

Nos. 08-56415 & 08-56436

**IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT**

**JEWISH WAR VETERANS OF THE UNITED STATES
OF AMERICA, INC., STEVE TRUNK, *et al.*,**

Plaintiffs-Appellants,

v.

CITY OF SAN DIEGO, *et al.*,

Defendants-Appellees.

**On Appeal From the United States District Court for the Southern District of California
Nos. 06-cv-01597-LAB, 06-cv-01728-LAB (Burns, J.)**

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January 5, 2009

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Jewish War Veterans of the United States of America, Inc. (“JWV”) states that it is a non-profit organization with no parent corporation, and no publicly held corporation owns 10% or more of its stock. JWV is dedicated to, *inter alia*, preserving the memories and records of patriotic service performed by the men and women of the Jewish faith and honoring their memory.

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INTRODUCTION

The federal government displays a 43-foot-high Latin cross, the preeminent symbol of Christianity, atop Mt. Soledad, the highest point in La Jolla, California. Until the court below rejected Plaintiffs' Establishment Clause challenge to the federal display of that cross, no court had ever ruled that the Constitution tolerated such a prominent display by the government of an unmistakably and profoundly sectarian symbol. The governmental display of a Latin cross is the paradigm of an Establishment Clause violation, and this Court has twice struck down displays of a cross on government land under the First Amendment. The decision below conflicts with controlling precedent, and this Court should reverse it.

STATEMENT OF JURISDICTION

Plaintiffs-Appellants appeal the July 29, 2008 decision of the United States District Court for the Southern District of California denying their motions for summary judgment and granting the Defendants-Appellees' motion for summary judgment. ER2-37. The District Court had jurisdiction under 28 U.S.C. § 1331. Plaintiffs-Appellants timely noticed appeals under Federal Rule of Appellate Procedure 4(a)(1)(B) on August 21, 2008 and August 27, 2008. ER688-689, 696-697. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the prominent display of a 43-foot-high Latin cross by the federal government violates the Establishment Clause.

STATEMENT OF THE CASE

In 1952, the City of San Diego authorized the Mt. Soledad Memorial Association (“MSMA”) to erect a massive Latin cross on top of Mt. Soledad. ER51, 286-287. In 1989, two Vietnam veterans from San Diego sued the City in the District Court, alleging that the Cross’s display on City property violated the federal and state constitutions. ER52. The District Court ruled in 1991 that the display violated the No Preference Clause of the California Constitution and permanently enjoined it. *Murphy v. Bilbray*, 782 F. Supp. 1420 (S.D. Cal. 1991). This Court affirmed. *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993).

In response to the injunction, the City attempted two sales of a patch of land under the Cross to the MSMA, both of which were held to violate the California Constitution. *Murphy v. Bilbray*, No. 90-134, 1997 WL 754604 (S.D. Cal. Sept. 18, 1997); *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002).

In May 2006, the District Court (Thompson, J.) ordered the City to comply with its 15-year-old injunction within 90 days. ER56. Congress responded by enacting federal legislation taking the Mt. Soledad property from the City. *Id.* On August 9, 2006, Plaintiffs Steve Trunk and Philip Paulson (now deceased) filed a

complaint against the City and the United States in the District Court, alleging violation of the United States and California Constitutions. ER787. Trunk filed an amended complaint on September 8, 2006, seeking, among other things, a declaration that the statute taking the Mt. Soledad property was void *ab initio*. ER738-750. On August 24, 2006, Plaintiffs Jewish War Veterans of the United States of America, Inc., Richard Smith, Mina Sagheb, and Judith Copeland (“*JWV* Plaintiffs”) filed a complaint in the District Court against the Secretary of Defense, who was tasked by the federal legislation with managing the Cross. ER705-724. The *JWV* complaint challenged the federal display of the Cross as a violation of the Establishment Clause. Plaintiffs’ cases were consolidated in the court below on September 22, 2006. ER790.

On November 7, 2007, the District Court determined that Trunk lacked standing to challenge the statute taking the Mt. Soledad property, dismissed that claim for lack of jurisdiction, and dismissed the City as a party. ER810.

On July 29, 2008, the District Court addressed Plaintiffs’ Establishment Clause challenges to the federal display of the Cross on cross-motions for summary judgment, denying Plaintiffs’ motions and granting Defendants’ motions. ER2-37.

Plaintiffs timely filed separate notices of appeal. ER688-689, 696-697. On Plaintiffs’ motion, this Court consolidated these appeals on December 3, 2008.

STATEMENT OF FACTS

A 43-foot-high Latin cross overlooks San Diego from atop Mt. Soledad, the highest point in La Jolla. ER51-52. This Mt. Soledad Cross is visible from miles away, including to thousands of people traveling daily along Interstate 5 below.

Id. The federal government owns, manages, and displays the Cross.

The History of Mt. Soledad and Its Latin Cross

Since the early twentieth century, three different Latin crosses have been displayed where the current Cross stands. ER4. Christian worshippers gathered at those crosses for annual Easter services beginning in 1922. ER114, 268. Soon after the second cross blew down in 1952, two groups made plans to replace it: one led by Rev. Dan Griffith, pastor of Pacific Beach Christian Church, and another led by Col. Hugh Miller, head of a local American Legion post. ER4, 286. The two groups combined to form the MSMA. *Id.*

Rev. Griffith presided over the first meetings of the MSMA at his church in Spring 1952. ER280-281. The MSMA soon requested approval of the San Diego City Council “to replace the fallen cross with a permanent handsome cast concrete cross” and “to create a park ... worthy to be a setting for the symbol of Christianity.” ER277. To perpetuate what it called “this manifestation, this symbol, of our faith,” the organization solicited public donations (ER278), and

collected additional funds at annual Easter services at the Cross and at a “dramatic reading” about the Apostle Paul at a local church (ER276, 279, 285).

The Mt. Soledad Cross was dedicated in a Christian religious service on Easter Sunday 1954. *See Murphy*, 782 F. Supp. at 1424 n.10; ER291-292. A poem on the cover of the service’s program dedicated the Cross to Jesus Christ:

In reverent humility
We dedicate this Cross to Thee
O Christ. May it forever stand
A symbol of this pleasant land
Of Thy great love and sacrifice
For all mankind. We lift our eyes
To this high Cross and courage take
To do our best for Thy dear sake.

ER291. The program described the Cross as a “gleaming white symbol of Christianity” intended to serve as “a place to hold Easter sunrise services,” and indicated that it also memorialized war dead. ER292.

The MSMA and other groups continued to hold Easter services at the foot of the Cross for the next forty years. *See, e.g.*, ER293-300, 305-321, 323-326, 328-331, 338-339, 342-343, 345-354. These services included hymns rejoicing in Christ’s resurrection, New Testament readings, prayers, and Easter messages from local Christian clergy. *See id.* From the 1960s through the 1980s, Easter programs proclaimed that the Cross “serv[ed] as a reminder of God’s Promise to man of redemption and everlasting life.” *See, e.g.*, ER305, 309, 320. Numerous travel

guides, road maps, the phone book, and federal publications referred to the structure as the “Soledad Easter Cross.” *Murphy*, 782 F. Supp. at 1437-1438.

Constitutional Litigation Over the Cross Begins

In 1989, two veterans sued the City in the District Court, seeking to enjoin the City from allowing the Cross to remain on City land. *See Murphy*, 782 F. Supp. at 1424. In response to what the MSMA called the “[a]theist suit against the city relating to the cross” (ER332), the MSMA immediately undertook a number of steps as attempts—as the MSMA admitted—to “secularize the cross” (ER199) with the goal of inoculating it against constitutional attack:

- MSMA members decided at an association meeting that the “Cross need[ed] to be identified as a memorial cross instead of as a religious symbol,” which would be achieved “by installing a plaque.” ER332. They also noted that installing a flag pole “could help the situation.” *Id.*
- An MSMA member called local mapmakers, who agreed to change the Cross’s label from “Easter Cross” to “Memorial Cross.” ER201, 334.
- Because they believed that another “cross under attack dodged the bullet by being designated as a historical monument” (ER333), the MSMA successfully sought designation of the Cross as a historical site by the City (ER340-341).
- The MSMA removed language from its Easter service program that had appeared for some thirty years calling the Cross “a reminder of God’s promise to man of everlasting life.” *Compare* ER348 (1993 program) *with* ER330 (1988 program).
- The MSMA rewrote its official “History of the Cross”—printed in the Easter program—to omit a long-standing reference to Rev. Griffith’s leadership in erecting the Cross. Instead, the rewritten history claimed that an American

Legion post founded the MSMA. *Compare* ER348 (1993 program) *with* ER330 (1988 program).

Yet the MSMA's attempts to create a more favorable terrain for litigation did not affect how the MSMA actually used the Cross, primarily as a site for Easter services. ER335-339.

The MSMA's efforts dovetailed with the City's defense against the veterans' suit: that somehow the Cross had "lost its religious symbolization and ... become resymbolized to take on a new commemorative secular meaning." *Murphy*, 782 F. Supp. at 1436. The District Court found the commemorative purpose was a "pretext" and held that the Cross could not be permitted to stand, ordering its removal within three months. *Id.* at 1438. This Court affirmed, finding the Cross—even if a war memorial—to be a "sectarian war memorial [that] carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion." *Ellis*, 990 F.2d at 1527-1528.

