

No. 13-1061

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**In the Supreme Court of the United States**

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MOUNT SOLEDAD MEMORIAL ASSOCIATION,  
PETITIONER

*v.*

STEVE TRUNK, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether the Mount Soledad Veterans Memorial in San Diego, California, which features a memorial cross amid many other secular and religious symbols of patriotism, sacrifice, and remembrance, violates the Establishment Clause.

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### OPINIONS BELOW

The opinion of the district court (Pet. App. 1-6) entering judgment in favor of plaintiffs-respondents Steve Trunk, et al., and specifying a remedy is unreported. The opinion of the court of appeals denying en banc review (Pet. App. 10-38) is reported at 660 F.3d 1091. The panel opinion of the court of appeals (Pet. App. 39-102) is reported at 629 F.3d 1099. The initial memorandum decision and order of the district court (Pet. App. 103-161) is reported at 568 F. Supp. 2d 1199.

### JURISDICTION

The judgment of the district court in favor of plaintiffs-respondents Steve Trunk, et al., was entered on December 12, 2013. Defendant-petitioner Mount

Soledad Memorial Association filed a notice of appeal on December 18, 2013. Defendants-respondents United States of America, et al., filed a separate notice of appeal on February 7, 2014. The court of appeals consolidated the respective appeals on March 20, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

#### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The First Amendment to the United States Constitution provides in pertinent part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Relevant statutory provisions are reproduced in the appendix to this brief in opposition. App., *infra*, 1a-6a.

#### **STATEMENT**

1. a. This case concerns the Mount Soledad Veterans Memorial (Memorial) in San Diego, California. Mount Soledad is an 822-foot-high hill located in the La Jolla community of San Diego, situated between the Pacific Ocean to the west and Interstate 5 to the east. Private citizens first erected a redwood cross on that land in 1913, but the current concrete cross was erected in 1954 by the Mount Soledad Memorial Association (Association) and dedicated by the town council to the memory of veterans of World War I, World War II, and the Korean War. The cross is 29 feet tall and sits on a 14-foot base. It is surrounded by six concentric walls now displaying more than 2000 granite plaques that commemorate individual veterans or veterans’ groups. Pet. App. 45. The walkways between the walls are paved with commemorative bricks, and the site is flanked by a tall flagpole and encircled

by 23 bollards that honor community and veterans' associations. *Ibid.*

The cross atop Mount Soledad stood unchallenged until 1989, when plaintiffs brought suit against the City of San Diego (City), which at the time owned the land on which the Memorial sits. The federal district court ruled that the Memorial violated the California Constitution and enjoined display of the cross. *Murphy v. Bilbray*, 782 F. Supp. 1420 (S.D. Cal. 1991). The Ninth Circuit, which at the time construed the Establishment Clause analogue in the California Constitution as “more separationist” than its federal counterpart, affirmed. *Ellis v. City of La Mesa*, 990 F.2d 1518, 1528 (1993), cert. denied, 512 U.S. 1220, and 513 U.S. 925 (1994).<sup>1</sup> In response to that litigation, the City twice attempted to sell the property, but those sales were likewise enjoined by federal courts on state constitutional grounds. See *Murphy v. Bilbray*, No. 90-134, 1997 WL 754604, at \*9-\*11 (S.D. Cal. Sept. 18, 1997); *Paulson v. City of San Diego*, 294 F.3d 1124, 1132 (9th Cir. 2002) (en banc), cert. denied, 538 U.S. 978 (2003).

b. In December 2004, Congress designated the Memorial as a national memorial to veterans. Specifically, Congress provided that “[t]he Mt. Soledad Veterans Memorial \* \* \* , which consists of a 29 foot-tall cross and surrounding granite memorial walls containing plaques engraved with the names and photographs of veterans of the United States Armed Forc-

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<sup>1</sup> The California Supreme Court has subsequently held that the “protection against the establishment of religion embedded in the California Constitution” does not create “broader protections than those of the First Amendment.” *East Bay Asian Local Dev. Corp. v. California*, 13 P.3d 1122, 1138 (2000).



es, is hereby designated as a national memorial honoring veterans of the United States Armed Forces.” Consolidated Appropriations Act, 2005 (2004 Act), Pub. L. No. 108-447, § 116(a), 118 Stat. 3346 (16 U.S.C. 431 note). Congress also directed the Secretary of the Interior, if the City donated the property to the United States, to administer the Memorial as a unit of the National Park System and to enter into a memorandum of understanding with the Association for the continued maintenance of the Memorial. See § 116(b) and (c), 118 Stat. 3346.

In May 2005, the City’s voters successfully petitioned to place the question of whether to donate the property to the United States on a special election ballot. See *Paulson v. Abdelnour*, 51 Cal. Rptr. 3d 575, 583 (Cal. Ct. App. 2006). In July 2005, 76% of voters—almost 200,000 of the City’s voters—approved the donation. See *id.* at 585. A state trial court, however, enjoined the transfer. *Ibid.* While the City’s appeal from that injunction was pending in state court, the federal district court ordered the City to remove the cross within 90 days or pay a fine of \$5000 per day. See *Paulson v. City of San Diego*, No. 89-0820, 2006 WL 3656149, at \*2 (S.D. Cal. May 3, 2006). The court of appeals denied a stay pending appeal, but Justice Kennedy granted a stay. See *San Diegans for the Mt. Soledad Nat’l War Mem’l v. Paulson*, 548 U.S. 1301, 1304 (2006).

c. In August 2006, while those state and federal appeals were pending, Congress exercised its power of eminent domain and took title to the Memorial. Congress stated that it was acting “[t]o preserve the Mt. Soledad Veterans Memorial in San Diego, California,” and it made a series of findings about the

