Nos. 13-57126 & 14-55231

In the
United States Court of Appeals for the Ninth Circuit

STEVE TRUNK, *ET AL.*,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA, *ET AL.*,
Defendants-Appellants.

On Appeal from the
United States District Court for
the Southern District of California

Brief *Amicus Curiae* of U.S. Justice Foundation, Public Advocate of the United States, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Inc., Institute on the Constitution, and Conservative Legal Defense and Education Fund in Support of Appellants and Reversal

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DISCLOSURE STATEMENT

The *amici curiae* herein, U.S. Justice Foundation, Public Advocate of the United States, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Inc., Institute on the Constitution, and Conservative Legal Defense and Education Fund, through their undersigned counsel, submit this Disclosure Statement pursuant Federal Rules of Appellate Procedure 26.1, 29(c).

These *amici curiae*, other than Institute on the Constitution, are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. *Amicus* Institute on the Constitution is not a publicly traded corporation, nor does it have a parent company which is a publicly traded corporation. The *amici curiae* are represented herein by Herbert W. Titus, who is counsel of record, William J. Olson, John S. Miles, Jeremiah L. Morgan, and Robert J. Olson, of William J. Olson, P.C., 370 Maple Avenue West, Suite 4, Vienna, Virginia 22180-5615. *Amicus* U.S. Justice Foundation also is represented herein by Michael Connelly of U.S. Justice Foundation, 932 D Street, Suite 2, Ramona, California 92065.

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INTEREST OF *AMICI CURIAE*[1]

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U.S. Justice Foundation has been involved as *amicus curiae* in the Mount Soledad Cross litigation for many years, including filing an *amicus* brief in the U.S. District Court for the Southern District of California on January 8, 1996 (No. 89-cv-820), and an *amicus* brief in the U.S. Court of Appeals for the Ninth Circuit on July 28, 2006 (No. 06-55769). On June 4, 2014, U.S. Justice Foundation also filed an *amicus* brief with the U.S. Supreme Court in support of the Mt. Soledad Memorial Association's petition for certiorari (No. 13-1061).

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[1] *Amici* requested and received the consents of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

This case presents the issue of the constitutionality of the Latin Cross situated in the Mount Soledad War Memorial, a "case that is of … imperative public importance" under the First Amendment's Establishment Clause, thereby justifying granting the appellants' petition for initial *en banc* review and reversal.

For decades, the Supreme Court and the lower federal courts have wrestled under the cloud of a "bankrupt" Establishment Clause jurisprudence, one that led in many directions, often on a collision course with itself. On May 5, 2014, that confusing era finally came to an end with the Supreme Court's decision in Town of Greece v. Galloway. Abandoning the infamous Lemon test, and rejecting its derivative "no endorsement" and "divisiveness" tests, the Supreme Court returned to and reinvigorated Marsh v. Chambers, its 41-year-old decision upholding legislative prayer under the Establishment Clause. Instead of viewing Marsh as an exception to its modernized Establishment Clause jurisprudence, the Supreme Court discarded its atextual "no endorsement" and "divisiveness" tests, opting instead for two principles that accord with the historic meaning and purpose of the Establishment Clause.

First, in Town of Greece, the Court recognized that the Establishment Clause drew a jurisdictional line between matters belonging to the State and matters belonging to the Church, ruling that so long as prayer addresses the corporate duties and needs of civil government, not the personal duties and needs of individuals, then prayer — even sectarian prayer — is constitutionally permissible. Second, in Town of Greece, the Court recognized that even where prayer is permissible, the Establishment Clause only prohibits the civil government from coercing the people to participate in a religious exercise, but not from merely offending some individuals.

When this case was previously on appeal, the Ninth Circuit panel ruled just the opposite. First, applying Lemon's endorsement test, it found the Latin Cross so inherently religious that the placement and maintenance of that cross even in a war memorial setting had the unconstitutional effect of endorsing the Christian religion. Second, it found that such endorsement unconstitutionally offended nonadherents of Christianity, causing them to feel like outsiders, not full members of the political community.

Neither of the prior panel's findings would now support a claim of a violation of the Establishment Clause, bringing that decision of this Court into

direct conflict with the Supreme Court's corrective restatement of Establishment Clause principles in Town of Greece. And there is no need for a remand to augment the record below developed over decades of litigation. The Mt. Soledad Memorial Cross stands, both historically and contemporaneously, as a war memorial celebrating and commending those Americans who have given their lives in service to the nation, a function well within the jurisdiction of the civil government and, therefore, consistent with the Establishment Clause principles enunciated in Town of Greece.