Following the District Court's 1991 decision, the City made its first in a series of attempts to perpetuate the Cross's display despite the court order. This attempt took the form of a 1992 ballot initiative in which City officials including the mayor urged voters to "SAVE THE CROSS ON MOUNT SOLEDAD" by authorizing a no-bid sale of a 222-square-foot parcel of land under the cross to the MSMA. *See Murphy v. Bilbray*, No. 90-134 GT, 1997 WL 754604, at *10 (S.D. Cal. Sept. 18, 1997); *Paulson*, 294 F.3d at 1126-1127. After San Diego's voters

approved the ballot proposition, the City conveyed the sliver of land to the MSMA for \$14,500. *Murphy*, 1997 WL 754604, at *7, *11. The MSMA took title and again dedicated the Cross to “Thee O Christ” at the 75th annual Easter service in 1995. ER353-354. In 1997, the District Court invalidated the sale to the MSMA, holding that the City “clearly show[ed] a governmental preference for the Christian religion” by “tak[ing] the position of trying to ‘save’ such a preeminent Christian symbol.” *Murphy*, 1997 WL 754604, at *10.

After the no-bid sale was rejected, the City tried once again, this time by soliciting bids. *See Paulson*, 294 F.3d at 1127. And once again, not surprisingly, the City arranged a sale to the MSMA. ER388-390. The MSMA’s bid included plans to “secularize the Cross” further by selling plaques at the site to families who wished to recognize individuals who died in the country’s service, and by inviting local military organizations to hold annual services (ER366). Over the next several years, the MSMA built the first two of what would become six granite walls around the Cross (ER393), with space for 3,200 plaques (ER5, 626).

Approximately 2,100 plaques are now in place, honoring individual veterans (both alive and deceased), entire platoons, and groups of corporate employees. ER626. Twenty-three bollards ring the walls and honor community and veterans’ organizations. *See id.* (Photographs depicting the Cross and other structures on Mt. Soledad are in the record. ER38-49.) Despite these additions, the Cross

continued to serve its traditional role as the focal point for Easter services. ER355-356, 391-392.

In 2002, this Court *en banc* held that the 1998 sale to the MSMA was unconstitutional because it gave “a direct, immediate, and substantial financial advantage to bidders who had the sectarian purpose of preserving the cross.” *Paulson*, 294 F.3d at 1133. The plaintiff and the MSMA thereafter reached a settlement, supported by veterans groups, that would “end[] 15 years of litigation by moving the cross approximately 1000 yards to a neighboring church thus preserving the cross and allowing a world class monument to all veterans to be erected in its place.” ER 411; *see also* ER395-397. In July 2004, the City Council passed a resolution that would compel the City to accept the settlement if it failed to obtain voter approval of “Proposition K,” which—if passed—would require yet a third sale of the property to the highest bidder, who could decide what to do with the Cross. ER398-403.

The Thomas More Law Center (“TMLC”), a nonprofit law firm “dedicated to the defense and promotion of the religious freedom of Christians” (ER629), opposed the settlement. TMLC’s West Coast Director, Charles LiMandri, called Proposition K “the only chance San Diego citizens have to ensure the cross remains on top of Mount Soledad.” ER404. LiMandri, a signatory of the ballot argument in favor of Proposition K, wrote that the proposition “challenges us to

pursue the vision of our Founding Fathers, profoundly religious men, rather than the vision of atheists.” *Id.* The day before the vote, an “America Bless God rally” at the Cross responded to the purported “assault on Christian religious expression” aimed at “removing all Christian symbols from public view including the Mt. Soledad Cross.” ER405-407. Despite these efforts, City voters overwhelmingly rejected Proposition K.

The Federal Government Intervenes

TMLC and others refused to accept San Diegans’ rejection of Proposition K. Days after the vote, LiMandri wrote to then-Representative Randy “Duke” Cunningham and Representatives Duncan Hunter and Darrell Issa, asking them to derail the settlement by declaring the Cross a “Federal National Memorial Park.” ER412-418. LiMandri wrote that “religion and morality are the foundation of our country” and the Cross is “one of the most visible” “symbols of our faith.” *Id.* He advised the legislators that “this final step should ultimately prove successful in saving the Cross” because, in LiMandri’s view, the federal Constitution is more tolerant of government religious displays than the California Constitution, and because the recent addition of memorial walls meant the Cross is “no longer a stand alone ‘religious’ symbol.” *Id.*

Two weeks later, Representatives Cunningham and Hunter inserted a rider into the 2005 omnibus budget bill. ER55; ER 419-424 (Consolidated

Appropriations Act, Pub. L. No. 108-447, § 116, 118 Stat. 2809, 3346-3347 (codified at 16 U.S.C. § 431 note)). The rider designated the Mt. Soledad property a national veterans' memorial and authorized the federal government to accept donation of the memorial. Representative Issa explained that the bill was meant to say "enough is enough" to "threat[s] to remove ... affirmations of our nation's religious heritage from public settings across America." ER427. President Bush signed the bill containing the rider on December 8, 2004. ER55.

In early 2005, at the urging of a local church, the City set a hearing to consider whether to donate the Mt. Soledad property to the federal government. ER430-431, 440. Before the hearing, the City Attorney formally opined that a donation would violate the federal and state constitutions. ER432-439. At the hearing, many speakers denounced that opinion, and TMLC officials offered to represent the City if its donation was subsequently challenged. ER450-452, 454, 478-479, 487-489. LiMandri received a standing ovation after calling the Cross a symbol of the "ultimate sacrifice of life triumphing over death." ER460. The Council declined to donate the property to the federal government. ER517.

TMLC and other religious organizations stepped up efforts to convince the City to change course. A new organization, formed by LiMandri and others and represented by TMLC, launched a referendum petition to "save the Mt. Soledad cross" via transfer to the federal government. ER522. In response to the petition,

the Council rescinded its decision and instead submitted the donation question to the voters as Proposition A. ER524-529. Supporters of the Council's decision sang "Onward, Christian Soldiers" as they left the Council chamber. ER530. The proposition passed on July 26, 2005. *Paulson v. Abdelnour*, 145 Cal. App. 4th 400, 413 (2006). A week later, a state Superior Court judge temporarily restrained the donation to the federal government, tentatively ruling that such a donation would be unconstitutional. *See id.*¹

On May 3, 2006, in response to the plaintiff's request that the District Court either enforce the injunction or the settlement, the court ordered the City to move the Cross within 90 days or pay a fine of \$5,000 a day, stating, "It is now time, and perhaps long overdue, for this Court to enforce its initial permanent injunction forbidding the presence of the Mount Soledad Cross on City property." *Paulson v. City of San Diego*, No. 89-0820GT, 2006 WL 3656149, at *1 (S.D. Cal. May 3, 2006).² Representative Hunter wrote to President Bush, asking him to initiate condemnation proceedings for the land beneath the Cross. ER576. When the

¹ In late 2006, after the federal government had already taken the Cross by other means, California's Court of Appeal reversed this ruling, upholding Proposition A but declining to opine whether the federal taking or current display violates the California or U.S. Constitution. *See id.* at 437.

² The City sought a stay of that order pending appeal, which this Court denied, *see Order, Paulson v. City of San Diego*, No. 06-55835 (9th Cir. June 26, 2006), but Circuit Justice Kennedy later granted, *see San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 126 S. Ct. 2856 (2006).

Administration declined, Representatives Hunter, Bilbray, and Issa introduced (after LiMandri helped draft) H.R. 5683 (the “Act”), a bill that provided for the immediate acquisition of Mt. Soledad by the federal government. ER616. The Act sought to “effectuate the purpose” of the earlier budget rider by “vest[ing] 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.” ER599-601. Upon federal acquisition of Mt. Soledad, the Secretary of Defense would manage the property and enter into a memorandum of understanding with the MSMA for continued maintenance of the memorial. ER600. The bill passed the House on July 19, 2006. ER56.

While the bill was being considered in the House, a TMLC official wrote to Senator Sessions’ Chief of Staff, “suggest[ing] we open a new offensive” in “the War for the Soul of America” “by joining this battle about the Soledad Cross.” ER589-590. Senator Sessions then introduced a bill identical to the House bill, explaining that it would “preserve the cross that stands at the center of the Mt. Soledad Veterans Memorial ... that is under attack by the ACLU to remove the cross This acquisition is the action that the U.S. Department of Justice tells us is needed to preserve this cross as a part of a memorial that has secular monuments also.” 152 Cong. Rec. S8364 (daily ed. July 27, 2006). The Senate passed the Mt. Soledad legislation on August 1, 2006, and President Bush signed the bill two

weeks later. ER602. The Christian Coalition heralded the “saving [of] this historic symbol of Christianity in America.” ER606.

Current Display of the Cross on Mt. Soledad

Under the Act, the Mt. Soledad property came under the control of the Department of Defense (ER600), which assigned jurisdiction over it to the Secretary of the Navy (ER57). The Act required the Department to negotiate a memorandum of understanding with the MSMA for the continued maintenance of the property. ER600. The MSMA’s assumption that the transfer to the government would be “in name only” made this negotiation difficult. ER225-226. At some point in the summer of 2008, the MSMA and the Navy finally reached an agreement, the terms of which have not been disclosed. The MSMA publicly stated that the agreement allows it to maintain the site, conduct special events, and add to the site according to Navy-approved plans.

