (discussing, inter alia, new litigation by serial plaintiffs over the September 11th Memorial Cross).

Moreover, there is serious, long-running confusion in the lower courts over the proper application of this Court's Establishment Clause precedents. See *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 22 (2011) (Thomas, J., dissenting from the denial of certiorari) ("It is difficult to imagine an area of law more in need of clarity. * * * It is *this* Court's precedent that has rendered even the most minute aesthetic details of a religious display relevant to the constitutional question. We should not now abdicate our responsibility to clean up our mess because these disputes, by our own making, are 'factbound.'").

Nor is there any reason to defer review until other courts have ruled. Further percolation would not materially aid this Court's consideration. This case has given rise to multiple opinions reflecting the views of nine different judges. Pet. App. 1 (McKeown, J.); *id.* at 65 (Burns, J.) (granting summary judgment in favor of the Memorial); *id.* at 124 (Bea, J., dissenting from the denial of rehearing en banc). One of these opinions explained the court's reasoning for invalidating the Memorial, while the others argued that the Memorial should be upheld under various theories. In reviewing the court of appeals' decision, this Court would have the benefit of thorough appellate consideration of arguments for and against the Memorial's validity.

Should this Court deny review, it would let stand the conclusion that memorial crosses are presumptively unconstitutional and ripe for challenge. After two circuit-level decisions to strike down crosses, "governments face a Hobson's choice: foregoing memorial crosses or facing litigation. The choice most cash-strapped governments would choose is obvious, and it amounts to a heckler's veto." *Am. Atheists, Inc.*, 637 F.3d at 1106 (Kelly, J., dissenting from the denial of rehearing en banc); see also

Utah Highway Patrol Ass'n, 132 S. Ct. at 22–23. Denying review would exacerbate significant practical problems for local governments and veterans groups everywhere.

III. The Court Of Appeals’ Decision Threatens The Widespread Use Of The Cross By The United States Military To Recognize Valor And Memorialize Sacrifice.

The court of appeals rested its decision largely on its characterization of the cross within the Memorial as an impermissible “sectarian” or “religious” symbol that necessarily projects a message of religious endorsement. In doing so, the court of appeals rejected evidence of the U.S. military’s historical use of the cross to honor and commemorate soldiers and focused monomaniacally on the cross’ role as “the preeminent symbol of Christianity.” Pet. App. 25–26 (quoting *Buono v. Norton*, 371 F.3d 543, 544–545 (9th Cir. 2004)).² The court of appeals’ persistent blindness to the physical and historical context of the Memorial cross threatens to disrupt the U.S. military’s longstanding use of the cross to honor valor and commemorate the fallen.

A. Crosses are frequently used by the military in a way that “need not be taken as a statement of governmental support for sectarian beliefs.” *Salazar*, 130 S. Ct. at 1818 (opinion of Kennedy, J.). In the United States and around the world, the cross has been incorporated into dozens of honorific military medals. The United States military recognizes especially meritorious conduct

² See also Pet. App. 28 (“[T]he Latin cross remains an iconic Christian symbol.”); *id.* at 39–40 (“The Latin cross * * * remains a sectarian, Christian symbol.”); *id.* at 55 (noting “widespread public recognition of the Cross as a Christian symbol”).

with the Distinguished Service Cross³ and the Distinguished Flying Cross.⁴ British, Australian, and Canadian soldiers may be awarded the Military Cross⁵ and, for acts of most conspicuous bravery, the Victoria Cross.⁶ The German Bundeswehr bestows the Honor Cross for bravery.⁷ The Mexican military awards the *Cruz de Guerra*.⁸ And the French military awards the famous *Croix de Guerre*.⁹

The cross has also been widely used to memorialize soldiers who died in battle. Among the famous memorials honoring fallen soldiers of World War I is the Cross of Sacrifice, featuring a simple white Latin cross adorned with a bronze sword. The United States government embraced the use of the cross in cemeteries devoted to

³ See The Institute of Heraldry, *Distinguished Service Cross*, http://www.tioh.hqda.pentagon.mil/Awards/distinguished_srv_cross.aspx (last visited March 13, 2012).