ARGUMENT

I. THIS COURT'S PRIOR PANEL DECISION HAS BEEN TOTALLY DISCREDITED BY TOWN OF GREECE v. GALLOWAY.

Both Appellant party briefs rightly contend that the 2011 Ninth Circuit panel decision is inconsistent with the Supreme Court's 2014 decision in Town of Greece v. Galloway, 572 U.S. ___, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014). *See* Opening Brief for the Federal Appellants ("Fed. Br.") at 16, 29-37 and Mt. Soledad Memorial Association's Opening Brief ("Memorial Br.") at 15, 25-28. But the original no Establishment textual and historical principles embraced by the Supreme Court in Town of Greece provide much stronger support for the Mt. Soledad War Memorial Cross than either party brief gives credit.

According to the United States, Town of Greece "did not abolish the endorsement test" (Fed. Br. at 30), but rather established only that "where a government action involving religion is part of a longstanding tradition, the reasonable observer is *presumed* to perceive it within that historical context rather than as an establishment of religion." *Id.* at 33. In like manner, the Memorial Association has contended that there is no establishment violation because "[t]he reasonable observer is acquainted with the long tradition of honoring veterans with a Latin cross," and thus such an observer "is not fearful that it was erected to 'afford government an opportunity to proselytize or force truant constituents into the pews.'" Memorial Br. at 27. In essence, both briefs assume that Town of Greece ruled that the "no endorsement test" did not apply to legislative prayer because such prayer "'has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court at the opening of this Court's sessions.'" *See* Fed. Br. at 32. *See also* Memorial Br. at 25-26.

A more careful examination of the Town of Greece opinion reveals, however, that the Supreme Court has jettisoned entirely the fact-intensive and

judge-empowering "reasonable observer" inquiry, spawned by Justice O'Connor's "no endorsement test" concurring opinion in County of Allegheny v. ACLU, 492 U.S. 573 (1989). *See infra* at 6-10. In its place, the Supreme Court has laid down a fixed jurisdictional principle distinguishing matters that belong to the Church and those that belong to the State. *See infra* at 22-23.

A. Town of Greece Discarded the Allegheny Endorsement Test.

Until Town of Greece, and dating back to Justice O'Connor's concurring opinion in Lynch v. Donnelly,[2] the Supreme Court habitually found a violation of the Establishment Clause if a particular government-sponsored religious display, monument, or other activity sent a message "to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688. In Town of Greece, however, the Court flatly rejected that such a finding could give rise to an Establishment Clause claim:

> In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary

[2] 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

> religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. [Town of Greece at 854.]

By elevating coercion as the *sine qua non* of an Establishment Clause violation in the case of legislative prayer (*see id.* at 854-55), Justice Kennedy returned the Establishment Clause to the "elemental First Amendment principle that government may not coerce its citizens," as stated and applied in other contexts, including Christmas displays and Ten Commandments monuments. *Id.* at 852. Thus, Justice Kennedy dispelled any inference that its "coercion" test in Town of Greece was limited to prayer. To the contrary, Justice Kennedy's insistence upon evidence of actual coercion was a direct repudiation of the Second Circuit's decision that an Establishment claim could be grounded upon alleged feelings of exclusion and disrespect. *Compare id.* at 845 *with id.* at 854.

The Supreme Court could not have reached this conclusion in Town of Greece if it had not previously disposed of a prior precedent that would have led to just the opposite result. As Justice Kennedy observed:

> The contention that legislative prayer must be generic or nonsectarian derives from dictum in *County of Allegheny* … that was disputed when written and has been repudiated by later cases. [*Id.* at 848.]

In Allegheny, Justice Kennedy recounted, "the Court held that a creche placed on the steps of a county courthouse to celebrate the Christmas season violated the Establishment Clause because it had 'the effect of **endorsing** a patently Christian message.'" *Id.* (emphasis added). Recalling the dissenting opinion's critique "that endorsement could [not possibly] be the proper test," Justice Kennedy repeated the contention of the Allegheny dissenters that such a test would "condemn a host of traditional practices that recognize the role religion plays in our society, among them legislative prayer [including] 'forthrightly religious' Thanksgiving proclamations issued by nearly every President since Washington." *Id.*

To "counter this criticism," Justice Kennedy asserted that the Allegheny majority had "recast[] *Marsh* to permit only prayer that contained no overtly Christian references." *Id.* Quoting explicitly from the Allegheny majority opinion, Justice Kennedy rejected the following explanation of the Marsh holding:

> "history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed, [but] [t]he legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'" [*Id.*]

To the contrary, Justice Kennedy exclaimed:

> This proposition is **irreconcilable** with the **facts** of *Marsh* and with its **holding** and reasoning. *Marsh* **nowhere** suggested that the constitutionality of legislative prayer turns on the **neutrality** of its **content**. [*Id.* (emphasis added).]