The Cross remains the site of religious worship. This past May, twenty churches hosted a sunrise prayer service on Mt. Soledad. ER618.

STANDARD OF REVIEW

This Court “review[s a] district court’s decision on cross-motions for summary judgment de novo.” *Seattle Affiliate of Oct. 22nd Coal. v. City of Seattle*, No. 06-35597, 2008 WL 5192062, at *2 (9th Cir. Dec. 12, 2008).

SUMMARY OF ARGUMENT

The federal government's display of a 43-foot-high Latin cross on Mt. Soledad violates the Establishment Clause. The District Court incorrectly concluded otherwise by slighting this Court's opinions in *Separation of Church & State Committee v. City of Eugene* ("SCSC"), 93 F.3d 617 (9th Cir. 1996); *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004); and *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993). As this Court ruled in those cases, even a cross legitimately labeled a war memorial sends a sectarian message. Any subsidiary message of service or sacrifice is derived directly from Christian theology. The Cross's long history as a site of Christian worship, and the religiously motivated efforts to preserve it, testify to its religious effect and purpose.

The display of the Cross—the preeminent symbol of Christianity—violates the First Amendment regardless of the constitutional test applied. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005), govern this case. *Van Orden v. Perry*, 545 U.S. 677 (2005), is limited to the display considered in that case: a Ten Commandments monument distributed widely by the Fraternal Order of Eagles and non-prominently displayed in settings along with numerous other monuments secular in character. But the Cross display is unconstitutional under all of these cases

because of its clear religious message, religiously infused history, and primary use as the focal point of celebrations of Jesus Christ's resurrection.

ARGUMENT

I. THE GOVERNMENT'S DISPLAY OF THE MT. SOLEDAD CROSS VIOLATES THE ESTABLISHMENT CLAUSE

The three-part test set forth in *Lemon*, 403 U.S. 602, governs Establishment Clause challenges.³ See *Vasquez v. Los Angeles ("LA") County*, 487 F.3d 1246, 1254-1255 (9th Cir. 2007). Under *Lemon*, government action must (1) have a predominantly secular purpose; (2) have a principal or primary effect that neither advances nor disapproves of religion; and (3) not foster excessive governmental entanglement with religion. See *Lemon*, 403 U.S. at 612-613; *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994).

In 2005, the Supreme Court reaffirmed *Lemon* in *McCreary*, 545 U.S. at 859. Since *McCreary*, this Court has confirmed that *Lemon* continues to govern Establishment Clause cases. See, e.g., *Access Fund v. United States Dep't of Agric.*, 499 F.3d 1036, 1042-1043 (9th Cir. 2007); *Vasquez*, 487 F.3d at 1255; see also *Inouye v. Kemna*, 504 F.3d 705, 712 n.7 (9th Cir. 2007); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1191 (9th Cir. 2006), *vacated on other grounds*, 127 S. Ct. 1484 (2007).

³ "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

The District Court erred in holding that the Mt. Soledad Cross satisfies all three of *Lemon*'s requirements. In fact it meets none of them.⁴

A. The Government's Display of the Mt. Soledad Cross Violates the Establishment Clause Because It Has the Effect of Advancing and Endorsing Religion, As *Buono*, *SCSC*, and *Ellis* Make Clear

This case is controlled by three decisions of this Court: *SCSC*, 93 F.3d 617; *Buono*, 371 F.3d 543; and *Ellis*, 990 F.2d 1518. The court below gave inexplicably short shrift to these controlling cases.

SCSC considered the display in a city park of a 51-foot-high Latin cross marked with a plaque designating it "a memorial to war veterans." 93 F.3d at 618. This Court held that the display on government property had an impermissible religious effect: "[t]here is no question that the Latin cross is a symbol of Christianity, and that its placement on public land ... violates the Establishment Clause[, b]ecause the cross may reasonably be perceived as governmental endorsement of Christianity." *Id.* at 620.

Eight years later, *Buono* struck down the display on federal land of a five-foot Latin cross designated as a war memorial. 371 F.3d at 548. The Veterans of Foreign Wars first placed a cross on the site in *Buono* in 1934, and Congress designated the cross a memorial to World War I veterans. *Id.* Following *SCSC*,

⁴ The District Court correctly held that Plaintiffs had standing, citing this Court's cases. ER6-8. Should Appellees or *amici* contest standing, Plaintiffs will address the issue in their reply brief.

this Court held that the display violated the Establishment Clause, notwithstanding the government's argument that the cross was smaller and less prominent than the one in *SCSC*. *Id.* at 548, 550.

Finally, this Court in *Ellis* made findings about the Mt. Soledad Cross itself as part of a state constitutional challenge. 990 F.2d at 1527-1528. This Court determined that even if the Cross were legitimately part of a war memorial, it was a "sectarian" one that "carries an inherently religious message and creates an appearance of honoring only [Christian] servicemen." *Id.* at 1527.

The District Court's excuses for declining to follow this Court's precedents are not persuasive.

1. The Post-Litigation Addition of Subordinate Secular Elements Near the Cross Does Not Make Its Display Constitutional

The District Court attempted to distinguish *SCSC* and *Buono* because in those cases the crosses were "standing alone," whereas the Mt. Soledad Cross is surrounded by "numerous other secular elements." ER25. Though context is crucial to the Establishment Clause inquiry, the belated attempts to "secularize the cross" by adding veterans-related features nearby cannot eliminate the religious effect of the display.

First, the Cross continues to dominate physically the elements recently added to Mt. Soledad.⁵ The Cross extends 43 feet above the ground and can be seen from several miles away. *Murphy*, 782 F. Supp. at 1422 nn.2 & 5.⁶ The same cannot be said for the walls honoring veterans, which do not even reach as high as the *base* of the Cross and are, quite literally, subordinate to it. The thousands of people who travel daily on Interstate 5 see only the Cross. The memorial may be multifaceted, but the size and arrangement of those facets leave no doubt as to which is the most important. To the reasonable observer, the fact that the Cross stands at the center of the memorial and dwarfs the tacked-on elements that surround it reinforces the dominance of its religious message.

Rather than taking the relative size, visibility, and arrangement of the display's elements into account when assessing its effect, the District Court employed an alternative inquiry in which it compared the number of religious elements to the number of secular elements. ER25. It wrote that "the primary

⁵ The District Court identified as "fair" and "representative" a photograph that actually presents a distorted perspective. ER4. That photograph makes it appear that the Cross is the same height as the walls beneath it, when in fact the Cross (even excluding its base) is almost five times the height of the walls. *Compare* ER38-49.

⁶ The District Court pointed out that airplanes and boats use the Cross for navigation. ER4-5. As the government has never asserted that it displays the Cross for navigational purposes, the only constitutional significance to this fact is that it demonstrates the Cross's overwhelming size and visibility. *See Ellis*, 990 F.2d at 1525.

effect [of the memorial] is patriotic and nationalistic, not religious” because “in terms of the number of elements the memorial comprises, secular symbols predominate.” *Id.*

Courts do not apply this counting test, however, because the reasonable observer would not employ quantitative analysis to assess the relative importance of elements of a display.⁷ For instance, in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the crèche display held unconstitutional was accompanied by a plaque; a wooden fence; red and white poinsettias; and two trees each decorated with a red bow. *Id.* at 580. Nearby were two more trees and two wreaths with red ribbons. *Id.* at 581 nn. 6 & 7. Despite the fact that secular elements substantially outnumbered the religious one, the Court found that the crèche remained central. *See id.* at 598. In the same way, a numeric tally is inappropriate here: no reasonable observer would consider a plaque to be equivalent to a Cross more than 60 times its size.⁸

⁷ The District Court itself appeared to recognize the limits of its test when it later observed that “deciphering the message ... does not depend on tallying-up a scorecard of secular and sectarian objects or monuments.” ER31. Yet it nevertheless tallied that score and cited “the number of [secular] elements” as principal grounds for finding no religious effect. ER25.

⁸ The District Court also asserted, inexplicably, that the Cross is “not the largest” element of the memorial. ER21. The court provided no basis for this finding, which is plainly erroneous.

Second, allowing the elements added in the wake of litigation to influence the analysis would mock the Establishment Clause. The reasonable observer is aware that those elements were belatedly tacked on after a cross stood alone on Mt. Soledad for more than 80 years, and 12 years after litigation was launched. ER366, 393. As the reasonable observer would also know, *see McCreary*, 545 U.S. at 866, the MSMA sought to “secularize the cross” only in response to litigation. The author of the legislation to take the Cross wrote to the Act’s sponsors that declaring the Cross a federal memorial “should ultimately prove successful in saving the Cross” because “the addition of the memorial walls and plaques ... should make it easier to withstand further constitutional challenges since it is no longer a stand alone ‘religious’ symbol.” ER414. The Constitution cannot be so easily manipulated.

