

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 08-56415 & 08-56436

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. 3:06-cv-01597-LAB & 3:06-cv-01728-LAB
Hon. Larry Alan Burns

**FEDERAL APPELLEES' PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC***

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INTRODUCTION

The panel in this case, relying on circuit precedent that has been superseded by Supreme Court precedent, declared unconstitutional a long-standing war memorial that Congress found historically significant and acted to preserve. The panel's analysis rested on the premise that a Latin cross, like the one in the Mount Soledad Veterans Memorial, can convey only religious meaning. A critical Supreme Court plurality concluded to the contrary, however, that a Latin cross has secular meaning as a symbol memorializing fallen service members. Indeed, Congress recognized that the particular Memorial at issue here conveys a message of memorialization. The panel compounded its conflict with binding precedent by holding that the history of the Memorial tainted Congress's efforts to preserve it. The court of appeals' judgment conflicts with decisions of this Court and the Supreme Court and presents a question of exceptional importance. *See* Fed. R. App. P. 35. For those and other reasons set forth below, this petition should be granted.

BACKGROUND

1. The City of San Diego dedicated Mount Soledad as a park in 1916, and in 1954, it permitted the Mount Soledad Memorial Association (MSMA) to erect a war memorial cross in the park that is 29 feet high and

sits atop a 14-foot-high base. ER51-52. Over the years, the Memorial has been the site of both religious and secular events, including Memorial and Veterans Day ceremonies, veterans' reunions, change of command ceremonies, re-enlistment ceremonies, commission ceremonies, retirement ceremonies, memorial services, weddings, family gatherings, and Easter sunrise services. ER4, SER29, 61-77. The Memorial is also used for surveying, mapping, and navigation and is an official station in the National Oceanic and Atmospheric Administration's National Geodetic Survey database. ER4 n.5, 114, 117; SER87 ("Destruction of this important monument would create an enormous amount of confusion, uncertainty and expense in the retracement of surveys upon which this monument was based."). On January 30, 1991, the City's Historic Site Board designated Mount Soledad Park as a historic site. ER52, 341.

MSMA developed the Memorial over the years. It is marked with a bronze plaque identifying it as a veterans' memorial, and six concentric walls around the base of the cross display over 2,000 engraved, black granite plaques memorializing individual veterans and fallen service members. Brick paving stones also honor veterans, and 23 bollards honor community and veterans' organizations. An American flag flies next to

the cross. ER5. These improvements predated the United States' involvement in the Memorial.

2. In 1989, Philip K. Paulson filed suit against the City to enjoin the display of the cross on public land. The federal district court enjoined the display of the cross as a violation of the California Constitution. *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). Neither court reached the question whether the Memorial violated the Establishment Clause of the U.S. Constitution. The City's subsequent attempts to sell the property were also 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) (*en banc*).

On December 8, 2004, Congress designated the "Mt. Soledad Veterans Memorial" – including not only the cross, but also the "surrounding granite memorial walls containing plaques engraved with the names and photographs of veterans" – as "a national memorial honoring veterans of the United States Armed Forces." Pub. L. No. 108-447, Div. J, § 116(a), 118 Stat. 2809, 3346 (2004), Addendum to Brief of

Federal Appellees (Add.) 3. Congress also agreed to accept title to the property if the City donated it to the federal government. *Id.* § 116(b). Proposition A, approved by 76% of the City's voters on July 26, 2005, provided for the City to donate the property to the United States, but a state trial court enjoined implementation of Proposition A. *See Paulson v. Abdelnour*, 51 Cal. Rptr. 3d 575, 583, 585 (2006).

On May 3, 2006, while the appeal of the Proposition A injunction was pending in state court, the federal district court ordered the City to remove the cross within 90 days or face fines of \$5,000 per day. *Paulson v. City of San Diego*, No. 89-0820GT, 2006 WL 3656149 (S.D. Cal. May 3, 2006). Justice Kennedy granted the City's application for a stay pending appeal. *San Diegans for the Mt. Soledad National War Memorial v. Paulson*, 548 U.S. 1301 (2006). Among other things, Justice Kennedy found that the passage of the 2004 Act designating the Memorial created "previously unaddressed issues" and "reinforce[d] the equities supporting a stay." *Id.* at 1304. He further found that "Congress' evident desire to preserve the memorial makes it substantially more likely that four Justices will agree to review the case in the event the Court of Appeals affirms the District Court's order." *Id.*

