Nos. 11-998, 11-1115

IN THE

Supreme Court of the United States

MOUNT SOLEDAD MEMORIAL ASSOCIATION,
Petitioner,

v.

STEVE TRUNK, *et al.*,
Respondents.

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

STEVE TRUNK, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The 43-foot high cross atop Mount Soledad was dedicated in 1954 "as a reminder of God's promise to man of everlasting life" (App. 3a); Jesus Christ was invoked in the hope that the Cross would be "a symbol in this pleasant land of Thy great love and sacrifice for all mankind" (*id.* 40a); and the ceremony's program referred to the Cross as "a gleaming white symbol of Christianity" (*id.*). The Cross furthered the objective to "create a park … worthy to be a setting for the symbol of Christianity" and served as "this manifestation, this symbol, of our faith." *Id.* 3a. Easter services were held annually at the Cross from 1954 until at least 2000. Although the Cross was dedicated to fallen soldiers as well, the Cross bore no physical indication that it was intended as a war memorial until 1989. Only then—after litigation had begun—was a small plaque honoring veterans added. No regular services or observances were conducted on Memorial Day or Veterans' Day until 1996.

In 2006, the federal government took the surrounding property by eminent domain. The Cross itself is unchanged from how it was in 1954 and towers above all of the surrounding features. The Cross is distinctly visible from miles away, including from two major interstate highways.

The question presented is:

Whether the Ninth Circuit correctly concluded that, based on the evidence of record regarding the history, location, and visibility of the 43-foot-tall Latin cross atop Mount Soledad, the government's continued display of this cross in these circumstances violates the Establishment Clause.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Jewish War Veterans of the United States of America, Inc. states that it is a non-profit organization with no parent corporation, and no publicly held company owns 10% or more of its stock.

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The court of appeals' ruling is narrow and appropriately focused on the specific and unique facts of this case. Based on the undisputed evidence of record, the court determined that the government's display of the Mount Soledad Cross, erected for an avowedly religious purpose and used for religious ceremonies for decades, was unambiguously religious in its effect. The court also concluded that recent litigation-inspired attempts to secularize the Cross—by installing secular elements

around it and calling it a war memorial—did not alter the unequivocal sectarian message that *this* Cross conveys to observers who see it from miles around.

Contrary to the petitioners' assertions, that is all this case is about. The court of appeals made no sweeping ruling of law that would condemn all displays of Latin crosses in all contexts. On the contrary, the court expressly left open the possibility that a "cross can be part of this veterans' memorial." Pet. App. 53a.[1] And it most certainly did not "hold[]" an act of Congress "unconstitutional," whether "effectively" or otherwise. Pet. 11. The court's ruling was that this particular cross, with its particular history and in this particular setting, created an unquestionably religious message. The court correctly analyzed and distinguished this Court's rulings in *Van Orden* v. *Perry*, 545 U.S. 677 (2005), and *Salazar* v. *Buono*, 130 S. Ct. 1803 (2010), which involved displays widely different in context, history, and scale from the massive Mount Soledad Cross with its lengthy history of identification with the Christian faith in the heart of a major American city.

At bottom, the government's true complaint seems to be that the court of appeals erred in assessing the government's evidence or misapplied the summary judgment standard. Pet. 18. In the government's view, the court should have concluded that the Cross was "integrated into an entire memorial that promotes a secular message." *Id.* 16. But the extent of the Cross's "integration" is a factual question that does not warrant this Court's review, even though it has ignited fervent disagreement.

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[1] References to "Pet." and "App." are to the United States' petition for certiorari and appendix thereto (No. 11-1115).

Moreover, the Ninth Circuit did *not* strike down an act of Congress. The 2006 Act that took ownership of the Mount Soledad Memorial did not require the federal government to display the Cross, and the Ninth Circuit's decision did not disturb any aspect of that law. The court of appeals also appropriately deferred to Congress's stated motives in having the federal government take control of the Mount Soledad Memorial—finding that Congress had a permissible secular *purpose* in passing the law. But the court's decision was based on the separate objective inquiry into whether the display of the Mount Soledad Cross has an impermissibly sectarian *effect*—an issue the court properly analyzed from the point of view of a reasonable observer. *See, e.g.*, *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 620 (1989).

Nor does the government's claim of confusion in Establishment Clause jurisprudence warrant review in *this* case. The court of appeals did not need to choose any Establishment Clause "test" in resolving the challenge to this sectarian display. Rather, it concluded that—again, based on the evidence of record—the Mount Soledad Cross violated the First Amendment under the reasoning of both *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and Justice Breyer's concurrence in *Van Orden*. Even the government does not contend that the Cross's constitutionality turns on which test is applied, nor does it suggest that any other circuit would decide this case any differently given its extreme facts.

Finally, the case is in an interlocutory posture, in which the district court must still determine an appropriate remedy. Thus, even if this Court were inclined to revisit the Establishment Clause so soon after *Van Orden* and *McCreary County* v. *ACLU of Kentucky*,

545 U.S. 844 (2005), this case is not an appropriate vehicle for doing so.

The petitions should be denied.