⁴ See The Institute of Heraldry, *Distinguished Flying Cross*, http://www.tioh.hqda.pentagon.mil/Awards/dist_flying_cross.aspx (last visited March 13, 2012).

⁵ See Ministry of Defence, *Military Cross (MC)*, <http://www.mod.uk/DefenceInternet/DefenceFor/Veterans/Medals/MilitaryCrossmc.htm> (last visited March 13, 2012).

⁶ See Ministry of Defence, *Victoria Cross*, <http://www.mod.uk/DefenceInternet/DefenceFor/Veterans/Medals/VictoriaCross.htm> (last visited March 13, 2012).

⁷ See *Germany Awards Military Cross of Courage*, Spiegel Online (July 6, 2009) <http://www.spiegel.de/international/germany/0,1518,634601,00.html>.

⁸ See Secretaria de la Defensa Nacional, *Cruz de Guerra*, <http://www.sedena.gob.mx/index.php/conoce-la-sedena/antecedentes-historicos/sedena/heraldica-militar/condecoracion/condecoraciones/312-cruz-de-guerra> (last visited March 13, 2012).

⁹ See The Institute of Heraldry, *Croix de Guerre, France*, http://www.tioh.hqda.pentagon.mil/Awards/croix_de_guerre_france.aspx (last visited March 13, 2012).

World War I and World War II veterans who died in combat. Tens of thousands of crosses fill America's foreign cemeteries. The cross has likewise been used on numerous occasions as a freestanding memorial to collectively honor America's war dead. See Pet. App. 145–146 (recounting record evidence of “several crosses used in American soldiers’ memorials”). Famous examples include the Canadian Cross of Sacrifice¹⁰ and the Argonne Cross Memorial¹¹ in Arlington National Cemetery, and the massive Memorial Peace Cross¹² in Bladensburg, Maryland.

B. Used in the military context, the cross communicates messages of universal significance that are not limited to a specific religion. When incorporated into medals, the cross communicates that its wearer has performed courageous acts worthy of honor. When erected as part of a memorial to America's veterans, it serves 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*, 130 S. Ct. at 1820 (opinion of Kennedy, J.). Far from communicating a purely or even predominantly religious message, a cross used as part of a veterans memorial “evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.” *Ibid.*

¹⁰ Arlington National Cemetery, *Canadian Cross of Sacrifice (WW I/WW II/Korea)*, <http://www.arlingtoncemetery.mil/VisitorInformation/MonumentMemorials/CanadianCross.aspx> (last visited March 13, 2012).

¹¹ Argonne Cross Memorial, <http://www.arlingtoncemetery.net/argonne-cross.htm> (last visited March 13, 2012).

¹² Historical Marker Database, *Peace Cross*, <http://www.hmdb.org/marker.asp?marker=5187> (last visited March 13, 2012).

That the cross may communicate universal or even secular messages is not unusual or unexpected. In other contexts, the cross communicates messages that bear little to no religious meaning. Worn as jewelry, the cross is frequently nothing more than a hollow fashion statement. Sewn into a flag, the cross communicates any number of political and nationalistic messages.¹³ Set ablaze by members of the Ku Klux Klan, the cross communicates racial intolerance and hatred. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring) (noting that erection of a cross by the Ku Klux Klan “is a political act, not a Christian one”). A cross means different things depending on physical and historical context.

Here, as Congress found, the Memorial evokes a rich and well-accepted heritage of military honor. “It stands, like those crosses in faraway lands of Americans who fell in Tripoli, Americans who were buried at Normandy, and of Americans who have never been returned home from the sea. It stands as a symbol of their passing and their sacrifice.” 152 Cong. Rec. H5424 (daily ed. July 19, 2006) (statement of Rep. Issa).