Memorial. Act of Aug. 14, 2006 (2006 Act), Pub. L. No. 109-272, 120 Stat. 770 (16 U.S.C. 431 note). Among other things, Congress found that the Memorial had stood “for over 52 years 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 in 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 the American veterans of all wars, including the War on Terrorism.” § 1(2), 120 Stat. 770. Congress further found that “[t]he 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 recognized that the 2004 Act—in order “to preserve a historically significant war memorial”—had “designated the Mt. Soledad Veterans Memorial in San Diego, California, as a national memorial honoring veterans of the United States Armed Forces.” 2006 Act § 2(a), 120 Stat. 770-771. “To effectuate the purpose” of that earlier enactment, Congress took title to the Memorial. *Ibid.*; see § 1(7), 120 Stat. 770 (“The City of San Diego has diligently pursued every possible legal recourse in order to preserve the Mt. Soledad Veterans Memorial in its entirety for persons who have served in the Armed Forces and those persons who will serve and sacrifice in the future.”). Congress directed the Secretary of Defense to “manage the property” and “enter into a memorandum of

understanding with the Mt. Soledad Memorial Association for the continued maintenance of the Mt. Soledad Veterans Memorial by the Association.” § 2(c), 120 Stat. 771.

2. In August 2006, plaintiffs Steve Trunk, Richard Smith, Mina Sagheb, Judith Copeland, and the Jewish War Veterans of the United States of America, Inc. filed two separate suits against the City, the United States, and the Secretary of Defense.<sup>2</sup> Those suits were consolidated by the district court into the present action. Plaintiffs argued, *inter alia*, that the display of the cross on public property violates the Establishment Clause. See, *e.g.*, 3:06-cv-1597 Docket entry No. 1, at 4-5 (S.D. Cal. Aug. 9, 2006) (“The acts of the Defendants violate \* \* \* the Establishment Clause of the U.S. Constitution \* \* \* by attempting to keep a sectarian symbol on public property and by transferring the symbol and the land under it to the federal government.”).

In July 2008, the district court granted the government’s motion for summary judgment. Pet. App. 103-161. Noting the “puzzle” of which legal test to apply in resolving the Establishment Clause challenge, the court applied the tests set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Van Orden v. Perry*, 545 U.S. 677 (2005). Pet. App. 114-116. With respect to *Lemon*’s three-part test, the court held that Congress had acted “with the clear-cut and bona fide secular purpose to preserve the site as a veterans’ memorial,” *id.* at 129; that the Mount Soledad cross “has a broadly-understood ancillary meaning as a symbol of military service, sacrifice, and death” and

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<sup>2</sup> The district court subsequently dismissed the City as a party. See 3:06-cv-1597 Docket entry No. 216 (S.D. Cal. Nov. 7, 2007).

“is displayed along with numerous purely secular symbols in an overall context that reinforces its secular message,” *id.* at 144; and that ownership of the Memorial does not excessively entangle the government with religion, *id.* at 144-145.

Turning to the *Van Orden* analysis, the district court held that both “the context of the memorial display itself” and “the memorial’s overall historical context” were secular in nature. 545 U.S. at 147. In the court’s view, an objective observer who “surveyed the plaque-lined dedication walls, passed the military bollards, walked on the inscribed paving stones, looked up at the large American flag, and read the inscription at the base of the cross declaring the display to be a veterans’ memorial,” would “readily perceive the purpose of the memorial was to honor veterans.” Pet. App. 147-148. The court noted that an objective observer would also be aware of “the numerous \* \* \* federal military enclaves in San Diego” and “San Diego’s historical relationship with the military.” *Id.* at 148. The court further observed that the current cross had not been challenged for 35 years (from 1954 to 1989), see *id.* at 151; the Memorial is located away from government buildings and facilities, see *id.* at 155; and the government’s involvement with the Memorial postdated, and was detached from, any religious affiliation, see *id.* at 158.

3. The court of appeals reversed. Pet. App. 39-102. The court did not resolve “the issue of whether *Lemon* or *Van Orden*” controlled its analysis, because it viewed both cases as requiring “a factually specific analysis of the Memorial’s history and setting” that leads to “the same result.” *Id.* at 56. Under that analysis, the court held that, although Congress had

acted with a “predominantly secular” purpose in acquiring the Memorial, see *id.* at 56-61, the primary effect of the Memorial is “predominantly religious,” *id.* at 63, because the cross at its center “does not possess an ancillary meaning as a secular or non-sectarian war memorial.” *Id.* at 77.

The court of appeals acknowledged that Justice Kennedy, writing for a plurality of this Court in *Salazar v. Buono*, 559 U.S. 700 (2010), had treated the cross at issue in that case as possessing a secular meaning. Pet. App. 78 n.18; see 559 U.S. at 721 (“[A] Latin cross is not merely a reaffirmation of Christian beliefs. \* \* \* [O]ne Latin cross in the desert evokes far more than religion. It 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.”). The court distinguished this case from *Buono*, however, by treating the abstract meaning of the Latin cross as a question of fact to be determined on the record of each challenge to a cross-bearing monument. It then held that “the record before us does not establish that Latin crosses have a well-established secular meaning as universal symbols of memorialization and remembrance.” Pet. App. 78 n.18. The court went on to declare that “[o]n the record in this appeal, the ‘thousands of small crosses’ in foreign battlefields serve as individual memorials to the lives of the Christian soldiers whose graves they mark, not as generic symbols of death and sacrifice.” *Ibid.* (quoting *Buono*, 559 U.S. at 721).