STATEMENT

1. A 43-foot-high Latin cross overlooks San Diego, California from atop Mount Soledad, the highest point in the La Jolla area of San Diego. App. 2a. The Mount Soledad Cross is visible from miles away, including to thousands of people traveling daily along Interstate 5 and Interstate 15 below. *Id.* 6a, 49a. The Cross stands at the center of a site that was only developed as a war memorial after the Cross was first challenged in litigation, and it remains much higher and more visible than any other element of the display. *Id.* 22a. The federal government owns, manages, and displays the Cross.

App. 55a.

Since the early twentieth century, three different Latin crosses have been displayed where the current Cross stands. App. 39a. Christian worshippers gath-

ered at those crosses for annual Easter services for more than 45 years—from 1954 until at least 2000—and other religious ceremonies have been held there since. *Id.* 3a, 40a.

The cross that currently stands atop Mount Soledad was dedicated in a Christian religious service on Easter Sunday 1954. *See* App. 3a; *Murphy* v. *Bilbray*, 782 F. Supp. 1420, 1424 n.10 (S.D. Cal. 1991). The program for the service 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. Court of Appeals Excerpts of Record ("ER") 292.

The Mount Soledad Memorial Association ("MSMA") and other groups held Easter services at the foot of the Cross for the next four decades. These services included hymns rejoicing in Christ's resurrection, New Testament readings, Christian prayers, and Easter messages from local Christian clergy. 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.'" *Id.* 40a-41a. Numerous travel guides, road maps, the telephone book, and federal publications referred to the structure as the "Soledad Easter Cross." *Murphy*, 782 F. Supp. at 1437-1438.

2. In 1989, two veterans sued the City of San Diego in the United States District Court for the Southern District of California, seeking to enjoin the City from allowing the Cross to remain on City land. *See* App. 7a; *Murphy*, 782 F. Supp. at 1424. In response, the MSMA, which had erected the Cross and was largely responsible for maintaining it, undertook a number of steps to—in MSMA's words—"secularize the cross," by removing

religious references to the Cross on local maps and Easter service programs. ER199, 201, 330, 334, 348. But the MSMA continued to use the Cross primarily as a site for Easter services.

In response to the veterans' suit, the City argued that 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. The Ninth Circuit 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* v. *City of La Mesa*, 990 F.2d 1518, 1527-1528 (9th Cir. 1993).

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. These included two separate attempts to transfer ownership of the parcel on which the Cross stood to the MSMA. Federal courts rejected both attempts, 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* v. *Bilbray*, 1997 WL 754604, at *10 (S.D. Cal. Sept. 18, 1997), and gave "a direct, immediate, and substantial financial advantage to bidders who had the sectarian purpose of preserving the cross," *Paulson* v. *City of San Diego*, 294 F.3d 1124, 1133 (9th Cir. 2002) (en banc).

In the meantime, the MSMA built the first two of what would become six concentric granite walls around the Cross. App. 6a. Approximately 2,100 small plaques are now in place on the walls, honoring individual veterans (both living and deceased), entire platoons, and groups of corporate employees. *Id.* Twenty-three bollards ring the walls and honor community and veterans' organizations. *Id.* Despite these additions, the Cross continues to tower over the site and serves its traditional role as the focal point for Easter services.

In 2004, the plaintiff in the ongoing litigation and the MSMA reached a settlement, supported by veterans' groups, that would have moved the Cross to a neighboring church. App. 8a. In July 2004, the San Diego City Council passed a resolution that would compel the City to accept the settlement unless voters approved "Proposition K," which—if passed—would have required yet a third sale of the property to the highest bidder. *Id.* City voters rejected Proposition K. *Id.*

Notwithstanding the Proposition K vote and the city council resolution, United States Representatives Cunningham and Hunter—at the urging of Cross supporters—inserted a rider into the 2005 omnibus federal budget bill. *Id.*; Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 116, 118 Stat. 2809, 3346-3347 (2004) (codified at 16 U.S.C. § 431 note). The rider designated the Mount 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. App. 9a.

3. In early 2005, at the urging of a local church, the City set a hearing to consider whether to donate the Mount 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. App. 9a n.4. In August 2005, a judge of the California Superior Court temporarily restrained the donation to the federal government, tentatively ruling that such a donation would be unconstitutional. *Paulson* v. *Abdelnour*, 51 Cal. Rptr. 3d 575, 584-585 (Ct. App. 2006).

On May 3, 2006, in response to the plaintiff's request that the district court enforce either the injunction or the settlement, the district court ordered the City to move the Cross within 90 days or pay a fine of $5,000 a day, stating, "[i]t 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*, 2006 WL 3656149, at *1 (S.D. Cal. May 3, 2006).

Representatives Hunter, Bilbray, and Issa then introduced H.R. 5683 (the "Act"), which provided for the federal government's immediate acquisition of Mount Soledad. App. 9a. 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." H.R. 5683 § 2(a). No hearings were held on the bill, which passed the House on July 19, 2006. App. 9a-10a.