2. As in *Buono*, *SCSC*, and *Ellis*, the Cross Sends an Unmistakably Religious Message

The Latin cross plainly delivers a religious message. As “the preeminent symbol of Christianity,” the cross is “exclusively a Christian symbol, and not a symbol of any other religion.” *Buono*, 371 F.3d at 545. It is so powerful because it “represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity.” *Ellis*, 990 F.2d at 1525. To billions of Christians throughout the world, “the message of the cross” is no less than “the power of God.” I Corinthians 1:18

(KJV). “[T]o suggest otherwise would demean this powerful religious symbol.”

Carpenter v. City & County of San Francisco, 93 F.3d 627, 630 (9th Cir. 1996).

Courts have repeatedly recognized that the cross is a sacred symbol with profound religious significance.⁹ Before this case, no federal court had ever upheld the government’s permanent display of a Latin cross on public land as constitutional. Indeed, in *Allegheny* all nine Justices joined opinions using the Latin cross as the prototypical example of an unconstitutional religious display.¹⁰ This Court’s decisions also recognize that the cross delivers the Christian message. *See, e.g., SCSC*, 93 F.3d at 619¹¹; *Buono*, 371 F.3d at 548. As this Court determined in *Ellis*, 990 F.2d at 1527, the Mt. Soledad Cross is no different.

⁹ *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (the “church speaks through the Cross”); *Harris v. City of Zion*, 927 F.2d 1401, 1403 (7th Cir. 1991); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986); *Friedman v. Board of County Comm’rs of Bernalillo County*, 781 F.2d 777, 781 n.3 (10th Cir. 1985); *ACLU of Ga. v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1983); *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002); *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065, 1069 (M.D. Fla. 1989); *ACLU of Miss. v. Miss. State Gen. Servs. Admin.*, 652 F. Supp. 380, 382 (S.D. Miss. 1987); *Jewish War Veterans of the United States v. United States*, 695 F. Supp. 3, 13 (D.D.C. 1987); *Libin v. Town of Greenwich*, 625 F. Supp. 393, 398 (D. Conn. 1985); *Greater Houston Chapter of ACLU v. Eckels*, 589 F. Supp. 222, 234 (S.D. Tex. 1984).

¹⁰ *See Allegheny*, 492 U.S. at 599 (plurality opinion); *id.* at 629 (O’Connor, J., concurring); *id.* at 661 (Kennedy, J., dissenting).

¹¹ *See also id.* at 626 (O’Scannlain, J., concurring) (reasonable observer might perceive display of the Latin cross “as government endorsement of the Christian faith,” and “use of a cross to memorialize the war dead may lead observers to believe that the City has chosen to honor only Christian veterans”).

a. To the Reasonable Observer, the Latin Cross Is Not a Secular Symbol of Death, Sacrifice, or Military Service

The District Court parted ways with this Court (and many others) by ruling that the display of the Latin cross does not send a religious message, and that the primary effect of its display “is patriotic and nationalistic, not religious.” ER25. According to the District Court, “the cross has a broadly-understood ancillary meaning as a symbol of military service, sacrifice, and death.” ER26.¹² The assertion that the preeminent symbol of Christianity sends any kind of secular message lacks basis in law or fact.

As a legal matter, this Court has thrice rejected the claim that a Latin cross labeled a war memorial sends a secular message.¹³

¹² The District Court suggested that a cross display “may evoke no particular religious impression at all.” ER19. Citing a newspaper article describing a display meant to represent lives lost in Iraq, the court wrote that in the “anti-war context” the crosses lacked religious significance and signified only “military death.” *Id.* Yet the organizers of that display, rather than using a cross to commemorate each death, also used Buddhist, Hindu, Muslim, and Jewish symbols. *See* Bruce V. Bigelow, *Beach Exhibit Calls Attention to Fallen*, San Diego Union-Tribune (Nov. 11, 2007). Using a cross to represent non-Christian service members would have been inappropriate because marking a mock “grave” with a Latin cross unavoidably sends the message that the honored individual was a Christian. *Cf.* *SCSC*, 93 F.3d at 626 (O’Scannlain, J., concurring).

¹³ The Court is right to be wary of such claims because post hoc professions that government displays of crosses are “war memorials” are standard operating procedure when defending against Establishment Clause challenges. *See, e.g.*, *SCSC*, 93 F.3d at 619 (rejecting claim “that the cross is no longer a religious symbol but a war memorial”); *Gonzales v. North Twp. of Lake County, Ind.*, 4 F.3d 1412, 1419 (7th Cir. 1993) (rejecting claim that “crucifix was intended to act as a

- In discussing the Mt. Soledad Cross itself, this Court in *Ellis* described Mt. Soledad as a “sectarian war memorial [that] carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion.” 990 F.2d at 1527.
- In *SCSC*, the Court found that a Latin cross war memorial could “reasonably be perceived as governmental endorsement of Christianity.” 93 F.3d at 620.
- Again in *Buono*, the Court found that a sign identifying a cross as a war memorial would cause observers to perceive display of the cross as government endorsement of Christianity, or as proof that the government “ha[d] chosen to honor only Christian veterans.” 371 F.3d at 549 n.5 (quoting *SCSC*, 93 F.3d at 626 (O’Scannlain, J., concurring)).¹⁴

The District Court strained to avoid those precedents, instead relying on two concurring opinions and two district court opinions from other circuits to strip the Cross of its fundamental meaning. ER19.¹⁵ Under this Court’s precedents and the

war memorial”); *Eckels*, 589 F. Supp. at 234 (rejecting claim that Latin crosses were “integral part of a planned war memorial”); *see also Rabun*, 698 F.2d at 1101-1102 (state agency recommended “designating the cross as a memorial for deceased persons” when Establishment Clause concerns were raised). These claims invariably fail because the government may not “exempt a[n] obviously religious symbol from constitutional strictures by attaching a sign dedicating the symbol to our honored dead.” *Gonzales*, 4 F.3d at 1421.

¹⁴ The District Court wrongly ignored *Buono*’s finding that the Latin cross “is exclusively a Christian symbol” because, the court claimed, the government did not dispute that finding in *Buono*. ER19. To the contrary, as here, the government in *Buono* argued unpersuasively that the cross has a “well-accepted secular identity” and that the reasonable observer would consider it a mere “war memorial.” Brief for Appellant, at 18-20 & n.6, *Buono v. Norton*, No. 03-55032 (9th Cir. filed April 14, 2003).

¹⁵ The cases and examples relied on by the court below are fundamentally different from the facts here and are unpersuasive. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), involved “purely private” speech protected by the Free Speech Clause, *id.* at 770, and the roadside crosses in *American Atheists v. Duncan*, 528 F. Supp. 2d 1245 (D. Utah 2007), were

overwhelming weight of decisions from other federal courts, however, *see supra* n.9, Latin crosses are primarily or exclusively religious symbols.

As a factual matter, the District Court assumed with little proof that the Cross carries a “well-recognized” secular message of service and sacrifice. ER24. It apparently based its assumption on evidence presented by the government purportedly “showing widespread use of the cross in honoring military dead.” ER23. That evidence cannot bear the weight the District Court placed upon it. According to the District Court, this “widespread use” is evident in the identification by the government and its expert of eight “monuments incorporating crosses as the sole or primary element.” *Id.* But eight monuments scattered among tens of thousands of American war memorials do not realistically demonstrate “widespread” or “frequent” use.¹⁶

displayed by a private organization to honor deceased highway patrol officers with a symbol requested by their families, *id.* at 1248, much like family selections of religious symbols to mark individual soldiers’ graves in government-owned cemeteries. The display of three crosses in an emblem on Las Cruces Public Schools’ vehicles symbolically represents “the name of the entity itself,” as the New Mexico city’s name literally means “The Crosses.” *Weinbaum v. Las Cruces Public Schools*, 465 F. Supp. 2d 1182, 1194 (D.N.M. 2006). The Argonne and Canadian crosses at Arlington include—and are surrounded by—numerous secular elements and depictions (ER86-87) and represent the organic addition of religiously-tinged elements over time to a government cemetery rather than, as here, secular elements tacked on to a religious monument in response to litigation.

¹⁶ For instance, the District Court relied upon the Irish Brigade Monument as proof that crosses are commonly used as war memorials. ER23. Yet that

To the contrary, the fact that the government and its expert located so few examples of crosses (and none similar to Mt. Soledad) confirms the testimony of Kurt Piehler, Ph.D., a scholar on the commemoration of war in American society. Professor Piehler stated that “the overwhelming majority of war memorials in the United States, excepting headstones marking the graves of individual soldiers, avoid using religious symbols and inscriptions.” ER77. In particular, “American war memorials incorporating crosses remain the rare exception” (ER87), and even in those that use crosses, the cross is “almost invariably ... a small part of the larger memorial” (ER82). The dearth of exceptions identified by the government proves this rule.

Professor Piehler judged the Mt. Soledad Cross an “aberration” because it “makes a religious symbol such a central feature.” ER88. The District Court discounted his testimony because of its supposed “focus on an individual element of the memorial—the cross—rather than looking at the memorial as a whole.” ER24.¹⁷ To the contrary, Dr. Piehler examined the use of religious symbols within the context of larger memorials. He concluded that religious symbols are used

monument, in which a life-sized Irish wolfhound lies at the foot of a Celtic cross adorned with regimental symbols, the New York State seal, and a shamrock, is only one of more than 1300 monuments at Gettysburg.