Applying the “endorsement test,” the court of appeals held that the effect of the Memorial was to “send[] a message of exclusion,” Pet. App. 90, and to

“project[] a government endorsement of Christianity.” *Id.* at 81. The court held that a reasonable observer of the Memorial would perceive a religious message because the cross is taller than the secular elements of the Memorial and the secular elements were added later. *Id.* at 83-84, 93. It further asserted that a reasonable observer would conclude that the past use of the site for religious ceremonies was significant, while the exclusively secular use of the site since the federal government took ownership was not. *Id.* at 92-93. According to the court, the “starkly religious message” of some private parties opposed to the removal of the cross “would not escape the notice of the reasonable observer,” *id.* at 87, and it dismissed as a “red herring” the district court’s conclusion that it is “neither logical nor proper” to determine the content of the government’s message from the words of private citizens. *Id.* at 85-86 n.19. The court further held that because “[u]ntil the late 1950s, Jews were effectively barred from living in La Jolla by a combination of formal and informal housing restrictions,” the reasonable observer would discern a “message of exclusion” in the federal government’s 2006 acquisition and ownership of the Memorial. *Id.* at 90. The court remanded with instructions to enter summary judgment for plaintiffs. *Id.* at 100.

4. The court of appeals denied rehearing en banc, over the dissent of five judges. Pet. App. 10-38. Judge Bea (joined by Judges O’Scannlain, Tallman, Callahan, and Ikuta) concluded that en banc review was appropriate because “[t]he panel applied the wrong test.” *Id.* at 15 (emphasis omitted). Under the correct test, which looks to the use, context, and history of the challenged display, the dissent reasoned that

“[t]he Government’s use of the Mt. Soledad Memorial and the context in which the Cross appears are both secular.” *Id.* at 18 (emphasis omitted). In addition, the dissent observed, the recent history of the Memorial—since the federal government assumed ownership—demonstrates that “the federal government has used this land *only* as a memorial to our fallen soldiers and veterans.” *Id.* at 24-25.

5. The United States and the Association both petitioned for certiorari. This Court denied both petitions on June 25, 2012, in an order accompanied by a statement from Justice Alito. The statement noted that the “Court’s Establishment Clause jurisprudence is undoubtedly in need of clarity” and that “the constitutionality of the Mount Soledad Veterans Memorial is a question of substantial importance.” *Mount Soledad Mem’l Ass’n v. Trunk*, 132 S. Ct. 2535, 2535 (2012). Justice Alito also observed, however, that “no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take,” stating that he therefore agreed with the Court’s decision to deny the petitions for certiorari at that time. *Id.* at 2536.

6. The case was remanded to the district court. The court noted that it had “previously held (and continues to believe) that permitting a historic, now 59 year-old cross to remain as part of a federal war memorial atop Mount Soledad cannot be reasonably viewed as our government’s attempt to establish or promote religion.” Pet. App. 2. Recognizing that “a panel of the Ninth Circuit Court of Appeals has ruled otherwise,” *ibid.*, the district court proceeded to fashion a remedy as directed. The court observed that although the Ninth Circuit did not explicitly order the

removal of the cross, “deliberate language in the opinion makes it clear that removal of the large, historic cross is the only remedy that the Ninth Circuit conceives will cure the constitutional violation.” *Id.* at 2-3. Noting that it is “required to follow the Ninth Circuit’s edicts, however indirectly worded they may be,” *id.* at 3, the court ordered that the cross be removed within 90 days of its order. *Id.* at 6. The court also stayed that order pending the resolution of any appeals. *Ibid.*

The United States and the Association each filed separate appeals. *Trunk v. Mount Soledad Mem’l Ass’n*, No. 13-57126 (9th Cir. Dec. 18, 2013); *Trunk v. City of San Diego*, No. 14-55231 (9th Cir. Feb. 11, 2014).<sup>3</sup> On March 4, 2014, the Association filed a petition for certiorari before judgment.

#### ARGUMENT

The United States agrees with petitioner that the court of appeals’ 2011 decision holding that the cross at the Mount Soledad Veterans Memorial violates the Establishment Clause is wrong and should not be permitted to stand. That decision effectively invalidates an Act of Congress; it conflicts with recent decisions of this Court; and it adds to the lower courts’ confusion over how to apply the Establishment Clause to public displays. In addition, by requiring the federal government to tear down a 60-year-old war memorial, the decision below unnecessarily fosters the very divisiveness that the Establishment and Free Exercise Clauses are intended to prevent.

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<sup>3</sup> On March 20, 2014, the court of appeals consolidated the respective appeals. 13-57126 Docket entry No. 8 (9th Cir. Mar. 20, 2014).



The government disagrees with petitioner, however, on the procedural question of whether the final judgment implementing the court of appeals' 2011 decision meets the standard for issuing a writ of certiorari before judgment. See Sup. Ct. R. 11. Because the district court issued a stay allowing the cross to remain in place pending an appeal of its final judgment, we do not believe that standard is met. So long as the stay remains in place, this case can proceed along the usual procedural course without causing immediate harm to the public interest.

To be clear, however, the United States continues to believe that this case raises an issue of great public importance. If the final judgment requiring the cross to be torn down is affirmed on appeal, the government expects to petition this Court for certiorari. And if the Court exercises its discretion and grants a writ of certiorari before judgment, the government will urge the Court to overturn the decisions below.

**A. This Case Does Not Meet The Standard For A Writ Of Certiorari Before Judgment**

Rule 11 of the Rules of this Court provides that a petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. The constitutionality of the Mount Soledad Veterans Memorial is unquestionably an issue of great public importance. Moreover, the court of appeals has already ruled that the continued presence of the cross in the Memorial violates the Establishment Clause, and it has denied en banc rehearing of that ruling despite a strong dissent by five judges.

Because the district court has stayed its order to remove the cross pending appeal, however, this is not one of the rare cases that requires immediate determination by this Court. Sup. Ct. R. 11. The Memorial will remain in place as the appellate process runs its course, and awaiting a decision of the Ninth Circuit will cause few collateral consequences. Although the Ninth Circuit has previously refused to take this case en banc, it is possible that the district court's entry of final judgment or the additional time for reflection may result in a different outcome this time around.<sup>4</sup> At the very least, the Ninth Circuit should have an opportunity in the first instance to consider the issue now that a final judgment requiring removal of the cross is in place. In short, although granting the writ of certiorari before judgment would bring an earlier end to the continued uncertainty over the fate of this historically significant national memorial, we do not believe that the public interest in the swifter resolution of these issues rises to the exceptional level ordinarily required to justify deviation from normal appellate practice.