Without any hearings, the Senate passed an identical version of the Mount Soledad legislation on August 1, 2006 (App. 10a) and President Bush signed the bill two weeks later. The Christian Coalition heralded the

"saving [of] this historic symbol of Christianity in America." *Id.* 42a.

Pursuant to the Act, the Mount Soledad property came under the control of the Department of Defense, which assigned jurisdiction over it to the Secretary of the Navy. App. 10a. The Act required the Department to negotiate a memorandum of understanding with the MSMA for the continued maintenance of the property. *Id.*

The Cross remains the site of Christian religious worship. In May 2008, for example, twenty churches hosted a sunrise prayer service on Mount Soledad. ER618.

4. In August 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. App. 11a.

Later that month, Plaintiffs Jewish War Veterans of the United States of America, Inc., Richard Smith, Mina Sagheb, and Judith Copeland ("JWV Respondents") filed a complaint in the district court against the Secretary of Defense. App. 11a. These plaintiffs challenged the federal display of the Cross as a violation of the Establishment Clause. The two cases were consolidated on September 22, 2006. *Id.*

On November 7, 2007, the district court determined that Mr. Trunk lacked standing to challenge the statute taking the Mount Soledad property, dismissed that claim for lack of jurisdiction, and dismissed the City as a party. App. 11a n.7.

The plaintiffs and the government filed cross-motions for summary judgment. On July 29, 2008, the

district court denied the plaintiffs' motions and granted the defendants' motions. *Trunk* v. *City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008). Plaintiffs filed separate notices of appeal, which the Ninth Circuit consolidated.

On January 4, 2011, a unanimous panel of the Ninth Circuit reversed, holding that the government's display of the Cross violated the Establishment Clause. The panel observed that, based on the undisputed material facts before it, the Mount Soledad Memorial "stands as an outlier among war memorials, even those incorporating crosses. Contrary to any popular notion, war memorials in the United States have not traditionally included or centered on the cross and, according to the parties' evidence, there is no comparable memorial on public land in which the cross holds such a pivotal and imposing stature, dwarfing by every measure the secular plaques and other symbols commemorating veterans." App. 3a.

The court acknowledged that "[s]imply because there is a cross or a religious symbol on public land does not mean that there is a constitutional violation." App. 4a. But the court concluded, based on its review of the evidence, that the Mount Soledad Memorial is not "a historical, longstanding veterans memorial that happens to include a cross." *Id.* 5a. Rather, the Mount Soledad Memorial is "a site with a free-standing cross originally erected in 1913 that was replaced with an even larger cross in 1954, a site that did not have any physical indication that it was a memorial nor take on the patina of a veterans memorial until the 1990s, in response to the litigation." *Id.*

The court of appeals reviewed the Establishment Clause framework developed by this Court in *Lemon* v.

Kurtzman, 403 U.S. 602 (1971), and *Van Orden* v. *Perry*, 545 U.S. 677 (2005). App. 12a-16a. But the court ultimately concluded that "we need not resolve the issue of whether *Lemon* or *Van Orden* controls our analysis of the Memorial," because "both cases guide us to the same result." *Id.* 16a.

The court observed that its analysis under either standard "must consider fine-grained, factually specific features of the Memorial, including the meaning or meanings of the Latin cross at the Memorial's center, the Memorial's history, its secularizing elements, its physical setting, and the way the Memorial is used." App. 22a. The court also looked at the history of La Jolla itself and noted that the community has a "well documented" history of anti-Semitism that "manifested itself in various forms but 'most prominently in the housing market.'" *Id.* 44a-45a. "Jews were effectively barred from living in La Jolla" until the late 1950s, and the aura of anti-Semitism in the community continued through at least the 1960s. *Id.* 45a. The court concluded that "[t]aking these factors into account and considering the entire context of the Memorial, the Memorial today remains a predominantly religious symbol. The history and absolute dominance of the Cross are not mitigated by the belated efforts to add less significant secular elements to the Memorial." *Id.* 22a.

The court "d[id] not discount the fact that the Cross was dedicated as a war memorial, as well as a tribute to God's promise of 'everlasting life,' when it was first erected, or that, in more recent years, the Memorial has become a site for secular events honoring veterans." App. 38a. But the court also noted that "the Memorial has a long history of religious use and symbolism that is inextricably intertwined with its com-

memorative message. This history, combined with the history of La Jolla and the prominence of the Cross in the Memorial, leads us to conclude that a reasonable observer would perceive the Memorial as projecting a message of religious endorsement, not simply secular memorialization." *Id.*

The panel "thoroughly considered Justice Kennedy's opinion" in *Salazar* v. *Buono*, 130 S. Ct. 1803 (2010). App. 34a-35a n.18. The panel observed that, in contrast to the far smaller Mojave Desert cross at issue in *Buono*, "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 that the Cross might possess." *Id.* The panel explained that "[t]he size and prominence of the [Mount Soledad] Cross evokes a message of aggrandizement and universalization of religion, and not the message of individual memorialization and remembrance that is presented by a field of gravestones." *Id.*

The court also "acknowledge[d] the historical role of religion in our civil society" and made clear that its decision was "[i]n no way … meant to undermine the importance of honoring our veterans. Indeed, there are countless ways that we can and should honor them, but without the imprimatur of state-endorsed religion." App. 5a.