¹⁷ The District Court further faulted Professor Piehler for failing to address the Cross’s “recognized secular meaning.” ER24. As discussed above, Dr. Piehler testified that crosses were so rarely used in war memorials that they cannot have the secular meaning ascribed to them by the government.

most frequently in “war memorials located in national cemeteries” (ER77), that religious symbols are “almost invariably a small part of the larger memorial” (ER82), and that in “those few war memorials that use the cross prominently, there are often distinguishing characteristics that reduce their religious message,” such as “modif[ication] to include imagery that stresses their national character” and placement within a larger memorial setting (ER86). Professor Piehler’s conclusion that Mt. Soledad is an outlier was informed by the fact that it “makes a religious symbol such a central feature,” “dominate[s] the landscape,” and—unlike other crosses cited by the government—does not “include any symbols of American nationalism in the design of the Cross itself, such as an image of American eagle, the national seal, a sword, or a rifle.” ER88-89.

b. Any Message of Death, Sacrifice, or Service Communicated by a Latin Cross Derives Directly From Christian Theology

Even if the Cross carries, as the District Court found, an “ancillary meaning as a symbol of military service, sacrifice, and death” (ER26), that meaning is inseparable from core Christian doctrine. Therefore, the only reasonable observer likely to perceive a secular meaning is an explicitly Christian reasonable observer. If honoring sacrifice is a meaning of the Cross, it is because for Christians (but only for Christians), the Cross symbolizes Christ’s sacrifice for humankind’s sins. If the Cross signifies eternal rest, it is because for Christians (but only for

Christians), the Latin cross's connection to Christ's death, resurrection, and promise of everlasting life makes it an apt Christian memorial.¹⁸

The government's expert agreed that the supposedly "secular" message of the Cross is deeply rooted in Christian belief. He claimed that the Cross recognizes sacrifice and service by "communicat[ing] ... the reality of service rendered and redemptive blood shed for the nation." ER159. According to him, in that message, "the blood is not that of Jesus, and it is not Christians as Christians who are redeemed. Instead the redemptive figure is a national martyr: a member of the nation's armed forces whose blood is shed for the continued life of the nation...." ER155.

In other words, the government claims that the Cross honors war dead by comparing them to Jesus: Just as Jesus shed his blood for the sinful world, America's war dead shed blood for the nation. But the analogy works, of course, only for those who embrace the Christian doctrine of atonement through Christ's crucifixion. Government, however, "may not promote or affiliate itself with any religious doctrine." *Allegheny*, 492 U.S. at 590. Nor may it use religious means to

¹⁸ The fundamentally Christian nature of the Cross as a symbol of death is underscored by the fact that non-Christians have rejected the use of crosses as grave markers. ER94-95, 194-195. Elsewhere, the Government recognizes that—even in the context of a veterans' cemetery—the Latin cross is a religious symbol. The Department of Veterans Affairs identifies the Latin cross as a "Christian cross" in its list of "available emblems of belief for placement on government headstones" and makes other emblems available for other religions. ER681-687.

achieve secular goals where nonreligious means will suffice. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-124 (1982); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 280-281 (1963) (Brennan, J., concurring). The Cross “simply is too laden with religious meaning to be appropriate for a government memorial assertedly free of any religious message.” *Ellis*, 990 F.2d at 1528 (quoting *Jewish War Veterans*, 695 F. Supp. at 14-15).

The District Court erred in crediting the government’s analogy. Any other conclusion, it thought, would render unconstitutional any “religious allusion or symbol” because “any such reference ... necessarily rel[ies] on underlying religious belief or doctrine.” ER20. The District Court found such a conclusion untenable given *Van Orden, Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Allegheny*, which approved of government displays of symbols that can carry religious significance. ER20-21.

The District Court failed to appreciate the difference between those symbols and the Cross here: Whereas the Supreme Court found that the symbols at issue in *Van Orden, Lynch*, and *Allegheny* sent independent secular messages *despite* their religious origins, the government has argued that the Cross sends a secular message *because* of its connection to religious doctrine.¹⁹ In each case, the

¹⁹ *See Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) (Ten Commandments communicated “secular moral message (about proper standards of social conduct)”); *see also id.* at 702 (Ten Commandments “illustrat[ed] a relation

religious content of the symbol was incidental to—not the basis of—the secular message. By contrast, the government has here asserted that the Cross’s subsidiary secular message is a product of its religious meaning.²⁰

3. The Cross’s Location Enhances Its Religious Effect

Courts routinely focus on the location of a governmental display when judging whether it sends a religious message. *See, e.g., Allegheny*, 492 U.S. at 598; *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring). Recently, this Court in *Card* conducted such an inquiry by asking whether “the setting is conducive to genuflection” or whether “religious activities ... have been held at the monument.” *Card v. City of Everett*, 520 F.3d 1009, 1021 & n.16 (9th Cir. 2008). Despite the Mt. Soledad Cross’s documented use for decades as an object of veneration during religious worship, the District Court inexplicably concluded that Mt. Soledad does

between ethics and law”); *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring) (crèche merely one among other “traditional symbol[s] of the holiday,” sending message of “celebrat[ion of] a public holiday”); *Allegheny*, 492 U.S. at 635 (O’Connor, J., concurring) (when accompanied by Christmas tree and sign saluting liberty, Chanukah menorah “convey[ed] a message of pluralism and freedom of belief during the holiday season”); *see also id.* at 619 (opinion of Blackmun, J.) (menorah display “simply a recognition of cultural diversity”).

²⁰ According to the Government’s expert, the Cross’s meaning as a symbol of sacrifice goes back to its Christian roots. ER185. The expert testified that “[t]here is also no question that [the Cross] was viewed as a Christian symbol.” ER183. The Government’s expert further stated that when the Cross was built, “religion, in itself, was conceived of as patriotic” and that “being religious ... meant being Christian.” ER181.

not “encourage[] religious devotion” nor “invit[e] veneration of the cross.” ER25. This conclusion cannot be justified.

To begin, the District Court found that the site did not encourage religious activity because “physical access to the cross is blocked by an iron fence.” ER25; *see also* ER30. It did not explain why physical access to the Cross—infeasible in many churches during worship—is needed to encourage religious devotion. The record shows that such physical access to the Cross was not necessary for throngs of worshippers to rededicate the Cross to Christ each Easter, nor did the fence in any way inhibit the Cross’s service—as the MSMA put it—“as a reminder of God’s Promise to man of redemption and everlasting life.” *E.g.*, ER320.

The court also erred when it determined that Mt. Soledad “is an unlikely venue for government indoctrination” because it is “[l]ocated away from the hub of downtown and the seat of government” and “no one is compelled to visit” the site. ER25. As this Court held in *Buono*, involving a cross in a far more “remote location,” the fact that the Cross “is not near a government building is insignificant.” *Buono*, 371 F.3d at 549-550. Moreover, San Diegans need not “visit the memorial” to receive the Cross’s message. Because of the Cross’s enormity and its placement at La Jolla’s highest point, its message is delivered throughout the community, including to those driving below on the community’s largest highway. *See Murphy*, 782 F. Supp. at 1422 nn.2 & 5; *see also Ellis*, 990

F.2d at 1527 (Cross is “focal point of the park, visible to those looking at the hill from a substantial distance”).

Beyond the illogic of the District Court’s reasoning, its conclusion cannot be squared with the facts. Any suggestion that the Cross’s location does not encourage religious devotion would surprise those who built the Cross with the intent that the location would encourage worship, and who then used it almost exclusively for that purpose. The MSMA applied to build the Cross with the goal of “creat[ing] a park ... worthy to be a setting for the symbol of Christianity.” ER277. When dedicating the Cross to Christ in 1954, the MSMA promised that the “gleaming white symbol of Christianity” would serve “as a place to hold Easter sunrise services.” ER292. For decades before and after the Cross was erected, Mt. Soledad was used to celebrate Christ’s resurrection with hymns, prayers, and sermons. According to a 1964 MSMA letter to the IRS, Mt. Soledad was “used basically for the Easter Sunrise Services” (ER304), and was widely known as the “Soledad Easter Cross,” *Murphy*, 782 F. Supp. at 1437-1438. Unquestionably, the site “readily lend[s] itself to ... religious activity.” *Van Orden*, 545 U.S. at 702.

4. The Cross’s History Enhances Its Religious Effect

The religious message of the Mt. Soledad Cross is amplified by its history. The reasonable observer is presumed reasonably knowledgeable and “deemed aware of the history and context of the community and forum in which the

religious display appears.” *Capitol Square Review & Advisory Bd.*, 515 U.S. at 780-781 (O’Connor, J., concurring); *see also McCreary*, 545 U.S. at 866 (reasonable observer “competent to learn what history has to show”). Anyone familiar with the history of the Cross would know that it has long served as a gathering place for Christians celebrating the resurrection of Jesus, and has in recent years become the focus of efforts by Christian organizations to ensure the continuing government display of their preeminent symbol.

First, the Cross’s long service as the centerpiece of religious celebration enhances its religious effect. *See Allegheny*, 492 U.S. at 599 (religious singing at crèche display “more likely to augment the religious quality of the scene than to secularize it”). After the MSMA first dedicated the Cross to Christ on Easter 1954, Christian worshippers continued to gather there on Easter Sundays. Each year, local ministers proclaimed the Easter message to worshippers who prayed and sang hymns such as “Jesus Christ Is Risen Today” (ER343) and “All Hail the Power of Jesus’ Name” (ER352). Apart from that primary use, the Cross also served as the site of other Christian religious events like weddings and baptisms. *Murphy*, 782 F. Supp. at 1436.