As noted, however, the United States remains fully committed to preserving the Mount Soledad cross as an appropriate memorial to our Nation's veterans. We will urge the court of appeals to overturn its 2011

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<sup>4</sup> In the proceedings below, the United States urged the district court to adopt a remedy for the Establishment Clause violation identified in the court of appeals' 2011 decision that would nonetheless allow the cross to remain standing. The court rejected that position. Pet. App. 3-4. The United States does not intend to continue pressing this argument in the court of appeals. Rather, the government will move that court for initial hearing en banc and urge it to overturn its 2011 decision and conclude that display of the cross does not violate the Establishment Clause.

ruling, and, if that effort proves unsuccessful, we would expect again to seek a writ of certiorari from this Court at that time.

**B. The Court Of Appeals Effectively Invalidated An Act Of Congress**

1. For decades, the cross on Mount Soledad memorialized the Nation's fallen soldiers without challenge. Between 1991 and 2002, however, federal courts repeatedly enjoined on state constitutional grounds not only the City's display of the Mount Soledad cross but also its attempts to sell the property to private parties. See p. 3, *supra*. In response, in 2004, Congress designated the site as a national memorial to veterans. Specifically, Congress provided that "[t]he Mt. Soledad Veterans Memorial \* \* \* , which consists of a 29 foot-tall cross and surrounding granite memorial walls containing plaques engraved with the names and photographs of veterans of the United States Armed Forces, is hereby designated as a national memorial honoring veterans of the United States Armed Forces." 2004 Act § 116(a), 118 Stat. 3346. Congress directed the Secretary of the Interior, if the City donated the property to the United States, to administer the Memorial as a unit of the National Park System. See § 116(b) and (c), 118 Stat. 3346.

In 2005, the vast majority of the City's voters approved donating the Memorial to the United States, but a state trial court blocked the transfer.<sup>5</sup> While the appeal of that order was pending, the federal district court ordered the City to remove the cross within 90 days or face fines of \$5000 per day. Shortly thereaf-

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<sup>5</sup> The state court order was ultimately reversed. *Paulson v. Abdelnour*, 51 Cal. Rptr. 3d 575 (2006).

ter, Congress exercised its power of eminent domain over the Memorial. Congress recognized that, “in order to preserve a historically significant war memorial,” the 2004 Act had “designated the Mt. Soledad Veterans Memorial \* \* \* as a national memorial honoring veterans of the United States Armed Forces.” 2006 Act § 2(a), 120 Stat. 770-771. “To effectuate the purpose” of that earlier enactment in the face of judicial decisions that threatened the Memorial’s continued existence, Congress took title to the Memorial. *Ibid.*; see § 1(7), 120 Stat. 770 (“The City of San Diego has diligently pursued every possible legal recourse in order to preserve the Mt. Soledad Veterans Memorial in its entirety for persons who have served in the Armed Forces and those persons who will serve and sacrifice in the future.”).

In the 2006 Act, Congress made several important findings. Congress found that the Memorial was dedicated in 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 the American veterans of all wars, including the War on Terrorism.” § 1(2), 120 Stat. 770. Congress found that, since the time of its dedication, the Memorial had stood “for over 52 years 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 further found that “[t]he 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.

2. The court of appeals’ decision effectively declares that the 2006 Act is unconstitutional. By taking title to the site at Mount Soledad in the 2006 Act, Congress expressly acted “[t]o preserve the Mt. Soledad Veterans Memorial,” including the “memorial cross” that forms the “centerpiece” of the Memorial. § 1(3), 120 Stat. 770. The decision below does not expressly declare the 2006 Act unconstitutional, but that is its undeniable effect. In holding that “the Memorial, presently configured and as a whole,” violates the Establishment Clause, Pet. App. 100, the court of appeals has held that the Constitution precludes Congress from realizing the basic object of the 2006 Act, *i.e.*, preserving the Memorial as it currently stands. The judgment below compels precisely what Congress sought to avoid: the removal of a historic and commemorative cross that is fully integrated into “the multi-faceted Mt. Soledad Veterans Memorial.” § 1(3), 120 Stat. 770.

The 2006 Act that the court of appeals effectively invalidated reflects Congress’s considered judgment about how to balance competing interests in a particularly sensitive context. See *Buono*, 559 U.S. at 717 (opinion of Kennedy, J.) (discussing “Congress’s prerogative to balance opposing interests and its institutional competence to do so”). The federal government did not erect the cross at Mount Soledad. Rather, the current cross was erected in 1954 by the Association and dedicated by the town council to the memory of veterans of World War I, World War II, and the Korean War. Pet. App. 84. When faced with decisions holding that the presence of the cross on the City’s

land violated the California Constitution, Congress could have by inaction allowed the cross to be removed, but that could have been viewed as demonstrating hostility toward religion and dishonoring the memory of service members who have long been memorialized on Mount Soledad. Congress chose instead to preserve the Memorial in its longstanding, historic form as a sign of respect for veterans and their sacrifices. The Ninth Circuit’s 2011 decision negates Congress’s action. That consequence alone would warrant the grant of certiorari if the court of appeals fails to reverse the judgment.

**C. The Decision Below Cannot Be Squared With This Court’s Precedents**

As the dissenting judges below recognized, the court of appeals’ approach cannot be reconciled with this Court’s recent decisions addressing Establishment Clause challenges to passive displays on public lands. See Pet. App. 15 (observing that the court “applied the wrong test”) (emphasis omitted). A faithful application of those decisions would compel the conclusion that the longstanding presence of a memorial cross as the centerpiece of the Memorial does not run afoul of the Establishment Clause.