The Ninth Circuit remanded the case to the district court with instructions to enter partial summary judgment for the plaintiffs on the constitutional question. The court did not dictate a specific remedy, instead leaving that to the district court to determine in the first instance. The panel emphasized that "[t]his result does not mean that the Memorial could not be modified to pass constitutional muster nor does it mean that no

cross can be part of this veterans' memorial. We take no position on those issues." App. 53a.

The government petitioned for rehearing en banc, as did the MSMA—in its first participation in the appeal. On October 14, 2011, the Ninth Circuit denied rehearing, with five judges dissenting. App. 59a.

REASONS FOR DENYING THE PETITIONS

I. THE COURT OF APPEALS' DECISION IS A FACTBOUND APPLICATION OF THIS COURT'S PRECEDENTS

The government errs when it argues that the decision below "cannot be reconciled with this Court's recent decisions addressing Establishment Clause challenges to passive displays on public lands." Pet. 13. In reality, the court of appeals based its ruling on precisely the factors that this Court has indicated matter in Establishment Clause cases.

1. In *Van Orden*, which the government argues provides the applicable standard here, Justice Breyer's controlling concurrence explained that whether a public display violates the Establishment Clause turns on the nature of the display, its history, its appearance, and its context. 545 U.S. at 700-703 (Breyer, J. concurring). In particular, Justice Breyer focused on the religious content of the display, the history of the monument, the motivation of the group that donated the monument, and "[t]he physical setting of the monument." *Id.* at 701.

The Ninth Circuit meticulously considered those same factors as applied to the Mount Soledad Cross. App. 20a-53a. The court concluded that, "after examining the entirety of the Mount Soledad Memorial in context—having considered its history, its religious and non-religious uses, its sectarian and secular features,

the history of war memorials and the dominance of the Cross— … the Memorial, presently configured and as a whole, primarily conveys a message of government endorsement of religion that violates the Establishment Clause." *Id.* 53a.

Indeed, the Ninth Circuit considered the exact factors that the government itself contends are relevant here: "the use of the religious symbol at issue in other public displays, its physical setting in the particular display at issue, and the duration and permanence of its presence at the specific site." Pet. 14. The court discussed at length the historical use of the Latin cross—or the lack thereof—in war memorials. App. 25a-34a. The court observed that "the uncontested facts are that the cross has never been used as a default grave marker for veterans buried in the United States, that very few war memorials include crosses or other religious imagery, and that even those memorials containing crosses tend to subordinate the cross to patriotic or other secular symbols. The record contains not a single clear example of a memorial cross akin to the Mount Soledad Cross." *Id.* 33a. Nor have the Petitioners or supporting amici identified one since the Ninth Circuit issued its decision.

The court also considered the physical setting of the Cross on Mount Soledad. App. 47a-51a. The court observed that "[t]he Cross physically dominates the site. It weighs twenty-four tons, stands forty-three feet tall on its base, and is visible from many more locations and perspectives than the Memorial's secular elements. The Cross is placed in a separate, fenced off box, which highlights it, rather than incorporates it as a natural part of the Memorial." *Id.* 48a. The court also noted that the Cross alone is visible from two separate

interstate highways, while no secular element is visible "except the site of the Memorial itself." *Id.* 49a.[2]

The court also discussed the history of the Cross's presence on Mount Soledad. App. 38a-47a. The court observed that "[f]or most of its life, the Memorial has consisted of the Cross alone." *Id.* 39a. The court further observed that the Cross has a long and consistent history as the site of religious services, while "the record of secular events at the Memorial is thin." *Id.* 41a.[3] The court noted as well that La Jolla, California was for a long time an "exclusionary community" with a history of anti-Semitism—facts that "reinforce[] the Memorial's sectarian effect" and "also inform[] our conclusion that the historical lack of complaint about the Memorial is not a determinative factor in this case." *Id.* 44a-45a.

In short, the Ninth Circuit performed exactly the type of fact-specific analysis that the government contends is required. That the government is unhappy with the conclusion the court reached after applying the *Van Orden* legal standard to the facts before it does not make this case worthy of certiorari.

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[2] The court observed that "[t]he centrality and prominence of the Cross in the [Mount Soledad] Memorial distinguishes the Memorial from other war memorials containing crosses. For example, the Argonne Cross and the Canadian Cross of Sacrifice at Arlington National Cemetery and the Irish Brigade Monument at Gettysburg are located among the many secular monuments in those memorials." App. 50a.

[3] As the court noted, "the history of the Memorial is relevant to determining its effect on the reasonable viewer." App. 41a n.19; *see also McCreary Cnty.* v. *ACLU of Ky.*, 545 U.S. 844, 866 (2005) ("reasonable observers have reasonable memories"); *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308-09 (2000) (noting relevance of historical context in assessing Establishment Clause claims).