On August 14, 2006, before the pending appeals were decided, Congress exercised its power of eminent domain and took title to the property on which the Memorial stands. Pub. L. No. 109-272, § 2(a), 120 Stat. 770 (2006) (2006 Act), Add. 5-6. The bill passed the House by a vote of 349-74 and the Senate by unanimous consent. ER6, 56, Add. 14, 17. In the 2006 Act, Congress found that: (1) the Memorial “has proudly stood overlooking San Diego, California, for over 52 years as a tribute to the members of the United States Armed Forces who sacrificed their lives in the defense of the United States”; (2) the Memorial was dedicated in 1954 “as ‘a lasting memorial to the dead of the First and Second World Wars and the Korean conflict’ and now serves as a memorial to American veterans of all wars”; (3) “The United States has a long history and tradition of memorializing members of the Armed Forces who die in battle with a cross or other religious emblem of their faith, and a memorial cross is fully integrated as the centerpiece of the multi-faceted Mt. Soledad Veterans Memorial that is replete with secular symbols”; (4) the Memorial “provides solace to the families and comrades of the veterans it memorializes”; (5) the Memorial “is considered a historically significant national memorial”; (6) 76% of San

Diego voters supported donating the Memorial to the United States “only to have a superior court judge . . . invalidate that election”; and (7) the City “has diligently pursued every possible legal recourse in order to preserve” the Memorial. Pub. L. No. 109-272, § 1. The 2006 Act specified that it was intended “to preserve a historically significant war memorial.” *Id.* § 2(a).

Thereafter, this Court dismissed as moot the City’s appeal of the district court’s order to remove the cross, *Paulson v. City of San Diego*, 475 F.3d 1047, 1048 (9th Cir. 2007), and the California Court of Appeal reversed the state trial court, holding that the City’s effort to donate the Memorial to the United States pursuant to Proposition A did not violate the State or Federal Constitution, *Abdelnour*, 51 Cal. Rptr. 3d at 589.

3.a. In August 2006, Steve Trunk and Jewish War Veterans filed complaints seeking to enjoin the inclusion of the cross in the Memorial as a violation of the Establishment Clause. On July 29, 2008, the district court (Hon. Larry Alan Burns) denied Trunk’s and JWV’s motions for summary judgment and granted the United States’ motion for summary judgment. ER37, *published at* 568 F. Supp. 2d 1199. Applying *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court first held

that “[t]he ‘purpose’ prong of the *Lemon* test is met.” ER17 (“it readily appears Congress acted with the clear-cut and bona fide secular purpose to preserve the site as a veterans’ memorial”). Second, the court held that the Memorial “passes the effect test” of *Lemon*, because “the cross has a broadly-understood ancillary meaning as a symbol of military service, sacrifice, and death; it is displayed along with numerous purely secular symbols in an overall context that reinforces its secular message; and it is historically significant.” ER26-27. Third, the court held that the Memorial does not excessively entangle the government with religion. ER27.

Applying *Van Orden v. Perry*, 545 U.S. 677 (2005), the court concluded that both the purpose of the Memorial itself and viewers’ perceptions of that purpose were secular. ER27-29. Examining the Memorial’s setting, the court held that “the message the objective observer takes away from the memorial is a secular one.” ER31. The 35-year period during which the cross stood without complaint, the court observed, “is close to the 40-year period found to be determinative in Justice Breyer’s concurrence in *Van Orden*, and exceeds the 30-year period in *Card* [*v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008)].”

ER31-32. The court also observed that, although “issues surrounding the original donation of the monument to the City” are not directly relevant because “the federal government is a step removed in the chain of ownership,” nothing in the original donation or “the attendant ceremony. . . suggests an abiding religious association.” ER35. Finally, the court held that the Memorial is a passive display that, unlike the Ten Commandments memorials at issue in *Van Orden* and *Card*, conveys no “explicit message”; “[a]ny exhortation emanating from this passive monument pertains to remembering the veterans who are recognized there.” ER36.

In conclusion, the court found that “the memorial at Mt. Soledad, including its Latin cross, communicates the primarily non-religious messages of military service, death, and sacrifice.” ER36-37.