1. The court of appeals purported to draw its constitutional test from both *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and Justice Breyer’s concurring opinion in *Van Orden v. Perry*, 545 U.S. 677, 698 (2005). See Pet. App. 51-56. Throughout its opinion, however, the court repeatedly framed the question before it as whether the cross at the Memorial amounts to an endorsement of Christianity for purposes of applying the effects prong of this Court’s decision in *Lemon*. See, e.g., *id.* at 61 (“The question is, under the effects

prong of *Lemon*, 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.”) (internal quotation marks omitted); *id.* at 81 (“The question, then, is whether the entirety of the Mount Soledad Memorial, when understood against the background of its particular history and setting, projects a government endorsement of Christianity.”)

The court of appeals’ approach is inconsistent with *Van Orden*. There, a majority of the Court expressly declined to apply the *Lemon* framework—including the endorsement test under *Lemon*’s effects prong—in examining the passive display of a religious article (there, the Ten Commandments) on public grounds. See *Van Orden*, 545 U.S. at 686 (opinion of Rehnquist, C.J., joined by Scalia, J., Kennedy, J., and Thomas, J.) (“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 the sort of passive monument that Texas has erected on its Capitol grounds.”); *id.* at 700 (Breyer, J., concurring in the judgment) (citing *Lemon* test and endorsement test but explaining that there is “no test-related substitute for the exercise of legal judgment” and that “no exact formula can dictate a resolution to such fact-intensive cases”). Instead, the plurality and concurrence in *Van Orden* focused on factors such as the government’s *use* of the religious symbol at issue, its physical *setting* in the particular display at issue, and the *length of time* that the monument has stood at the site without legal challenge. See *id.* at 688-691 (opinion of Rehnquist, C.J.); *id.* at 701-702 (Breyer, J., concurring in the judgment). Considering those factors, the

Court upheld the Ten Commandments display against an Establishment Clause challenge. As the district court below correctly explained, see Pet. App. 145-155, applying the same factors here should lead to the conclusion that the memorial cross on Mount Soledad is likewise consistent with the Establishment Clause.

2. a. The flaws in the court of appeals' approach under *Van Orden* are particularly apparent when considered in light of the plurality opinion in *Buono*. That case, like this one, involved a historic war memorial that includes a Latin cross. *Buono* concerned the constitutionality of transferring such a memorial to a private party, but the factors that the plurality considered in its constitutional analysis—*i.e.*, the cross was erected to commemorate veterans, the public associated that secular message with the cross over time, and ultimately Congress designated the memorial to recognize that secular message—apply equally here. See 559 U.S. at 714-717 (opinion of Kennedy, J.). In addition, the congressional transfer at issue in *Buono* was necessary because lower courts had previously enjoined the memorial's display, and the plurality questioned that injunction for reasons directly relevant to this case. See *id.* at 718-721. Despite those parallels, the court of appeals confined its discussion of this Court's decision in *Buono* to a single footnote. See Pet. App. 78 n.18.

The plurality in *Buono*—comprising the only justices in the majority to address the merits—explained that a Latin cross, although “certainly a Christian symbol,” may be used in ways other than “to promote a Christian message.” 559 U.S. at 715 (opinion of Kennedy, J.). Specifically in *Buono*, a cross had been erected by veterans in a remote desert location (Sun-



rise Rock), and the plurality concluded that the cross had been “intended simply to honor our Nation’s fallen soldiers.” *Ibid.* In addition, the cross had stood at that location for decades without controversy, during which time “the cross and the cause it commemorated had become entwined in the public consciousness.” *Id.* at 716. The plurality thus deemed it “reasonable to interpret the congressional designation as giving recognition to the historical meaning that the cross had attained.” *Ibid.*

The court of appeals should have applied the same reasoning here. The Mount Soledad cross was erected by the Association in 1954 and dedicated by the town council to the memory of veterans of World War I, World War II, and the Korean War. The cross then stood without legal challenge for 35 years—very close to the 40 years that Justice Breyer found “determinative” in *Van Orden*. Pet. App. 41-42; *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in the judgment). By the time that Congress designated the Memorial in the 2004 Act, the cross had thus attained a historical meaning that Congress sought to recognize. And when Congress took title to the property in the 2006 Act, the court of appeals accepted that Congress did so for a predominantly secular purpose: “to preserve a historically significant war memorial” as a testament to the sacrifices of veterans. Pet. App. 58 (quoting 2006 Act § 2(a), 120 Stat. 770). Indeed, Congress denominated the cross a “memorial cross.” § 1(3), 120 Stat. 770. As it stands now, the memorial cross is surrounded by thousands of commemorative plaques, paving bricks, and bollards—all of which reinforce the message of remembering veterans. The current cross

is integrated into an entire memorial that promotes a secular message.

Of particular significance here, the *Buono* plurality faulted the district court’s analysis in that case for “concentrat[ing] solely on the religious aspects of the cross, divorced from its background and context.” 559 U.S. at 721. According to the plurality,

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. Here, one Latin cross in the desert evokes far more than religion. It 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.* The *Buono* plurality thus was clear that the Latin cross has an ancillary meaning as a secular symbol memorializing fallen soldiers. See *id.* at 725 (Alito, J., concurring in part and concurring in the judgment) (noting that visitors to Sunrise Rock viewed the cross “as conveying at least two significantly different messages,” one of which is secular in that the cross “no doubt evoke[s] the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell” in World War I).

b. In a footnote, the court of appeals attempted to distinguish the *Buono* plurality opinion on several grounds, none of which withstands scrutiny. See Pet. App. 78 n.18. First, the court stated that the record in this case “does not establish that Latin crosses have a well-established secular meaning as universal symbols

of memorialization and remembrance.” *Id.* at 78 n.18; see *id.* at 76-77 (reasoning that, “on the basis of the evidence” in this case, “the Latin cross does not possess an ancillary meaning as a secular or non-sectarian war memorial”). The *Buono* plurality did not treat the meaning of a Latin cross situated in a war memorial as a question of fact, but even if it were, the plurality opinion resolved that question by finding that the Latin cross can be a secular symbol of remembrance in the context of a war memorial. See 559 U.S. at 721 (“[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.”).