Without specifically overruling Allegheny, Justice Kennedy's majority opinion in Town of Greece conformed to Justice Kennedy's dissenting opinion in Allegheny — that no Establishment Clause claim can be sustained by a finding of government endorsement, but only by a finding of government coercion. *See id.* at 852.

To be sure, the Town of Greece dissenters did not agree. In her vigorous dissenting opinion, Justice Kagan attempted to salvage the Allegheny "endorsement" test, but not by refuting Justice Kennedy's characterization of it as *dictum*. Instead, Justice Kagan attempted to rebuff Justice Kennedy's claim that the test rests upon a false factual or legal premise. Startlingly, Justice Kagan proffered in support of the endorsement test a lengthy quote from Justice Scalia's dissenting opinion in Lee v. Weisman,[3] implying strongly that even Justice Scalia has admitted that "Our constitutional tradition … ruled out of order government-sponsored endorsement of religion … where the endorsement is sectarian, in the

[3] 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example the divinity of Christ)." *See* Town of Greece at 872-73 (Kagan, J., dissenting). In context, however, Justice Scalia's statement was clearly a rhetorical concession to provide a predicate for his argument that even a "sectarian endorsement" does not, in his view, meet the Establishment Clause requirement of legal coercion. *See* Lee, 505 U.S. at 641-42.

After this foray into the endorsement legacy of Allegheny, Justice Kagan made no attempt whatsoever to weave Justice O'Connor's "no endorsement" test into her analysis. Instead, she used phrases, such as "religious equality,"[4] "neutrality,"[5] "religious diversity,"[6] and no "preference"[7] as guides to what she believed to be a correct application of the Establishment Clause. Even then, Justice Kagan failed to land on any set of governing principles, apparently because she was convinced (as Justice Breyer before her in Van Orden[8]) that

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[4] Town of Greece at 870.

[5] *Id.*

[6] *Id.* at 871.

[7] *Id.* at 873.

[8] Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

whether a particular act or practice violates the Establishment Clause depends ultimately upon the collective "judgment" of a majority of the justices — after review of all the facts. *See generally id.* at 867-70 (Breyer, J., dissenting) and 876-81 (Kagan, J., dissenting).

In short, all of the justices abandoned Justice O'Connor's endorsement test, the majority opting for a "coercion" test which does not rest, as did the discarded no endorsement test, upon the perception of a so-called "reasonable observer." *See Id.* at 852-55. *See also id.* at 865-67 (Thomas, J., concurring).

B. Town of Greece Abandoned the Three-Part Lemon Test.

Not only did the Town of Greece majority discard the "no-endorsement test," but the entire Court also completely abandoned the three-part test adopted by the Court in 1971 in Lemon v. Kurtzman, 403 U.S. 602 (1971). According to Lemon, a statute or other governmental act or practice violated the Establishment Clause if it failed one or more of three tests. First, the statute or practice must have a secular purpose. Second, its principal or primary effect must neither advance nor inhibit religion. Third, the statute or practice must not foster an excessive government entanglement with religion. *See, e.g.,* Trunk, 629 F.3d at 1106.

In Town of Greece, the Supreme Court totally ignored the Lemon test, and the case that spawned it. Without explanation, Justice Kennedy's majority opinion and the two concurring opinions simply abandoned Lemon and its progeny. Even Justice Kagan deserted the Lemon case and its much-discredited test in their entirety,[9] stating instead that she and her fellow dissenters "agree with the Court's decision in *Marsh* … upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer." Town of Greece at 870 (Kagan, J., dissenting).