Accordingly, the court held the Memorial constitutional and entered judgment for the United States. ER37.

b. On January 4, 2011, a panel of this Court reversed and remanded. The panel agreed with the district court that Congress’s purpose in acquiring the Memorial was predominantly secular, Op. 192, but the panel followed circuit precedent holding that a sectarian war

memorial carries an inherently religious message. Op. 199-200 (citing *Ellis*, 990 F.2d 1518, and *Separation of Church & State Committee (SCSC) v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996)). The panel found it most significant that “the cross is not *commonly* used as a symbol to commemorate veterans.” Op. 200 (emphasis added). Reviewing JWV’s expert’s declaration at length, Op. 201-4, the panel found that “the cross has not been a universal, or even a common, feature of war memorials,” Op. 206, and thus has not “become a secularized representation of war memory.” Op. 204; *see also* Op. 207.

In a lengthy footnote, the panel declined to follow the critical plurality opinion in *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010), because 1) the Supreme Court there “was not addressing the merits of the Establishment Clause challenge to the cross at issue in that case”; 2) the record in the case at bar “does not establish that Latin crosses have a well-established secular meaning as universal symbols of memorialization and remembrance”; 3) the context of the Mount Soledad cross “projects a strongly sectarian message”; and 4) “the Cross is *forty-three feet tall*.” Op. 208 n.18 (emphasis in original).

Turning to the Memorial itself, the panel acknowledged that secular elements and history can transform a sectarian symbol into a secular symbol, Op. 209, but found that the Mount Soledad Memorial, as a whole, endorses Christianity, Op. 210-11. The panel examined the entire history of the Memorial, “not just ... the short time that it has stood on federal land,” Op. 212; *see also* Op. 213 n.19, and held that that history “would lead the reasonable observer to perceive a religious message in the Memorial.” Op. 212. The use of the Memorial for secular veterans’ ceremonies was insufficient, in the panel’s view, to “overcome the effect of its decades-long religious history.” Op. 216. The panel further held that the Memorial’s physical setting “amplifies the message of endorsement and exclusion projected by its history and usage.” Op. 219.

ARGUMENT

I. THE PANEL’S DECISION CONFLICTS WITH *BUONO*’S HOLDING THAT THE GOVERNMENT MAY EMPLOY A RELIGIOUS SYMBOL TO CONVEY A SECULAR MESSAGE, AND WITH CONGRESS’S JUDGMENT THAT THIS MEMORIAL CONVEYS A SECULAR MESSAGE.

1. The panel followed decisions from the 1990s, *Ellis* and *SCSC*, in which this Court held that a sectarian war memorial carries an inherently religious message. *See* Op. 199-200. The panel’s analysis

rests on the view that a Latin cross can convey only religious meaning. Op. 207 (“the Latin cross does not possess an ancillary meaning as a secular or non-sectarian war memorial”), 222 (“the Cross’s central position ... intensifies the Memorial’s sectarian message”), *id.* (“The particular history of this Cross only deepens its religious meaning”), 223 (“The use of such a distinctively Christian symbol to honor all veterans sends a strong message of endorsement and exclusion.”). Supreme Court jurisprudence, however, has developed since *SCSC* was decided 15 years ago.

In *Van Orden*, the Supreme Court held that the display of a Ten Commandments monument on the Texas State Capitol grounds did not violate the Establishment Clause. The Supreme Court held that an object can have undeniably religious content,¹ yet not violate the Establishment Clause if it also conveys secular meaning. 545 U.S. at 692 (plurality opinion); *see also id.* at 701 (Breyer, J., concurring).

Similarly, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009),

¹ The Ten Commandments “proclaim the existence of a monotheistic god[,] ... regulate details of religious obligation[, and] ... unmistakably rest even the universally accepted prohibitions (as against murder, theft, and the like) on the sanction the divinity proclaimed at the beginning of the text.” *McCreary County v. ACLU*, 545 U.S. 844, 868 (2005).

rejected the proposition that a monument “can convey only one ‘message’” and held to the contrary that monuments, particularly symbolic monuments like the one at issue here, can convey a variety of messages to different observers. *Id.* at 1135-36; *see also id.* at 1135 (“text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable”).

The *Buono* plurality applied those themes to a war memorial cross that veterans erected on federal land. *Buono* recognized that Latin crosses have secular significance and need not be eradicated from the public domain because they also have religious meaning. 130 S. Ct. at 1818, 1820; *see also id.* at 1822 (Alito, J., concurring). Justice Kennedy explained that “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 1820. The cross at issue in *Buono*, he said, “evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are

compounded if the fallen are forgotten.” *Id.*² The plurality thus concluded that the Latin cross has an ancillary meaning as a secular symbol memorializing fallen service members.