Even assuming the question is both factual in nature and left open by *Buono*, the government presented expert testimony below that the Latin cross has a well-recognized ancillary meaning as a secular symbol of remembrance. See Pet. App. 136-141. The court of appeals was required to construe that evidence in the light most favorable to the government before it granted summary judgment to plaintiffs. See *id.* at 68 n.12. As the dissenting judges pointed out, see *id.* at 28-36, the court did not do that. Instead, the court explained at length why, in its view, the government’s evidence did not demonstrate that the Latin cross serves as a secular symbol at many war memorials. See *id.* at 68-78 & n.17. And the court did so in the face of an express congressional finding that “[t]he 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.” 2006 Act § 1(3), 120 Stat. 770.

The court of appeals then reasoned that “[e]ven assuming that a Latin cross can convey a more secular message, \* \* \* [a]s we discuss below, the background and context of the Mount Soledad Cross projects a strongly sectarian message that overwhelms any undocumented association with foreign battlefields or other secular meanings.” Pet. App. 78 n.18. But in its ensuing discussion, the court never appeared to assume that a Latin cross can convey a secular message, depending on its context. To the contrary, the court appeared to assume throughout its discussion that the inclusion of a cross within the Memorial necessarily promotes an inherently religious and sectarian message. *Id.* at 79-100; see *id.* at 77-78 (“The Latin cross can, as in Flanders fields, serve as a powerful symbol of death and memorialization, but it remains a sectarian, Christian symbol.”). The court then proceeded to examine whether the Memorial’s physical setting and history somehow *overcome* that sectarian message, such that a reasonable observer, looking at the Memorial as a whole, would not perceive a governmental endorsement of Christianity. *Id.* at 79-100.

In other words, the court of appeals incorrectly analyzed whether the context of the Mount Soledad cross overwhelms its ascribed sectarian message, not whether that context indicates a nonsectarian message in the first instance. See, *e.g.*, Pet. App. 97 (“In addition to overshadowing the Memorial’s secular elements, the Cross’s central position within the Memorial gives it a symbolic value that intensifies the Memorial’s sectarian message.”); *ibid.* (“The particu-

lar history of this Cross only deepens its religious meaning.”); *id.* at 98 (“The use of such a distinctively Christian symbol to honor all veterans sends a strong message of endorsement and exclusion.”). That reasoning is simply not consistent with the *Buono* plurality opinion, which says that the Latin cross *can* have an ancillary meaning as a secular symbol when placed in the context of a war memorial.

For instance, the court of appeals attempted to distinguish other crosses in war memorials, such as those at the Arlington National Cemetery and the Gettysburg National Military Park, on the ground that they are “non-dominant features of a much larger landscape providing a ‘context of history’ and memory that overwhelms the sectarian nature of the crosses themselves.” Pet. App. 74 (quoting *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in the judgment)). But in *Van Orden*, neither the plurality nor Justice Breyer found the Ten Commandments permissible as a religious display embedded in a secular context. Rather, they found the display permissible because its secular context indicated that it was not being used to send a religious message. See 545 U.S. at 690 (opinion of Rehnquist, C.J.); *id.* at 701 (Breyer, J., concurring in the judgment) (“The circumstances surrounding the display’s placement on the capitol grounds and its physical setting suggest that the State itself intended the \* \* \* nonreligious aspects of the tablets’ message to predominate.”). The court of appeals’ entire analysis was underpinned—and undermined—by its erroneous view that the Mount Soledad cross could serve only as a religious symbol.

3. The court of appeals’ holding that the government has endorsed Christianity in acting to preserve

the Memorial is inconsistent with Congress's findings in the 2006 Act. Among other things, Congress found that the Memorial was dedicated in 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 the American veterans of all wars, including the War on Terrorism." 2006 Act § 1(2), 120 Stat. 770. As a result, Congress recognized, the Memorial had stood "for over 52 years 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 further found that "[t]he 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 observed that "[t]he 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.

Those findings confirm that Congress understood the Memorial, including the cross, to bear a secular message of memorialization and remembrance. See *Buono*, 559 U.S. at 716 (opinion of Kennedy, J.) ("It is reasonable to interpret the congressional designation as giving recognition to the historical meaning that the cross had attained."). The court of appeals acknowledged the legislative findings when examining whether Congress had acted with a secular purpose in acquiring the Memorial, but the court ignored the congressional findings in assessing whether the cross

projects a message of endorsement. See Pet. App. 56-100. That was error. As the dissenting judges pointed out, the court should have “grant[ed] some deference to the reflection of the popular understanding of the symbol, as established by Congress.” *Id.* at 35. Congress is better situated than the court of appeals to determine what message the Memorial as a whole, including the cross, conveys to the public. Cf. *Buono*, 559 U.S. at 717 (opinion of Kennedy, J.) (“Congress’s prerogative to balance opposing interests and its institutional competence to do so provide one of the principal reasons for deference to its policy determinations.”).

Instead of focusing on what Congress intended to accomplish by designating and then preserving the Memorial, the court of appeals focused on the actions of *nongovernmental* parties. Some of those third-party actions occurred long before the government had any involvement with the Memorial, see Pet. App. 82-93, and, as the dissenting judges correctly observed, “[w]hat happened while the land was privately held hardly seems relevant to the issue whether the government acted to establish religion.” *Id.* at 24. Nor do more recent third-party actions demonstrate that the government has had any impermissible involvement with the Memorial. For instance, some private parties protested the removal of the cross for religious reasons, *id.* at 86, but it does not follow that Congress acted to preserve the cross for the same reasons. In fact, the court of appeals elsewhere accepted that Congress sought to prevent offense to veterans and those who visit Mount Soledad to honor veterans’ sacrifices. See *id.* at 57-60; see also 2006 Act § 1(4), 120 Stat. 770. The district court correctly rec-

ognized that what matters for purposes of the Establishment Clause is the conduct of the government, and the government's acquisition and management of the Memorial have been secular in nature. See Pet. App. 118-129.