Thus, by concurring with Marsh, every member of the dissenting team abandoned Lemon and the Lemon test and, by implication, rejected Justice Brennan's dissenting opinion in Marsh that the Establishment Clause was violated because the practice of legislative prayer violated all three prongs of the Lemon test. *See* Marsh, 463 U.S. at 795-96.[10] In sum, having fully embraced the

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[9] Lemon does make a cameo appearance in Justice Breyer's dissent, but not in the form of a specific constitutional test. Rather, the Justice repeats his view that Establishment Clause claims ultimately must be resolved by "appl[ying] legal judgment to the relevant facts." Town of Greece at 870 (Breyer, J., dissenting). Along with former Justice Potter Stewart who knew pornography when he saw it (Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)), Justice Breyer apparently knows an unconstitutional establishment of religion when he sees it.

[10] First, faithfully applying the three-part Lemon test, Justice Brennan found that "the 'purpose' of legislative prayer is pre-eminently religious rather

Marsh ruling, both the majority and the dissenters in Town of Greece have finally put the Lemon test to death. The only thing missing is a tombstone proclaiming that Lemon and its progeny were buried there.

C. Town of Greece Affirmed the Original Jurisdictional Principle of the Establishment Clause as Applied in Marsh v. Chambers.

For decades, the Supreme Court's Establishment Clause jurisprudence was doctrinally bankrupt. *See, e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639, 688 (2002) (Souter, J., dissenting). Justices across the ideological spectrum shared this view. For example, Justice Scalia once observed that the Supreme Court's Establishment Clause cases constitute a "geometry of crooked lines and wavering shapes,"[11] while 13 years previously, Justice Stevens bemoaned the Court's

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than secular…. 'To invoke Divine guidance on a public body entrusted with making the laws' … is nothing but a religious act." *Id.* at 797. Second, Justice Brennan observed that "[t]he 'primary effect' of legislative prayer is also clearly religious," because linking the power and prestige of the State to such an act "'provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.'" *Id.* at 798. Third, and finally, Justice Brennan contended that "there can be no doubt that the practice of legislative prayer leads to excessive 'entanglement' between the State and religion," in two ways. First, it invites the State to "monitor[] and oversee[] religious affairs," by making sure that the chaplain engages in "'suitable' prayers." *Id.* at 798-99. Second, it invites "'political division along religious lines,'" and thus, fosters "divisiveness," "'threat[ening] … the normal political process.'" *Id.* at 799.

[11] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring).

unenviable "sysiphean task of trying to patch together 'the blurred, indistinct and variable barrier' described in *Lemon*."[12]

At one point, the Supreme Court attempted to justify the "hopeless disarray"[13] of precedents, explaining that the Court's Establishment Clause jurisprudence "'sacrifices clarity and predictability for flexibility.'" *See* Edwards v. Aguillard, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting and quoting from Committee for Public Educ., 444 U.S. at 662). As Professor Jesse Choper observed, this explanation is a "euphemism … for … the absence of any principled rationale." J. Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. PITT. L. REV. 673, 680-81 (1980).

However, on May 5, 2014, the Supreme Court rediscovered the Establishment Clause's principled rationale in Town of Greece, upholding the constitutionality of a city council opening its meetings with prayer. In doing so, the Supreme Court reaffirmed Marsh v. Chambers, 463 U.S. 783 (1983), its

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[12] Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

[13] Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

41-year-old precedent which "found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds." *See* Town of Greece, 188 L.Ed.2d at 845.

But the Court did much more than that. In addition to reaffirming Marsh, it elevated Marsh to a new status. Long considered to be an exception to the Supreme Court's Establishment Clause jurisprudence, Marsh — as rearticulated and explained in Town of Greece — is now the rule. *See id.* at 845-55. Thus, Town of Greece marks a seismic shift in the Supreme Court's Establishment Clause jurisprudence.

Although some might seek to confine Town of Greece to no more than a reaffirmation of a narrow historical exception for legislative chaplains, as permitted under Marsh, that would be a mistake. Indeed, Justice Kennedy addressed that issue squarely, acknowledging that "*Marsh* is sometimes described as 'carving out an exception' to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to 'any of the formal "tests" that have traditionally structured' this inquiry." Town of Greece at 845. In fact, Justice Kennedy concluded that Marsh stood for just the opposite principle:

> *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted "by reference to historical practices and understandings." [Town of Greece at 846.]

Under Town of Greece's restatement of Marsh, then, the Establishment Clause text as historically understood would govern, and "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.*

> Even more specifically, Justice Alito explained:
>
> In the case before us, the Court of Appeals appeared to base its decision on one of the Establishment Clause "tests" set out in the opinions of this Court …, but if there is any inconsistency between any of those tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice. [Town of Greece at 862 (Alito, J., concurring).]