2. Moreover, although the government's petition relies heavily on the plurality opinion in *Buono* (Pet. 15-18), it does not assert any *actual* disagreement between the court of appeals' reasoning and that of the *Buono* plurality. The government does not read the *Buono* plurality to state that a Latin cross *always* has a secular meaning. Nor could it: The plurality opinion referred to crosses as "religious symbols." 130 S. Ct. at 1818; *see also County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part) ("I doubt not, for example, that the [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall."); MSMA Pet. 3 ("There is no question the cross is a religious symbol.").

Rather, the *Buono* plurality remarked instead that "the Latin cross *can* have an ancillary meaning as a secular symbol when placed in the context of a war memorial." Pet. 19.[4] But the court of appeals stated the same thing here: "This principle that the cross represents Christianity is not an absolute one. In certain circumstances, even a quintessentially sectarian symbol can acquire an alternate, non-religious meaning." App. 24a. Indeed, the court concluded by leaving

[4] Of course, the merits of the Establishment Clause question were not before the Court in *Buono*. Rather, the Court considered only whether the trial court properly exercised its equitable discretion in deciding that the land-transfer statute at issue was a constitutionally acceptable response to the trial court's earlier Establishment Clause ruling. 130 S. Ct. at 1815-1816 (plurality opinion of Kennedy, J.). The Court did not decide any Establishment Clause question in *Buono*, and it certainly did not establish any binding precedent as to the message conveyed by a Latin cross in all circumstances, especially in the specific circumstances of this case, which differ significantly from those in *Buono*.

open the very possibility that a "cross can be part of this veterans' memorial." *Id.* 53a.[5]

The government complains that the court of appeals "never appeared to assume that a Latin cross can convey a secular message" and that it "appeared to assume … that the inclusion of a cross … necessarily promotes an inherently religious and sectarian message." Pet. 19; *see also* MSMA Pet. 16 (asserting that the court of appeals held that "the cross can be only a sectarian, Christian symbol, no matter how it is used"). Such statements are at odds with any fair reading of the opinion. Although the court recognized that the cross is an "iconic Christian symbol," it also stated that "[i]n certain circumstances," the use of such a symbol might convey a secular message. App. 24a. The court also observed that "[m]ilitary cemeteries have not, of course, remained entirely free of religious symbolism." *Id.* 27a. And the court acknowledged that "many monuments that include sectarian symbols do not have the primary effect of advancing religion." *Id.* 31a.

Rather, and contrary to the government's suggestion, the court of appeals concluded, based on its review of the physical setting, history, and context of *this* par-

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[5] The government also ignores the differences between the isolated, much smaller eight-foot-tall cross in the desert that was at issue in *Buono* and the massive 43-foot cast concrete cross atop Mount Soledad. Given its height, the way it dominates the surrounding landscape in the heart of a major city, and the fact that it was popularly and justifiably known as the "Easter Cross" for decades, the Mount Soledad Cross, far from invoking "thousands of small crosses," *Buono*, 130 S. Ct. at 1820 (plurality opinion of Kennedy, J.), more pointedly recalls the cross on which Jesus was crucified 2,000 years ago at Calvary—as indeed it was originally intended to do.

ticular cross on Mount Soledad, that the Cross and the memorial that it dominates convey a religious message. *See* App. 53a.

3. The government confusingly accuses the court of appeals of "incorrectly analyz[ing] whether the context of the Mount Soledad cross overwhelms its ascribed sectarian meaning" instead of "whether that context indicates a nonsectarian meaning in the first instance." Pet. 19. The government posits a distinction that seems largely without a difference: The government's apparent approach, like that of the court of appeals, involves considering the context of the display. The court of appeals considered that context at length. App. 35a-52a. Under either approach, the ultimate question remains the same: Whether that context indicates that the Cross has a sectarian meaning that predominates over any secular message that the Cross might also convey. *See Van Orden*, 545 U.S. at 700-701 (Breyer, J., concurring).

Nor, contrary to the government's suggestion (Pet. 18-19), did the court of appeals place the burden on the defenders of the display to show that the secular aspects of the display rescued it from an Establishment Clause violation. Rather, the court considered numerous factors that *enhanced* the sectarian nature of the Mount Soledad Cross: the long history of religious observance at the site, its 1954 dedication "on Easter Sunday in a ceremony that included a Christian religious service," the fact that the Cross stood alone for decades with no surrounding secular elements, and the Cross's physical dominance over the rest of the memorial. App. 38a-52a. The court ruled that these factors outweighed "the fact that [the Cross] is also dedicated to fallen soldiers," and "its comparatively short history of secular events." *Id.* 47a.