4. The decision below, if permitted to stand, calls for the government to tear down a memorial cross that has stood for 60 years as a tribute to fallen service members. Nothing in the Establishment Clause compels that result, because the Establishment Clause “does not require eradication of all religious symbols in the public realm.” *Buono*, 559 U.S. at 718 (opinion of Kennedy, J.). If the government is required to remove the cross from the Memorial, that will understandably be viewed “by many as a sign of disrespect for the brave soldiers whom the cross was meant to honor.” *Id.* at 726 (Alito, J., concurring in part and concurring in the judgment). And that message in turn will only “create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.” *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment). The decision below “exhibit[s] a hostility toward religion that has no place in our Establishment Clause traditions,” *ibid.*, and it should be overturned.

**D. The Courts Of Appeals Are Divided On The Correct Interpretation Of This Court's Recent Cases Involving Passive Monuments**

Since this Court's decisions in *Van Orden* and *McCreary County v. ACLU*, 545 U.S. 844 (2005), the courts of appeals have expressed confusion about the correct test to apply in cases involving public displays challenged on Establishment Clause grounds. See, e.g., *ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 (6th



Cir. 2005) (“[W]e remain in Establishment Clause purgatory.”); *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (“Confounded by the ten individual opinions in [*Van Orden* and *McCreary*] \* \* \* , courts have described the current state of the law as both ‘Establishment Clause purgatory’ and ‘Limbo.’”). See also *Mount Soledad Mem’l Ass’n v. Trunk*, 132 S. Ct. 2535, 2535 (2012) (Alito, J., statement with respect to denial of certiorari) (noting that the Court’s “Establishment Clause jurisprudence is undoubtedly in need of clarity”); *Utah Highway Patrol Ass’n v. American Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of certiorari) (“our jurisprudence has confounded the lower courts and rendered the constitutionality of displays of religious imagery on government property anyone’s guess.”)

In the absence of clear guidance from this Court, the courts of appeals have applied different standards and arrived at “wildly divergent outcomes.” *Utah Highway Patrol Ass’n*, 132 S. Ct. at 19 (Thomas, J., dissenting from denial of certiorari). For example, the Tenth Circuit struck down the display of a Ten Commandments monument on the lawn of a county courthouse, noting that “[w]e are obliged here to apply the *Lemon* test, with Justice O’Connor’s endorsement patina,” *Green v. Haskell Cnty. Bd. of Comm’rs*, 568 F.3d 784, 797 (2009), while the Ninth Circuit upheld the display of a Ten Commandments monument on the lawn of a city hall, holding that under *Van Orden*, “we do not use the *Lemon* test to determine the constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a non-religious context.” *Card*, 520 F.3d at 1016. The Eighth Circuit, sitting en banc, held that “[t]he Su-

preme Court’s decision in *Van Orden* governs our resolution” of a challenge to a passive display with religious content, *ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772, 776 (2005), while the Second Circuit held that *Lemon* continues to apply to passive displays, despite *Van Orden*, because this Court has “never specifically disavowed *Lemon*’s analytic framework.” *Skoros v. City of New York*, 437 F.3d 1, 17 n.13 (2006).

Although the Mount Soledad cross should be upheld under any of those approaches, the proceedings below illustrate that the choice of approach can affect the constitutional analysis. The court of appeals in this case effectively applied only the *Lemon* endorsement test and concluded that the Memorial is unconstitutional. The five judges who dissented from the denial of rehearing en banc then explained that the panel had applied the wrong standard and that, under the correct approach, the Memorial is fully consistent with the Establishment Clause. The result of the prevailing uncertainty concerning the applicable framework will be that governmental bodies err on the side of emptying public displays of any arguably religious content, even if the purpose and effect of the display is in fact secular. That result would itself conflict with the Establishment Clause’s core purposes. See *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment) (explaining that “the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious,” a result that would “tend to promote the kind of social conflict the Establishment Clause seeks to avoid”).

\* \* \* \* \*

In its initial summary-judgment decision in 2008, the district court correctly concluded that the Memorial does not violate the Establishment Clause. By contrast, the court of appeals, in conflict with this Court’s cases and over a five-judge dissent from denial of rehearing en banc, effectively invalidated an Act of Congress and held that the existence of a memorial cross that has stood for 60 years as a venerated memorial to the Nation’s fallen service members violates the Establishment Clause. On remand, the district court ordered the removal of the cross, reluctantly concluding that no less drastic remedy would be consistent with the court of appeals’ ruling.

That decision undoubtedly raises a question of “substantial importance” for the Nation and our veterans. *Trunk*, 132 S. Ct. at 2535 (2012) (Alito, J., statement with respect to denial of certiorari). If the decision is not reversed by the court of appeals, it would warrant review by this Court at that time. Because the district court stayed its order pending appeals, however, the need for this Court’s immediate intervention is not so pressing as to require departure from the normal course of appellate review.

**CONCLUSION**

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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APRIL 2014

## APPENDIX

1. Consolidated Appropriations Act, 2005, Pub. L. 108-447, 118 Stat. 3346, Sec. 116 provides:

SEC. 116. (a) DESIGNATION OF NATIONAL VETERANS MEMORIAL.—The Mt. Soledad Veterans Memorial located within the Soledad Natural Park in San Diego, California, which consists of a 29 foot-tall cross and surrounding granite memorial walls containing plaques engraved with the names and photographs of veterans of the United States Armed Forces, is hereby designated as a national memorial honoring veterans of the United States Armed Forces.

(b) ACQUISITION AND ADMINISTRATION BY UNITED STATES.—Not later than 90 days after the date on which the City of San Diego, California, offers to donate the Mt. Soledad Veterans Memorial to the United States, the Secretary of the Interior shall accept, on behalf of the United States, all right, title, and interest of the City in and to the Mt. Soledad Veterans Memorial.