Thus, in further explanation of Marsh, Justice Alito continued:

> what is important is not so much what happened in Nebraska in the years prior to *Marsh*, but what happened before congressional sessions during the period leading up to the adoption of the First Amendment. [Town of Greece at 860 (Alito, J., concurring).]

On that original foundation, Justice Alito launched a review of the "'morning in Philadelphia' [in] September 1774 [when] [t]he First Continental Congress convened in Philadelphia, and [when] the need for the 13 colonies to

unite was imperative." *Id.* at 861. Putting aside their denominational differences, the members of Congress called on an Anglican minister to pray, leading Justice Alito to comment:

> This first congressional prayer was emphatically Christian, and it was neither an empty formality nor strictly nondenominational. But one of its purposes, and presumably one of its effects, was not to divide, but to unite. [*Id.*]

Indeed, in both purpose and effect, the prayer united the members of Congress — not on any confession of faith or doctrinal statement, such matters belonging exclusively to the Church — but on a Declaration and Resolves concerning taxes, writs of assistance, standing armies, and quartering of soldiers and other such matters belonging to the State.[14] *See* Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), reprinted in Sources of Our Liberties, pp. 286-289 (R. Perry & J. Cooper, eds., rev. ed., ABA Foundation: 1978).

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[14] Two years later, in 1776, in recognition of this jurisdictional separation between church matters and matters belonging to the State, the people of Virginia ratified the Virginia Declaration of Rights, Article I, Section 16 of which provided that "religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." *See* Constitution of Virginia (June 12, 1776), reprinted in Sources at 312.

Thus, the Court found that the prayer practice of the Greece town council was, like that "practiced by Congress since the framing of the Constitution," purposed to "lend[] gravity to public business, remind[] lawmakers to transcend petty differences in pursuit of a higher purpose, and express[] a common aspiration to a just and peaceful society." Town of Greece at 845. Accordingly, the Court found no violation of the Establishment Clause, so long as the prayer addressed matters of State, even though the content of the prayer was sectarian. *See id.* at 850-52. Only if the content spilled over into such topics as "damnation," "conversion," or other topics related to individual proselytizing, would the practice cross the jurisdictional line between the affairs of the church and the affairs of State.[15] *Id.*

In short, the Court concluded that the Establishment Clause "may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy." *See id.* at 849.

[15] *See Luke* 20:25 KJV ("[R]ender to Caesar the things that are Caesar's, and to God the things that are God's.").

D. The Ninth Circuit Panel Opinion Rested Upon the Thoroughly Discredited Three-Part Lemon Test, Including the Repudiated Endorsement and Divisiveness Tests.

By applying the now repudiated Lemon endorsement and divisiveness tests, the prior Ninth Circuit panel found the presence of the Latin Cross in the Mount Soledad War Memorial to be a violation of the Establishment Clause. *See* Trunk v. San Diego, 629 F.3d 1099 (9th Cir. 2011). Such reliance puts the ruling below into direct conflict with Town of Greece.

As was true of the Second Circuit decision in Town of Greece,[16] the prior Ninth Circuit panel announced that its review was governed by "the *Lemon* and *Van Orden* Frameworks." Trunk at 1105. Thus, the panel set the following opening parameter:

> The Supreme Court has articulated two related constructs that guide our analysis: the test set forth in *Lemon* … and the analysis for monuments and religious displays more recently articulated in *Van Orden*. The *Lemon* test asks whether the action or policy at issue (1) has a secular purpose, (2) has the principal effect of advancing religion, or (3) causes excessive entanglement with religion.… In recent years, the Supreme Court essentially has collapsed these last two prongs to ask "whether the challenged governmental practice has the effect of endorsing religion." [Trunk at 1106.]

[16] *See id.* at 844-45.

After noting that the Supreme Court recently applied the Lemon test to a Ten Commandments display, the panel opined that, unless the Mount Soledad Cross qualified as an historical exception under Van Orden v. Perry,[17] the Lemon test applied. Trunk at 1106-07.

After finding that the federal government had acquired the Mount Soledad Memorial, including the Cross, for a secular purpose (*id.* at 1107-09), the court below turned to the "heart of this controversy," whether the primary effect of the Memorial Cross advanced or inhibited religion. *Id.* at 1109. It then posed the issue this way:

> The question is, under the effects prong of *Lemon*, whether "it would be objectively reasonable for the government action to be construed as sending primarily a message of either **endorsement** or disapproval of religion"… By **"endorsement,"** we are not concerned with all forms of government approval of religion … but rather [with] those acts that send the **stigmatic message** to nonadherents "'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members'"…. [*Id.* at 1109 (emphasis added).]