4. The government's real objection appears to be not that the court of appeals applied the wrong legal principle, but that it erred in ruling that the government's evidence did not withstand summary judgment. Pet. 18. But the application of what was indisputably the legally correct summary judgment standard to a particular set of facts does not warrant certiorari. Moreover, the argument is waived, as the government agreed that the case was ripe for summary disposition and that the relevant facts were undisputed. Mem. in Support of Federal Defendants' Motion for Summary Judgment, Dkt. #227, at 1, 17 (Dec. 3, 2007); *see also* Summary Judgment Hearing Tr., Dkt. #276, at 73:2-4 (Apr. 14, 2008) (government counsel: "I don't think there is any disagreement about those facts. Nobody is disagreeing that any of these facts took place.").

In any event, the factual matters the government now raises do not present a *genuine* dispute of *material* fact. The parties do not dispute any significant facts about the history and physical layout of the Mount Soledad display, which are well documented in the record. Nor is there any genuine dispute about whether Latin crosses appear in certain other American war memorials or the context in which they appear. Indeed, the court of appeals considered these other memorials at length. App. 25a-34a. The government's problem with the court of appeals' decision is not that the court took a position on material disputed facts, but rather that it applied the law to undisputed facts in a way that the government does not like.

II. THE COURT OF APPEALS DID NOT INVALIDATE AN ACT OF CONGRESS OR OTHERWISE FAIL TO GIVE PROPER EFFECT TO CONGRESS'S FINDINGS OF FACT

1. The government asserts that a holding that the federal display of the Cross is unconstitutional "effectively" invalidates the 2006 Act transferring title to the Mount Soledad Veterans Memorial to the United States. Pet. 9-13. This argument—which the government never asserted below—is meritless.

a. First, the 2006 Act is a land-transfer statute that does not require the continued display of the Mount Soledad Cross. The 2006 Act vests "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," and requires that "[u]pon 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 continued maintenance of the Mt. Soledad Veterans Memorial by the Association." Pub. L. No. 109-272, 120 Stat. 770, 770-771, §§ 2(a), (c) (2006).

But the statute does not provide that the "Mt. Soledad Veterans Memorial" must include the Mount Soledad Cross in any particular form. Indeed, the 2006 Act specifically defines "Mt. Soledad Veterans Memorial," and that definition does not even mention the Cross. *Id.* § 2(d), 120 Stat. 771-772. It is well established that a statutory definition will normally control the meaning of statutory terms. *See Bilski* v. *Kappos*, 130 S. Ct. 3218, 3226 (2010) ("When a statute includes an explicit definition, we must follow that definition." (internal quotation marks and citations omitted)). If

Congress had wanted to mandate that the government display the Cross on Mount Soledad, doing so would have been a simple matter.

Under these circumstances, it cannot be said that the court of appeals' decision renders the 2006 Act unconstitutional. *Cf. Jones* v. *United States*, 529 U.S. 848, 857 (2000) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter" (citation omitted)). The Cross may be modified or removed while remaining fully consistent with the 2006 Act's terms.

b. The government's argument that the Ninth Circuit "effectively" struck down a federal statute also starkly contrasts with the position the government successfully took in the district court. Two of the original plaintiffs in this litigation, Steve Trunk and Philip Paulson, challenged the 2006 Act that transferred ownership of the memorial grounds to the federal government. ER747. The government argued in response that these plaintiffs lacked standing to challenge the statute, and expressly distinguished the display of the Cross from the 2006 Act:

> Plaintiffs have standing, if at all, to challenge the display of the cross on federal land only because the display has allegedly affected them each personally. But they do not have standing to challenge the federal statute effectuating a taking of the Memorial.

Federal Defendants' Mem. in Response to Order to Show Cause re: Justiciability, Dkt. #138, at 8-9 (July 16, 2007). In addition, the government argued that Congress's purpose in taking ownership of the memorial

would be furthered even if the Cross were *not* on display:

> Plaintiffs' claim that the property cannot be used as Congress intended [because display of the Cross is unconstitutional] is misplaced. The property, which is adorned with plaques in memory of veterans, is clearly being used as Congress intended when the bill "to preserve the Mt. Soledad Veteran's Memorial in San Diego" was introduced and the taking was authorized for a "Veteran's Memorial."

Id. at 10.

The district court credited the distinction the government drew between the land-transfer statute and the display of the Cross. On November 7, 2007, the district court held that Trunk lacked standing to challenge the statute.[6] Order Dismissing Claims for Lack of Standing, Dkt. #216 (Nov. 7, 2007). The court rejected any "suggest[ion] that the transfer of land will necessarily entail permanent display of the cross." *Id.* at 13. Rather, the court stated:

> Although Public Law 109-272 mentions the existing cross, it does not require the continued display of the cross on Mt. Soledad ….
>
> Public Law 109-272 merely provides for the acquisition of land, the compensation of the land's owners, and the maintenance of the property as a veterans memorial.

Id. (citation omitted); *see also id.* at 14 (rejecting attempts "to conflate acquisition of the Mt. Soledad prop-

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[6] Paulson passed away before the ruling, which is not at issue here.

erty with unconstitutional operation of the property. As noted, Public Law 109-272 does not specifically require the operation of the property in question in any particular manner." (citation omitted)).