Strangely, the District Court thought the Cross’s “venerable history” somehow lessened its religious significance. ER26. It thought the objective observer would “recognize [the Cross’s] relationship and significance to San

Diego's history (especially the City's military history).” *Id.* But the Cross has little connection to San Diego's military history. The program for the Cross's dedication to Christ did state that the Cross was also intended to honor war dead (ER292), but in the following decades, any function as a memorial was almost entirely forgotten. The MSMA hosted a “Veterans' Tribute” in 1972 (ER311), but that event did not occur at the Cross, and was discontinued after 1973. Veterans Day and Memorial Day passed by year after year without notice, but each year the Cross was the site of a well-publicized, well-organized, and well-attended Easter worship service.

Second, the reasonable observer would know that court decisions enjoining the government display of the Cross have been resisted at every turn by religiously motivated individuals and groups. This resistance is probative of religious effect. *See Van Orden*, 545 U.S. at 703 (Breyer, J., concurring) (“short (and stormy) history of the courthouse Commandments' displays [in *McCreary*] demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them”). Religious effect must be judged by “whether ‘the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement.’” *Allegheny*, 492 U.S. at 597 (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389-392 (1985)). This Court need not speculate about that likelihood because

the Cross's most high-profile supporters have repeatedly cast the battle over the display in religious terms. Their actions make clear that such "adherents of the controlling denominations" view the Cross not as a secular, patriotic symbol, but as deeply connected to their faith.

For example, the reasonable observer—and anyone else who reads the newspaper in San Diego—would be aware of the role of the TMLC and LiMandri in securing federal intervention to "save" the Cross, and the stark religious terms in which they promoted its federal display. Days after voters embraced a solution that would move the Cross to the grounds of a church 1000 yards away, LiMandri wrote to San Diego's congressmen offering a "legal blueprint to designate the land a national veteran's memorial." ER573. When the City refused to donate Mt. Soledad to the federal government, LiMandri helped draft the 2006 legislation to federalize the land. ER616. When President Bush signed the Act into law, LiMandri joined him in the Oval Office for the ceremony. ER602, 616.

The TMLC and LiMandri emphasized the religious message throughout. LiMandri said that federal intervention was necessary because the Cross is "one of the most visible" "symbols of our faith." ER413. He participated in a 54-day prayer to preserve to Cross, which was launched on Mt. Soledad with the singing of "Immaculate Mary" and the prayer of 20 mysteries of the rosary. ER580-581,

ER667-669. He publicly described Mt. Soledad as a “spiritual battle” (ER640), and said:

Christ won the war on Calvary. These are just kind of mop-up battles. Satan wants to take as many people with him in the end. ... [T]he war is over. But we are just doing ... the best we can to save as many souls as we can along the way....

ER665. When an author of federal legislation to ensure governmental display of a Cross characterizes that display as part of a “mop-up battle” against Satan after “Christ won the war on Calvary,” the reasonable observer is likely to believe that the display has religious significance.

LiMandri and the TMLC were not alone among adherents who fought for government display of the Cross. National petition campaigns were launched by the American Family Association, the American Center for Law & Justice, and Fidelis, a Catholic advocacy organization. ER570-574, 577, 587-588 Those campaigns were bolstered by a vigil held by the Christian Defense Council and an intercessory prayer movement in front of the White House. ER578-579. And after the Act passed, the Christian Coalition “commend[ed] the great efforts ... in saving this historic symbol of Christianity in America.” ER606.

Finally, the sponsors of the Act readily admitted that the Act was meant to use government resources to help Christians celebrate their religion. On the floor of the House, Representative Hunter stated that the Cross—the “centerpiece” of the memorial—was “a religious symbol.” 152 Cong. Rec. H5422-23 (daily ed. July

19, 2006). Representative Issa stated that the Act was desirable “because our Founding Fathers ... didn’t want a godless society; just the opposite, ... for people to observe their God as they felt fit.” *Id.* at H5424.

B. The District Court Also Erred Because the Mt. Soledad Cross Display Lacks a Predominantly Secular Purpose

To survive scrutiny under the First Amendment, government action “‘must have a secular ... purpose.’” *Card*, 520 F.3d at 1013 (quoting *Lemon*, 403 U.S. at 612) (alteration in original). By “[m]anifesting a purpose to favor one faith over another, or adherence to religion generally,” the government sends a message that believers are favored members of the political community, and that nonbelievers are outsiders. *McCreary*, 545 U.S. at 860 (quoting *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring)). The government’s display of the Mt. Soledad Cross is unconstitutional for this reason as well.

1. Contrary to the District Court’s View, to Survive Constitutional Scrutiny, Government Action Must Have a Predominantly Secular Purpose

In upholding the federal display of the Cross, the District Court erroneously stated that government action fails the secular-purpose test only when it is “‘motivated *wholly* by religious considerations.’” ER11 (quoting *Lynch*, 465 U.S. at 680) (emphasis added). In doing so, the court below ignored the Supreme Court’s rejection in *McCreary* of the “timid standard” that such a misreading of *Lynch* would erect. 545 U.S. at 864-865. Rather, *McCreary* clarified that, even if

a government action may have *some* secular motivation, it is nonetheless improper if its predominant motive is religious. *See id.* at 864 (“secular purpose required has to be ... not merely secondary to a religious objective”); *see also id.* at 901 (Scalia, J., dissenting) (criticizing *McCreary* majority’s “heightened requirement that the secular purpose ‘predominate’ over any purpose to advance religion”). Indeed, *Lemon*’s purpose prong “is not satisfied ... by the mere existence of some secular purpose, however dominated by religious purposes.” *Id.* at 865 n.11 (quoting *Lynch*, 465 U.S. at 691 (O’Connor, J., concurring)). Given this authority, the District Court’s own analysis fatally undermines its holding when it ascribes to the Cross only “an established *secondary* meaning [that] is non-religious.” ER36 (emphasis added). Even if true, this is not enough.

2. Government Displays of the Latin Cross Have an Inherently Religious Purpose

As the Supreme Court has held, government can act in such an overtly religious way that no further investigation is necessary to identify a religious purpose. In those situations, “the government action itself besp[eaks] the purpose.” *McCreary*, 545 U.S. at 862. This is such a case, as the District Court should have realized, given this Court’s holdings that “the Latin cross ‘is the preeminent symbol of many Christian religions,’” *Ellis*, 990 F.2d at 1525 (quoting *Okrand v. City of Los Angeles*, 254 Cal. Rptr. 913, 922 (Cal. Ct. App. 1989)), and

that it “is exclusively a Christian symbol, and not a symbol of any other religion,” *Buono*, 371 F.3d at 545.

In emphasizing the congressional finding that the Mt. Soledad Cross is “illustrative of our nation’s ‘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,’” ER13 (quoting Pub. L. 109-272 § 1(3)), the District Court ignored key distinctions between the government’s display of the Cross and private displays of the cross on headstones in government cemeteries. Crosses chosen by veterans and their families to mark veterans’ graves (not remotely implicated by this lawsuit) do not run afoul of the Establishment Clause because “there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.” *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (O’Connor, J., concurring)). The objective observer understands the difference between a gravestone reflecting the faith of the family that selected it and a cross designated as a collective memorial reflecting governmental religious expression.

3. The Statute, Legislative History, Historical Context, and Sequence of Events Leading to the Federal Display of the Cross Further Reveal the Government’s Religious Purpose

The District Court failed to appreciate that in assessing the government’s purpose in displaying a religious symbol, a court must infer purpose not “only from the latest news about the last in a series of governmental actions,” but must also “learn what history has to show” by exploring “the historical context” and “the specific sequence of events” leading to the government action. *McCreary*, 545 U.S. at 866. The evolution of a challenged display—particularly in the context of earlier litigation challenging it—helps separate sham purposes from sincere ones. *Id.* at 867-874.

a. The History of the Cross Leaves No Doubt as to Its Sectarian Purpose

The pre-litigation history of the Cross—all but ignored by the District Court in its analysis of the display’s purpose—illustrates its predominantly religious purpose. The veterans’ 1989 lawsuit set off a prolonged sequence of maneuvers aimed at manufacturing some permissible, secular purpose for the Cross’s display, continuing even after a federal judge found it “difficult to conclude that the commemorative objective advanced by the City is anything other than pretext.” *Murphy*, 782 F. Supp. at 1437-1438. However, the court below treated this history as if entirely irrelevant to the Cross’s purpose, despite the Supreme Court’s

admonition that the historical context of a display is essential to any evaluation of purpose. *See McCreary*, 545 U.S. at 866.