The Ninth Circuit panel then embarked on an extensive search for possible perceptions of the memorial. It found the Latin Cross to be "an iconic Christian symbol," and that placing such a cross in a cemetery or other memorial setting

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[17] 545 U.S. 677 (2005).

does not shed its "inherently religious message." *Id.* at 1110-16. Having made this general finding, the Ninth Circuit panel turned to the specific placement and history of the Cross in the Mount Soledad Memorial. *See id.* at 1117. In order to assess whether the primary effect of the Cross was religious or secular, the panel laid down its constitutional prism:

> Secular elements, coupled with the history and physical setting of a monument or display, can — but do not always — transform sectarian symbols that otherwise would convey a message of government **endorsement** of a particular religion. [*Id.* (emphasis added).]

Enlisting Allegheny as its quintessential guide, the panel pronounced its conclusion that "the entirety of the Mount Soledad Memorial, when understood against the background of its particular history and setting, projects a government **endorsement** of Christianity." *Id.* at 1118 (emphasis added). *See also id* at 1124.

Additionally, the Ninth Circuit panel emphasized that the religious message conveyed by the Memorial not only "sends a strong message of endorsement," but also of "exclusion":

> It suggests that the government is so connected to a particular religion that it treats that religion's symbolism as its own, as universal. To many non-Christian veterans, this claim of universality is alienating[,] send[ing] an implicit message "to

> nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." [*Id.* at 1124-25.]

On these twin grounds, the Ninth Circuit panel concluded that "the Memorial, presently configured and as a whole, primarily conveys a message of government **endorsement** of religion that violates the Establishment Clause." *Id.* (emphasis added).

Significantly, in Town of Greece, the Second Circuit applied the same analysis and came to the same conclusion as did the Mount Soledad panel. First, "[i]t held that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity." *Id.* at 844. Second, the Second Circuit panel concluded that, overall, the prayers "'placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation.'" *Id.* at 845. Neither ground is valid under the rule announced and applied by the Supreme Court in Town of Greece.

II. THE MT. SOLEDAD MEMORIAL CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Having rejected outright the judicially contrived, fact-based no-endorsement test, and having also abandoned the three-part Lemon test, the Supreme Court in Town of Greece has cleared out the unconstitutional underbrush in favor of a fixed jurisdictional line, separating matters that belong exclusively to the Church and matters belonging to the State. This jurisdictional distinction permeates Justice Kennedy's opinion, as he sorts out the constitutionally "permissible" from the "impermissible." *Id.* at 846. Permissible are prayers that address matters of State that are properly before the town council or other civil government body. *See id.* at 845, 846, and 850-51. Impermissible are prayers that address matters that belong to the Church. *See id.* at 849-51.

As the party briefs for the United States and for the Memorial Association demonstrate, the "historical practice of memorializing fallen members of the armed services with a cross" has been amply documented in the fact record developed below, and confirmed by the plaintiffs' own witness. *See* Fed. Br. at 34-36. *See also* Memorial Br. at 26. Additionally, both party opening briefs demonstrate that the fact record developed below establish that the present use of

the memorial grounds is and has been "to memorializ[e] veterans, not for any other purpose." *See* Fed. Br. at 37, 50-51. *See also* Memorial Br. at 28-30. Thus, the cross as it now stands in the Memorial serves a legitimate civic purpose, honoring "patriotism and sacrifice"[18] (*id.* at 30), as acknowledged by the Supreme Court in Salazar v. Buono, 559 U.S. 700 (2010):

> [A] Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. [*Id.* at 721.]

According to the principles set forth in Town of Greece then, the Mount Soledad War Memorial Cross does not violate the Establishment Clause.

CONCLUSION

For the foregoing reasons, *en banc* review should be granted, the decision of the court below should be reversed, and the order to remove the Mr. Soledad Memorial Cross be stricken.

Respectfully submitted,

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[18] "For civil [rulers] are not a terror to good works but to the evil… [D]o that which is good, and thou shalt have praise of the same." *Romans* 13:3 KJV.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* complies with the word limitation set forth by FRAP Rule 29(d), because this brief contains 5,055 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 13.0.0.568 in 14-point CG Times.

/s/Herbert W. Titus
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Dated: October 22, 2014

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, in Support of Appellants and Reversal, was made, this 22nd day of October 2014, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/Herbert W. Titus
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