Thus, in the district court, the government successfully argued that the 2006 Act was legally distinct from, and did not necessarily entail, the federal display of the Cross on Mount Soledad. The government's contrary position here should not be credited.

c. The government's claim that the 2006 Act "reflects Congress's considered judgment about how to balance competing interests in a particularly sensitive context" is likewise misplaced. Pet. 12. The government relies on Justice Kennedy's observation in *Buono* that Congress was entitled to deference when it crafted a land-transfer statute in order to comply with an injunction barring the continued display of a cross on federal land. *See* 130 S. Ct. at 1817-18 (plurality opinion of Kennedy, J.). But the legislation at issue in *Buono* represented Congress's attempt to remedy an adjudicated Establishment Clause violation by transferring the land containing the cross to a private party. As the owner of the land on which the cross stood, the federal government necessarily had to respond to a court order holding the cross's display unconstitutional, and any appearance of disrespect for religion that would have arisen from the cross's removal would necessarily have been attributed to the federal government. *Id.* at 1817 ("[Congress] could not maintain the cross without violating the injunction, but it could not remove the cross without conveying disrespect for those the cross was seen as honoring.").

The 2006 Act here is nothing like the legislation at issue in *Buono*. This is not a case of Congress exercis-

ing its discretion in deciding how to comply with a court order. Rather, the 2006 Act is the very opposite: By inserting the federal government into the controversy, it *created* the constitutional issue by transferring ownership of the Mount Soledad memorial, including the Cross, to the federal government after courts determined that the City's ongoing display of the Cross violated the California Constitution. Congress did not need to take over the Mount Soledad Memorial, and its failure to do so certainly would not have conveyed any hostility to religion.

2. The government's complaint that the court of appeals should have deferred to Congress's stated motive in taking the Mount Soledad Memorial (Pet. 20-22) is likewise difficult to understand. The court did defer to Congress's articulation of its motives where such motives were arguably relevant—namely, in determining whether Congress was acting with a secular *purpose* in displaying the Cross. App. 17a ("we must defer to Congress's stated reasons" for the display). The panel accordingly held that "[t]he purpose of Congress's acquisition of the Memorial was predominantly secular in nature." *Id.*

The government contends, however, that Congress's statement of its motives should also be determinative of a court's assessment of the *effect* of a display on a *reasonable observer*. The government cites no support for its suggestion that Congress can decree the effect that a display has on a reasonable observer, and, indeed, authority is squarely to the contrary. *See, e.g.*, *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) ("The effect prong [of the *Lemon* test] asks whether, *irrespective of government's actual purpose*, the practice under review in fact conveys a message of endorsement or disapproval.'" (em-

phasis added)). If it were otherwise, the effects inquiry would be subsumed into the purpose inquiry, such that any display—no matter how religious in appearance and message—would survive a constitutional challenge as long as a majority of Congress declared a secular motive. Such a holding would be particularly inappropriate here, because the congressional findings were not the product of any hearings or other apparent fact-finding by Congress.

Indeed, by suggesting that the court of appeals should have looked to Congress's findings as reflecting the popular understanding of the memorial, the government argues that Congress should be the arbiter of the constitutionality of its own conduct. The government would be able to insulate its action against an Establishment Clause challenge by including legislative findings disclaiming a message of endorsement and demanding deference to those findings. That would not only conflict with this Court's precedents, but also would violate the principle that the courts, not Congress, are charged with determining whether Congress has violated the Constitution. *Cf. Gonzales* v. *Carhart*, 550 U.S. 124, 165 (2007) ("The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."); *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 129 (1989) ("To the extent that the federal parties suggest that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution. This is particularly true where the Legislature has concluded that its product does not violate the First Amendment.").

III. THIS CASE IS A POOR VEHICLE FOR REVIEW

This case also presents a poor vehicle for this Court's review for additional reasons. First, this case is in an interlocutory posture, set for remand to the district court to determine an appropriate remedy. Second, the court of appeals did not, and did not have to, take a position as to which constitutional test should control its analysis, and thus did not create or deepen any circuit split.

1. There has been no final disposition in this case. Rather, the case is in an interlocutory posture, which weighs strongly against certiorari. *See Bhd. of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case" and it was thus "not yet ripe for review by this Court"). The court of appeals reversed the district court's summary judgment ruling and remanded the case for determination of a proper remedy. App. 54a. Accordingly, this case is far from over, and reviewing it at this stage would not be a prudent use of this Court's resources. Further developments on remand, including the potential for an eventual settlement or legislation that affects the memorial, could influence the outcome of this case, obviating any need for review of the constitutional question presented.

Given this ongoing uncertainty, the Court should refrain from considering whether review is warranted until final disposition of the case. *See, e.g., Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923) ("a mere denial of the writ to an interlocutory ruling of the Circuit Court of Appeals does not limit our power to review the whole case when it is brought here by our certiorari on final decree"); *Virginia Military Inst.* v.

United States, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) (stating that, where court of appeals had remanded "for determination of an appropriate remedy," "[o]ur action does not, of course, preclude VMI from raising the same issues in a later petition, after final judgment has been rendered").