The District Court attempted to explain away the Cross's history by asserting that "it is neither logical nor proper to impute the motivation for [changes made to the memorial after the commencement of litigation] after-the-fact to Congress." ER10. Yet the statute itself made clear that Congress was mindful of the Cross's history: The Act's stated purpose was "to preserve a historically significant war memorial." Pub. L. 109-272 § 2(a). If the government means to embrace that history, it cannot at the same time pretend that certain elements of that history are irrelevant to the purpose inquiry. Nor can a sectarian purpose be obviated by the expedient of transferring a religious display from one government to another.

b. The Government's Asserted Secular Purpose of Preserving a War Memorial Is a Sham

The government's attempts to cloak the Cross with some secular cover upon taking ownership of it are as unconvincing as those of the MSMA. The District Court's uncritical method for assessing Congress's stated purpose (ER13-14) was squarely rejected in *McCreary* because it would give the purpose inquiry "no real bite, given the ease of finding some secular purpose for almost any government action." *McCreary*, 545 U.S. at 865 n.13.

First, the District Court wrongly credited Congress’s self-serving finding that it sought only to preserve a veterans’ memorial. The statute claims that its purpose was “to preserve a historically significant war memorial,” Pub. L. 109-272 § 2(a), but only the *Cross* has historical significance, as the veterans-related features were added only five years before the passage of the Act. ER393. The statute announces that “[t]he Mt. Soledad Veterans Memorial has proudly stood overlooking San Diego, California, for over 52 years,” Pub. L. 109-272 § 1(1), but only the *Cross* so stood. The Administration said the Act was necessary because of “legal action threatening the continued existence of the current Memorial.” ER592. But no legal action has ever implicated the Memorial walls, plaques, bollards, or flag—only the Cross itself. Congress’s plain purpose in taking control of the memorial was to perpetuate the display of the Cross on government land, nothing else.

Second, the District Court ignored well-settled law in refusing to consider the statements of individual legislators responsible for the Act. The Supreme Court has repeatedly turned to statements of individual legislators to aid its determination of purpose in Establishment Clause cases. *See, e.g., McCreary*, 545 U.S. at 862 (noting that *Edwards v. Aguillard*, 482 U.S. 578 (1987), “relied on the statute’s text and the detailed public comments of its sponsor, when [it] sought the purpose of a state law requiring creationism to be taught alongside evolution”);

Wallace v. Jaffree, 472 U.S. 38, 57-58 (1985) (relying on testimony of statute’s lead sponsor as evidence of statute’s purpose). The District Court improperly relied on *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002), to justify ignoring legislative statements revealing religious purpose. ER15. *Barnhart* was not an Establishment Clause case, and the Supreme Court made clear in *McCreary* that the purpose inquiry must proceed differently in Establishment Clause cases than in “review of economic legislation” as in *Barnhart*. *McCreary*, 545 U.S. at 865 n.13.²¹

The statements of those federal legislators who sponsored the Act demonstrate that the Act was meant to use government resources to help Christians celebrate their religion. Representative Hunter stated that the Cross—the “centerpiece” of the memorial—was “a religious symbol.” 152 Cong. Rec. H5422-23 (July 19, 2006). He entered a letter into the record decrying those who “would like to see the cross removed from Mt. Soledad and thus deny the majority their rights to religious expression.” *Id.* Representative Issa similarly described

²¹ The District Court gave improper weight to the fact that the Act “passed by an overwhelming vote in the House of Representatives and by unanimous consent in the Senate.” ER14. Establishment Clause jurisprudence makes clear that majority preferences are *not* a factor in determining whether a government act is constitutional. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 596 (1992) (“While in some societies the wishes of the majority might prevail, the Establishment Clause ... is addressed to this contingency and rejects the balance urged upon us.”); *McCreary*, 545 U.S. at 884 (O’Connor, J., concurring) (“we do not count heads before enforcing the First Amendment”).

the Act as rejecting a “godless society” and preserving “a freedom for people to observe their God as they felt fit.” *Id.* at H5424. Upon passage of the Act, Senate Majority Leader Frist called the Cross “a key symbol of our religious freedom.” 152 Cong. Rec. S8550 (daily ed. Aug. 1, 2006).

Third, and contrary to the District Court’s assertion that the motives of those who advocate for a law have “no bearing on the motives or purposes of Congress as a whole” (ER12), a law’s religious purpose also may be demonstrated—as here—by religious groups’ attempts to convince Congress to act.²² A host of Christian organizations—with no apparent connection to veterans’ issues—pressured the government to intervene to “save” the Mt. Soledad Cross.²³ The nature of these groups and the fact that they lobbied for federal action in religious terms suggest that the purpose of the federal taking and display was religious. *See Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1531 (11th Cir. 1993).

²² *See, e.g., Epperson v. Arkansas*, 393 U.S. 97, 107-109 & n.16 (1968) (advertising campaign and supporting letters evidence that “sectarian conviction was and is the law’s reason for existence”); *see also Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) (finding relevant secular aims of private organization that donated challenged display).

²³ The Christian Coalition, the Christian Defense Coalition, CAUSE USA, Fidelis, the American Family Association, the Family Research Council, TMLC, and the ACLJ, among others, sought federal intervention to preserve the Cross on government property. ER570-574, 578-579, 587-588, 593-594, 603-607.

Finally, the government’s avowed purpose in seizing Mt. Soledad is a sham because it does not make sense on its own terms. In introducing the Act, Representative Hunter said that the Mt. Soledad Memorial—with the Cross as its “centerpiece”—was to serve as a memorial to all veterans, “regardless of race, religion, or creed.” 152 Cong. Rec. H5422 (July 19, 2006). But the Latin cross does not represent all veterans, which is why veterans may choose among nearly 40 emblems of faith for placement on government-furnished headstones. ER681-687. It defies logic that the government would faithfully aim to remember veterans of all religions by displaying a symbol of only one. *See Buono*, 371 F.3d at 549 n.5 (cross memorializing war dead gives impression of “honor[ing] only Christian veterans”).

C. The Government’s Display of the Mt. Soledad Cross Violates the Establishment Clause Because It Excessively Entangles the Government With Religion

The District Court’s summary rejection of Plaintiffs’ entanglement showing—“because, as the Court has found, the memorial does not advance religion” (ER27)—is doubly wrong. First, for the reasons stated above, *see supra* Part I.A, the Cross does indeed advance religion. Second, the court put the cart before the horse: Because the extent of entanglement is “an aspect of the inquiry into a statute’s effect,” *Agostini v. Felton*, 521 U.S. 203, 233 (1997); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002) (O’Connor, J., concurring),

the District Court should have considered whether the statute advances religion by entangling it with government—rather than concluding that religion could not possibly become entangled with government if the statute fails to advance religion.

The entanglement inquiry considers “the character and purposes of the benefited institutions, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.” *Agostini*, 521 U.S. at 206. The District Court short-circuited this analysis because it thought that “allowing the MSMA—a civic organization—to operate the site effectively insulates the government from any impermissible relationships.” ER27.

But the court cited no evidence to support its description of the MSMA as a “civic organization,” and the characterization is insupportable. Ample and undisputed evidence, ignored by the court, demonstrates that the MSMA has strong and longstanding religious affiliations. Founded in part by Rev. Griffith, pastor of Pacific Beach Christian Church, the MSMA’s principal (and often its only) activity through the years has been to organize Easter services beneath the Cross to commemorate Christ’s resurrection. The MSMA’s religious ties easily meet this part of the entanglement test, just as the Boy Scouts have been deemed a religious organization for Establishment Clause purposes. *See Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259, 1270-1273 (S.D. Cal. 2003).

With respect to the remaining entanglement inquiry, the Act has already produced, and will require for the indefinite future, a close and ongoing relationship between the Defense Department and the MSMA. The Act requires the Department to “enter into a memorandum of understanding with the [MSMA] for the continued maintenance of the Mt. Soledad Veterans Memorial by the Association.” ER600. In practice, this means either that the government will decide what events the MSMA may sponsor at the Cross, which groups may conduct services, and how the Cross may be adorned—or else the MSMA will be allowed to make these decisions on its own, creating even greater entanglement problems. *See Larkin*, 459 U.S. at 127 (invalidating statute giving churches power to decide whether to grant liquor licenses to nearby establishments).

II. VAN ORDEN, EVEN IF CONTROLLING, WOULD NOT MAKE THE CROSS DISPLAY CONSTITUTIONAL

Even if it were appropriate to analyze the Mt. Soledad Cross under *Van Orden*, that analysis would still compel a holding that the display of the Cross is unconstitutional.

A. *Van Orden* Does Not Apply to This Case

Despite *McCreary*'s clear guidance, the District Court, in addition to applying *Lemon*, also applied Justice Breyer's concurring analysis in *Van Orden*.²⁴ ER27-37. Applying *Van Orden* was inappropriate for four reasons.

First, Van Orden—unlike *McCreary*, which was decided on the same day—established no binding legal standard because no opinion in that case garnered the support of a majority of the Court.