Accordingly, the district court was correct in concluding that the cross on Mount Soledad conveys a religious message to some, but it is not so inherently religious that it cannot also convey a secular message of honoring the war dead. ER19-20. Indeed, this Court has recognized that the federal government preserves many “religious landmarks,” such as the National Cathedral, Touro Synagogue, and Sixteenth Street Baptist Church, and the fact that those sites “have religious significance to many or even most visitors” does not “diminish [their] importance as . . . national cultural resource[s].” *Access Fund v. USDA*, 499 F.3d 1036, 1044 (9th Cir. 2007). The panel’s reliance on superceded circuit precedent to reach a contrary conclusion warrants rehearing *en banc*.

² Justice Alito agreed that the cross at issue conveyed “at least two significantly different messages.” *Id.* at 1822 (Alito, J., concurring). He recognized that “[t]he cross is of course the preeminent symbol of Christianity,” but noted that the *Buono* cross was intended “to commemorate American war dead.” *Id.*

2. The panel's decision also conflicts with Congress's judgment. In 2004, Congress designated the Mount Soledad Memorial, including "a 29 foot-tall cross and surrounding granite memorial walls," as a national memorial. Add. 3. In 2006, Congress took title to the Memorial in an effort "to preserve a historically significant war memorial" whose "patriotic and inspirational symbolism ... provides solace to the families and comrades of the veterans it memorializes." Add. 5. Through those enactments, which enjoyed overwhelming support in the House and Senate, Congress gave its imprimatur to the Memorial in its current form and expressed its judgment that the Memorial conveys a message of memorialization. *Cf. id.* ("The United States has a long history and tradition of memorializing members of the Armed Forces who die in battle with a cross.").

Although the panel acknowledged that Congress acted for secular reasons, Op. 192, it failed to take that into account when it held that Latin crosses convey only religious meaning, Op. 199-200, 207, 222, 223. Congress recognized the cross's non-sectarian significance in this particular Memorial, and the panel failed to accord that judgment sufficient weight. *Compare, e.g.,* op. 193 n.9 ("These legislative

recitations... are simply instructive”), *with Buono*, 130 S. Ct. at 1818 (Congress has the discretion to enact “a framework and policy of accommodation for a symbol that ... has complex meaning beyond the expression of religious views”); *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 320 (1985) (“deference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted” is unconstitutional).

3. The panel’s efforts to distinguish *Buono* were to no avail. The panel objected that the record did not establish that the Latin cross has “a well-established secular meaning.” Op. 208 n.18; *see also* Op. 202 (the cross is “not a universal monument to the war dead”), 206 (“the cross has not been a universal, or even a common, feature of war memorials”). The *Buono* plurality resolved that question, however, by concluding that the Latin cross does serve as a secular symbol of memorialization. 130 S. Ct. at 1820.

Moreover, the panel cited no authority for the proposition that a symbol must be “commonly used” for secular purposes, Op. 200, to take on a secular meaning. The Supreme Court’s holding in *Van Orden* and *Pleasant Grove* that the Ten Commandments can convey secular

meaning did not turn on the prevalence of Ten Commandments monuments, and the Supreme Court did not need to find that crosses are commonly used in war memorials to hold in *Buono* that they can be used to honor the war dead. This Memorial conveys a secular meaning because that is how Congress employed its symbolism.

Even if this were a question of fact, the panel was required to construe the facts in the light most favorable to the government before ordering the entry of summary judgment for the plaintiffs. *See Hopper v. City of Pasco*, 241 F.3d 1067, 1078 (9th Cir. 2001); *see also id.* at 1088 (Gould, J., concurring in part).³ In concluding that the Latin cross lacks a broadly understood meaning as a symbol of memorialization, the panel discounted certain important facts: that 114 Civil War monuments include a cross, Op. 203; the fallen in World Wars I and II are memorialized by thousands of crosses in foreign cemeteries, Op. 201; Arlington Cemetery is home to three war memorial crosses, and Gettysburg is home to two more, Op. 204; and military awards often use

³ The district court did “not weigh evidence at the summary judgment stage,” but found JWV’s expert “not particularly helpful to the Court’s legal analysis.” ER24. In contrast, the panel relied heavily on JWV’s expert and discounted the testimony of the government’s expert as providing “less than a scintilla of evidence to support his conclusion that the Latin cross serves as a non-sectarian war memorial.” Op. 207 n.17.

the image of a cross to recognize service, such as the Army's Distinguished Service Cross, the Navy Cross, the Air Force Cross, and the Distinguished Flying Cross.