C. The court of appeals rejected Congress’ findings that the cross incorporated within the Mt. Soledad Memorial bears some non-religious meaning or significance. Instead, the Ninth Circuit concluded that “[b]y claiming to honor all service members with a symbol that is intrinsically connected to a particular religion, the government sends an implicit message ‘to nonadherents that they are

¹³ The flag of the United Kingdom, the Union Jack, is actually a combination of three crosses: the cross of Saint George, patron saint of England; the cross saltire of Saint Andrew, patron saint of Scotland; and the cross saltire of Saint Patrick, patron saint of Ireland. The British Monarchy, *Union Jack*, <http://www.royal.gov.uk/MonarchUK/Symbols/UnionJack.aspx> (last visited March 13, 2012).

outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members.” Pet. App. 23–24 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–310 (2000)).

In effect, the Ninth Circuit concluded that the cross is *necessarily* a sectarian symbol, regardless of context or stated Congressional purpose, and that “its placement on public land * * * violates the Establishment Clause.” *Id.* at 26–27 (citation omitted) (quoting *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996)). That categorical approach is contrary to this Court’s direction in *Van Orden v. Perry* that the message conveyed by a religious symbol displayed on public grounds must be ascertained, in the first instance, from how the symbol is *used* in light of its surrounding context and history. 545 U.S. at 701 (Breyer, J., concurring). The court of appeals turned *Van Orden* on its head by looking to use and context only as factors that failed to ameliorate what the court found to be the inherently sectarian, and constitutionally toxic, message communicated by the cross within the Memorial.

D. The court of appeals’ order is an affront not only to the Legislative and Executive Branches, but also to generations of soldiers, their families, and patriotic Americans. 152 Cong. Rec. H5423–H5424 (daily ed. July 19, 2006) (joint statements of The American Legion, the Disabled American Veterans, the VFW, and AMVETS).

“Overlooking the Pacific Ocean,” the Memorial “is the first and last thing that ships see as they arrive or depart from one of the world’s largest naval installations.” *Ibid.* The Memorial stands at the location “where the 1st Marine Division embarked for those incredible fights in the island chains, taking back Guadalcanal, Iwo Jima and other islands in the Axis Powers in World War II. * * * It

is a point where many families last saw their loved ones.” 152 Cong. Rec. H5426 (daily ed. July 19, 2006) (statement of Rep. Hunter). Thus, Congress determined that the “patriotic and inspirational symbolism of the Mt. Soledad Veterans Memorial provides solace to the families and comrades of the veterans it memorializes.” 2006 Act § 1(4), 120 Stat. 770.

As with the memorial cross to World War I veterans that stands alone in the Mojave Desert, the government cannot remove the Mt. Soledad cross “without conveying disrespect for those the cross [is] honoring.” *Salazar*, 130 S. Ct. at 1817 (opinion of Kennedy, J.). Tearing down the Memorial cross will be “viewed by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor.” *Id.* at 1822–1823 (Alito, J., concurring); see *Van Orden*, 545 U.S. at 704.

In these circumstances, the decision below should not be allowed to stand without plenary review.

CONCLUSION

The petition should be granted.

Respectfully submitted.

VAN H. BECKWITH
CHAD M. PINSON
RYAN L. BANGERT
BAKER BOTTS L.L.P.
2001 Ross Avenue, Ste. 600
Dallas, Texas 75201
(214) 953-6500

AARON M. STREETT
Counsel of Record
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
(713) 229-1855
aaron.streett@bakerbotts.com

JULIE MARIE BLAKE
BAKER BOTTS L.L.P.
1299 PENN. AVE., N.W.
WASHINGTON, D.C. 20004
(202) 639-7700

*Counsel for Amici Curiae The American Legion,
Veterans of Foreign Wars of The United States, and
Military Order of The Purple Heart, Inc.*

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