2. Nor is the government correct that the Ninth Circuit's decision here created or exacerbated a circuit split. Pet. 23-25. Although the court of appeals recognized that this case presented the issue whether *Lemon* or *Van Orden* should control the court's analysis, the court refrained from addressing that question because it was unnecessary. Rather, the court concluded that the result in the case would be the same under either. App. 16a.

The court of appeals recognized that both *Lemon* and *Van Orden* "incorporate[] many of the same factors," because both "require us to determine Congress's purpose in acquiring the Memorial and to engage in a factually specific analysis of the Memorial's history and setting." App. 15a-16a. Justice Breyer's controlling concurrence in *Van Orden* reaffirmed that "the context of the display" is key to the inquiry into the "message that the [display] conveys." 545 U.S. at 701 (Breyer, J., concurring). Accordingly, Justice Breyer's analysis of the display in *Van Orden* examined a wide range of contextual factors. *See id.* at 700-705. This was not a departure from earlier Establishment Clause jurisprudence, which also emphasized the importance of context. *See, e.g.*, *County of Allegheny*, 492 U.S. at 597 ("the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context"); *Lynch*, 465 U.S. at 679 ("the focus of our inquiry must

be on the crèche in the context of the Christmas season").

The court of appeals here undertook the contextual inquiry that is required under both *Lemon* and *Van Orden*. It found that under either approach, this display was unconstitutional. App. 16a. Indeed, not even the government tries to explain what factors the court would have considered under *Van Orden* that it would have disregarded under *Lemon*, or vice versa. Pet. 25. Nor does the government assert that the outcome in this case turns on which approach is employed.

This case is thus a singularly poor vehicle for resolving any alleged circuit split. The court of appeals followed a "fundamental rule of judicial restraint" by "not reach[ing] constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Ft. Berthold Reservation* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984). In short, the government requests review of a question that the Ninth Circuit did not have to answer, and did not answer, because it made no difference to the outcome of the case. *See Halbert* v. *Michigan*, 545 U.S. 605, 632 (2005) (Thomas, J., dissenting) ("[T]his Court would be unlikely to grant certiorari in a case to announce a rule that could not alter the case's disposition, or to correct an error that had not affected the proceedings below.").

IV. THE MSMA'S PETITION SHOULD BE DENIED

The Court should also deny the MSMA's separate petition. Like the government, the MSMA argues that *Van Orden* controls the ultimate disposition of this case and that the Ninth Circuit's opinion represents a misapplication of that decision. MSMA Pet. 11-15. The

MSMA's petition adds nothing to the government's argument on this issue.

Moreover, the MSMA's petition vastly overstates matters by suggesting that the court of appeals' decision puts at risk the "countless cherished memorials" containing crosses and other religious symbols that are used to honor our country's veterans. MSMA Pet. 20 (asserting that the court of appeals held that all veterans' memorials containing religious symbols violate the Constitution and that the only remaining option under the court of appeals' approach is the "removal, defacement, or destruction of countless cherished memorials across the Nation").

Contrary to the MSMA's exaggeration, the court of appeals' decision does not call into question the constitutionality of other memorials. The court of appeals clearly confined its decision to the specific circumstances surrounding the government's ongoing display of the unique Mount Soledad Cross. *See* App. 5a. The court expressly disclaimed any consideration of the constitutionality of other crosses, including several of the crosses referenced by MSMA. *Id.* 5a, 30a-31a. Indeed, rather than suggesting that all crosses in war memorials are unconstitutional, the court of appeals pointed to several of these crosses as specific examples of how crosses *may* be incorporated within a larger memorial setting so that the crosses 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." *Id.* 31a.

Those examples were invoked in contrast to this case; they are not governed by it.[7]

CONCLUSION

The petitions for a writ of certiorari should be denied.

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[7] Respondents join the government in questioning the MSMA's standing to petition for certiorari in this case. The filings in both the district court and the court of appeals, as well as the MSMA's conduct in this litigation, make clear that MSMA is not a "party" entitled to petition for certiorari under 28 U.S.C. § 1254(1).

First, as the government notes, neither of the original complaints in this consolidated action named MSMA as a defendant. An amended complaint in one of the cases did name the MSMA as a "real party in interest." But, as this Court has previously made clear, the term "party" does not include a "real party in interest" because "[t]he phrase, 'real party in interest,' is a term of art." *United States ex rel. Eisenstein* v. *City of N.Y.*, 556 U.S. 928, 934 (2009).

Moreover, the MSMA's own conduct throughout this litigation demonstrates that it is not a "party." In over two years of litigation in the district court, the MSMA made only three filings and it did not participate in summary judgment briefing or argument in the district court. The MSMA's conduct on appeal was even more passive. The appeal was docketed on August 28, 2008, and for more than two years thereafter the MSMA made no attempt to participate in the appeal; it did not even notice an appearance. It was not until after the panel issued its decision that the MSMA noticed an appearance and purported to file a petition for rehearing, though it never sought to intervene as a party.

Respectfully submitted.

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