The panel also attempted to distinguish *Buono* based on the size of the cross on Mount Soledad. Op. 208 n.18. The size of the cross, however, was of no consequence to the Supreme Court's decision in *Buono*, and it does not diminish the Memorial's secular meaning here. When Congress acted to preserve the Memorial, including the cross, in 2004 and 2006, it did so for secular reasons and intended to convey a secular message. The secular nature of Congress's message was not undermined by the size of the symbol Congress employed to convey that message.

II. THE PANEL'S RELIANCE ON THE HISTORY OF THE MEMORIAL CONFLICTS WITH *PLEASANT GROVE* AND *CARD*.

The panel erred in holding that a Latin cross in the context of a war memorial is inherently a religious, sectarian symbol. The *Buono* plurality clearly said otherwise, and for that reason alone the panel's decision should be set aside. But the panel compounded its error by further holding that, even if the Mount Soledad cross can have a secular meaning, it does not based primarily on the history of the Memorial from the time it was erected. Op. 211-19. The panel's view of that

history was skewed,⁴ but even assuming that it were accurate, that history is of limited relevance here, because Congress only became involved in this Memorial in 2004.

Pleasant Grove and *Card* held that the motives of a memorial's donor should not be imputed to the government. The Supreme Court in *Pleasant Grove* recognized that "the thoughts or sentiments expressed by a government entity that accepts and displays ... an object may be quite different from those of either its creator or its donor." 129 S. Ct. at 1136. In *Card*, this Court found that "the key" was not the intent of the group that donated the monument, a national civic organization, but rather that of the donee, the City of Everett. 520 F.3d at 1020; see also *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008).

The district court pointed out that the United States here is one more "step removed in the chain of ownership" than the City in *Card*,

⁴ The panel failed to acknowledge, *inter alia*, that the MSMA is not a religious organization, ER4 n.2; military entities participated in the Memorial's dedication ceremony in 1954, ER4; the City's Historic Site Board designated Mount Soledad Park as a historic site in 1991, ER52, 341; and the National Oceanic and Atmospheric Administration uses the Memorial as an official station in the Geodetic Survey database, ER4 n.5, 114, 117. The panel should have construed the facts in favor of the government before reversing the judgment. See *Hopper*, 241 F.3d at 1078.

because the United States acquired the Memorial not from the MSMA, but from the donee, the City of San Diego. ER35. Thus, “issues surrounding the original donation of the monument to the City of San Diego are less relevant here.” *Id.* The history of the Memorial before 2004 does not “forever taint” Congress, an entity that is twice removed from the Memorial’s original donor, in its effort to honor the Nation’s fallen service members. *See McCreary*, 545 U.S. at 874.

The panel held that the message the Memorial conveys did not change over time. *Id.* at 211, 216, 219. That holding, however, cannot be reconciled with the Supreme Court’s holding in *Pleasant Grove* that the message “a government entity conveys by allowing a monument to remain on its property” can change. 129 S. Ct. at 1136 (“people reinterpret’ the meaning of these memorials as ‘historical interpretations’ and ‘the society around them changes’” (citation omitted)). The Memorial itself has changed significantly over the years, such that “[t]he ‘message’ conveyed . . . [has] change[d] over time.” *Id.* Like the cross at issue in *Buono*, the Mount Soledad Veterans Memorial “and the cause it commemorated” became “entwined in the public consciousness,” and its designation as a national memorial gave

“recognition to the historical meaning that the cross had attained.” 130 S. Ct. at 1817.

Congress’s acquisition of the Memorial did not wipe out its history, *see* Op. 213 n.19, but Congress did not endorse the religious aspects of that history. Instead, Congress took action to preserve the Memorial as a historically significant monument to the Nation’s fallen service members. Congress’s decision to preserve the Memorial as such is entitled to respect.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for rehearing en banc is:

X Proportionately spaced, has a typeface of 14 points or more and contains 4,081 words (petitions and answers must not exceed 4,200 words).

or

Monospaced, has 10.5 or fewer characters per inch and contains words or lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

/s/ Kathryn E. Kovacs

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Kathryn E. Kovacs