(c) ADMINISTRATION OF MEMORIAL.—Upon acquisition of the Mt. Soledad Veterans Memorial by the United States, the Secretary of the Interior shall administer the Mt. Soledad Veterans Memorial as a unit of the National Park System, except that the Secretary shall enter into a memorandum of understanding with the Mt. Soledad Memorial Association for the continued maintenance by the Association of the cross and surrounding granite memorial walls and plaques of the Memorial.

(1a)

(d) LEGAL DESCRIPTION.—The Mt. Soledad Veterans Memorial referred to in this section is all that portion of Pueblo lot 1265 of the Pueblo Lands of San Diego in the City and County of San Diego, California, according to the map thereof prepared by James Pascoe in 1879, a copy of which was filed in the office of the County Recorder of San Diego County on November 14, 1921, and is known as miscellaneous map NO. 36, more particularly described as follows: The area bounded by the back of the existing inner sidewalk on top of Mt. Soledad, being also a circle with a radius of 84 feet, the center of which circle is located as follows: Beginning at the Southwesterly corner of such Pueblo Lot 1265, such corner being South 17 degrees 14'33" East (Record South 17 degrees 14'09" East) 607.21 feet distant along the westerly line of such Pueblo lot 1265 from the intersection with the North line of La Jolla Scenic Drive South as described and dedicated as parcel 2 of City Council Resolution NO. 216644 adopted August 25, 1976; thence North 39 degrees 59'24" East 1147.62 feet to the center of such circle. The exact boundaries and legal description of the Mt. Soledad Veterans Memorial shall be determined by a survey prepared jointly by the City of San Diego and the Secretary of the Interior. Upon acquisition of the Mt. Soledad Veterans Memorial by the United States, the boundaries of the Memorial may not be expanded.

2. Act of Aug. 14, 2006, Pub. L. 109-272, 120 Stat. 770 provides:

An Act

To preserve the Mt. Soledad Veterans Memorial in San Diego, California, by providing for the immediate acquisition of the memorial by the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. FINDINGS.**

Congress makes the following findings:

(1) The Mt. Soledad Veterans Memorial has proudly stood overlooking San Diego, California, for over 52 years as a tribute to the members of the United States Armed Forces who sacrificed their lives in the defense of the United States.

(2) The Mt. Soledad Veterans 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.

(3) 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.

(4) The patriotic and inspirational symbolism of the Mt. Soledad Veterans Memorial provides solace to the families and comrades of the veterans it memorializes.

(5) The Mt. Soledad Veterans Memorial has been recognized by Congress as a National Veterans Memorial and is considered a historically significant national memorial.

(6) 76 percent of the voters of San Diego supported donating the Mt. Soledad Memorial to the Federal Government only to have a superior court judge of the State of California invalidate that election.

(7) The City of San Diego has diligently pursued every possible legal recourse in order to preserve the Mt. Soledad Veterans Memorial in its entirety for persons who have served in the Armed Forces and those persons who will serve and sacrifice in the future.

## **SEC. 2. ACQUISITION OF MT. SOLEDAD VETERANS MEMORIAL, SAN DIEGO, CALIFORNIA.**

(a) ACQUISITION.—To effectuate the purpose of section 116 of division E of Public Law 108-447 (118 Stat. 3346; 16 U.S.C. 431 note), which, in order to preserve a historically significant war memorial, desig-



nated the Mt. Soledad Veterans Memorial in San Diego, California, as a national memorial honoring veterans of the United States Armed Forces, there is hereby vested in the United States all right, title, and interest in and to, and the right to immediate possession of, the Mt. Soledad Veterans Memorial in San Diego, California, as more fully described in subsection (d).

(b) COMPENSATION.—The United States shall pay just compensation to any owner of the property for the property taken pursuant to this section, and the full faith and credit of the United States is hereby pledged to the payment of any judgment entered against the United States with respect to the taking of the property. Payment shall be in the amount of the agreed negotiated value of the property or the valuation of the property awarded by judgment and shall be made from the permanent judgment appropriation established pursuant to section 1304 of title 31, United States Code. If the parties do not reach a negotiated settlement within one year after the date of the enactment of this Act, the Secretary of Defense may initiate a proceeding in a court of competent jurisdiction to determine the just compensation with respect to the taking of such property.

(c) MAINTENANCE.—Upon acquisition of the Mt. Soledad Veterans Memorial by the United States, the Secretary of Defense shall manage the property and shall enter into a memorandum of understanding with the Mt. Soledad Memorial Association for the contin-

ued maintenance of the Mt. Soledad Veterans Memorial by the Association.

(d) LEGAL DESCRIPTION.—The Mt. Soledad Veterans Memorial referred to in this section is all that portion of Pueblo lot 1265 of the Pueblo Lands of San Diego in the City and County of San Diego, California, according to the map thereof prepared by James Pascoe in 1879, a copy of which was filed in the office of the County Recorder of San Diego County on November 14, 1921, and is known as miscellaneous map No. 36, more particularly described as follows: The area bounded by the back of the existing inner sidewalk on top of Mt. Soledad, being also a circle with radius of 84 feet, the center of which circle is located as follows: Beginning at the Southwesterly corner of such Pueblo Lot 1265, such corner being South 17 degrees 14'33" East (Record South 17 degrees 14'09" East) 607.21 feet distant along the westerly line of such Pueblo lot 1265 from the intersection with the North line of La Jolla Scenic Drive South as described and dedicated as parcel 2 of City Council Resolution No. 216644 adopted August 25, 1976; thence North 39 degrees 59'24" East 1147.62 feet to the center of such circle. The exact boundaries and legal description of the Mt. Soledad Veterans Memorial shall be determined by survey prepared by the Secretary of Defense. Upon acquisition of the Mt. Soledad Veterans Memorial by the United States, the boundaries of the Memorial may not be expanded.

Approved Aug. 14, 2006.