Second, in the wake of *Van Orden* and *McCreary*, this Court has repeatedly recognized the continuing vitality of the *Lemon* test. *See, e.g., Access Fund*, 499 F.3d at 1042-1043; *Vasquez*, 487 F.3d at 1255; *see also Inouye*, 504 F.3d at 712 n.7; *Harper*, 445 F.3d at 1191.²⁵

Third, the District Court's reliance on this Court's recent application of *Van Orden* in *Card*, 520 F.3d 1009, is misplaced. *Card* expressly reaffirmed that “the three-part test set forth in *Lemon* ... remains the general rule for evaluating whether an Establishment Clause violation exists.” *Id.* at 1016. Indeed, the *Card*

²⁴ As the narrowest opinion of any Justice concurring in the judgment, Justice Breyer's concurrence would control if *Van Orden* applied. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

²⁵ Since *McCreary* and *Van Orden*, other courts of appeals have also continued to apply the *Lemon* test to Establishment Clause cases involving religious displays on government property. *See, e.g., Skoros v. City of New York*, 437 F.3d 1, 17 (2d Cir. 2006); *ACLU of Ky. v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1224 (10th Cir. 2005).

decision emphasized that “[t]here can be little doubt after *McCreary* not only that *Lemon* is still alive but that the secular purpose inquiry has been fortified.” *Id.* at 1017.

Nothing in *Card* remotely suggests a revision of this Court’s previously expressed view that *McCreary* and *Lemon* control in cases considering the constitutionality of a Latin cross display. *Card*, in fact, cites approvingly this Court’s post-*Van Orden* decision in *Vasquez*, 487 F.3d 1246, which applied *Lemon* to an Establishment Clause challenge involving a Latin cross on a county seal. This Court’s 2007 *Buono* decision said nothing to suggest that *McCreary* and *Van Orden* change the analysis of government displays of the Latin cross. *See Buono v. Kempthorne*, 502 F.3d 1069, 1082 n.13 (9th Cir. 2007), *amended on denial of rehearing en banc*, 527 F.3d 758 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3243 (Oct. 10, 2008). To be sure, in *Card* this Court did recognize a limited exception for “certain Ten Commandments displays” in “contexts closely analogous to that found in *Van Orden*,” 520 F.3d at 1021,²⁶ but this is not such a Ten Commandments case.

Fourth, *Van Orden* is inapplicable on its facts. Justice Breyer wrote that a “fact-intensive” examination of a Ten Commandments display on Texas Capitol

²⁶ The *Card* monument was “identical” to the one donated at about the same time by the same secular organization as in *Van Orden*. *Id.* at 1019.

grounds was necessary because the case presented one of the “difficult borderline cases” for which application of a strict legal test like *Lemon* is unhelpful. 545 U.S. at 700 (Breyer, J., concurring). For reasons set forth in Part I, the Mt. Soledad Cross does not come within miles of any borderline, and the facts are distinguishable from the circumstances Justice Breyer described in *Van Orden* in critical ways. For one, a Latin cross lacks the breadth of meanings that may be associated with a Ten Commandments display; for both the *Van Orden* plurality, *see* 545 U.S. at 688-690, and Justice Breyer, *see id.* at 700, the Ten Commandments had historic significance and a universality that a Cross does not. Furthermore, squarely on-point precedent rejects similar governmental cross displays. *See Buono*, 371 F.3d at 548; *SCSC*, 93 F.3d at 620. Finally, the display at issue in *Van Orden* was one just of many historical monuments—and by no means the largest—on the Capitol grounds. *See Van Orden*, 545 U.S. at 702 (Breyer, J., concurring). The physically imposing Mt. Soledad Cross, by contrast, dominates its site.

B. Under *Van Orden*, the Cross Display Is Unconstitutional

In any event, even applying the *Van Orden* standard to the present facts, the display of the Cross is unconstitutional. According to Justice Breyer, the constitutional question turns on the nature of the display, its history, its appearance, and its context. 545 U.S. at 700-703 (Breyer, J. concurring).

1. By Its Very Nature, the Cross Conveys a Purely Religious Message

The District Court’s view that the Latin cross has a less starkly religious message than the Ten Commandments because the cross is more “passive” (ER36) runs against both authority and history. Although “[i]n certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct) [and] also convey a historical message (about a historic relation between those standards and the law),” *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring), the Latin cross is different. Unlike the Ten Commandments, which are significant to multiple faiths, the cross is a purely Christian religious symbol; it conveys no secular message separable from its religious message; and it lacks what, in some contexts, has been viewed as the Ten Commandments’ symbolic connection to the law and to secular standards of moral behavior.

2. The History and Motivation of the Mt. Soledad Cross’s Donor Underscore Its Religious Nature

The history and motivation of the group that donated the monument informed Justice Breyer’s reasoning in *Van Orden*, and these inquiries militate against the Cross’s constitutionality here. The District Court noted that the *Van Orden* and *Card* decisions observed that the donor of the challenged monument in each case was the Fraternal Order of Eagles, a “private civic and primarily secular”

organization. ER34 (citing *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring)). However, the court below did not take the next logical step to assess whether the MSMA, the group that dedicated the Cross, is comparably secular. As discussed above, the MSMA's religious affiliations make it far different from the civic, secular Fraternal Order of Eagles.

3. The Physical Setting of the Cross Establishes Its Predominantly Religious Message

The District Court attempted to explain the Cross's history away by observing that it "should examine not just how government came to be involved with the monument, but should also ask whether its continued display implies religious purpose." ER27. But in contrast to the 16 monuments and 21 other historical markers on the grounds of the Texas Capitol in *Van Orden*, which "provide[d] a context of history and moral ideals," 545 U.S. at 702 (Breyer, J., concurring), or the Ten Commandments monument in *Card*, which was two feet *shorter* than the nearby memorial honoring citizens who died in military service, 520 F.3d at 1010-1011, everything about the physical setting of the Mt. Soledad Cross indicates the predominance of its religious message. Unlike the *Van Orden* and *Card* monuments, the Cross for the vast majority of its history was surrounded by no additional monuments with any secular meaning. ER127. And even in its

current version, the Cross—unlike the monuments in *Van Orden* and *Card*—dominates the entire area.²⁷

Perhaps realizing that the Cross’s physical dominance undercuts its analysis, the District Court also stated that the location of the Cross—in a park, “far off the beaten path,” rather than near, say, a city hall—was a factor in its holding the display constitutional. ER33. This observation is no more persuasive under *Van Orden* than it was in assessing secular effect. *See supra* Part I.A.3; *see also SCSC*, 93 F.3d at 618 (religious display unconstitutional despite distance from government buildings); *Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487, 489 (7th Cir. 2000) (same); *Gonzales*, 4 F.3d at 1414 (same).

4. The Period of Time Between the Erection of the Cross and the Court Challenge to Its Display Does Not Make the Display Constitutional

Justice Breyer saw the 40 years during which the monument in *Van Orden* stood without challenge as evidence that few individuals viewed the monument as a government attempt to favor religion. 545 U.S. at 702-703 (Breyer, J.,

²⁷ The District Court also pointed out that “the plaque at the base of the cross announces it was dedicated by the MSMA long before the federal government acquired the memorial.” ER35. But the Cross itself is visible from a great distance, while the plaque is not. In *Card*, by contrast, there was no indication that the “prominently carved” language indicating that a private organization had donated the Ten Commandments monument was any less visible than the text of the Commandments themselves. *See* 520 F.3d at 1011.

concurring). The period before the challenge to the Mt. Soledad Cross was much shorter than the period before the challenge to the display in *Van Orden*. Although the District Court counted a “35-year complaint-free period” (ER31), in fact, as the government’s own submission showed (ER327), and as the government’s own expert testified (ER144-145), only (at most) 15 years passed before the first challenge.²⁸

Perhaps more importantly, undisputed facts provide context that further explains why a legal challenge to the Cross did not occur earlier, and why no inferences helpful to the government may be drawn from this passage of time. Unlike in *Van Orden*, in this case there is a history that “intimidat[ed],” 545 U.S. at 702, and at a minimum would have discouraged, those who might earlier have challenged the Cross. La Jolla had a long history of excluding Jews from housing and membership in its recreational and social clubs. ER98-111, 236-266. Here, as with a previous challenge to a display of a large cross on governmental property, the lapse of time is not “persuasive evidence of disinterest”; to the contrary, it reflects “complex and troubling reasons why residents who are non-Christian have

²⁸ A City councilwoman’s effort in 1969 or 1970 to address the Cross’s constitutionality shows that the display did not go unquestioned and helps explain why more formal challenges did not then take place. ER327. The District Court disputed the significance of the inquiry because the councilwoman found no constitutional violation. ER31. But her conclusion reflected only a *legal* judgment that the display of the Cross was constitutionally permissible under then-prevailing case law (ER327), *not* a belief that the Cross conveyed a secular message.

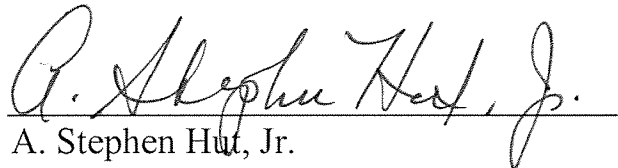
chosen not to ... lodge their objection.” *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 797 (1978).²⁹

²⁹ As one La Jollan wrote to the MSMA, “[t]he presence of the cross at the Veteran’s Memorial” prevents her from honoring her grandfather with a plaque “[b]ecause the cross is a Christian religious symbol that excludes my husband’s Jewish father, a US Army veteran of the Korean War from feeling included.” ER394.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment and direct the court below to enter judgment for Plaintiffs-Appellants.

Respectfully submitted,



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Dated: January 5, 2009

STATEMENT OF RELATED CASES

Appellants are unaware of any related cases. *See* Circuit Rule 28-2.6.

