

**UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
MISSOULA DIVISION**

**FREEDOM FROM RELIGION
FOUNDATION, INC.,
a Wisconsin Non-Profit Corporation,**

Plaintiff,

v.

**CHIP WEBER, Flathead National Forest
Supervisor,**

and

**UNITED STATES FOREST SERVICE,
an Agency of the United States
Department of Agriculture,**

Defendants,

and

**WILLIAM GLIDDEN, RAYMOND
LEOPOLD, NORMAN DEFOREST,
EUGENE THOMAS, and the
KNIGHTS OF COLUMBUS
(Kalispell Council No. 1328),**

Intervenor-Defendants.

Case No. CV 12-19-M-DLC

Hon. Dana L. Christensen

PLAINTIFF'S BRIEF OPPOSING MOTIONS FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The suggestion that a permanent shrine with a six-foot statue of Jesus Christ, standing by itself in the forest on federal land, does not convey a religious impression is unsupported by evidence or common sense. The shrine was intended as and approved by the Forest Service as a religious shrine -- and Jesus on Big Mountain remains a government-favored religious icon today.

A religious shrine on government land does not pass constitutional muster even if supported by a popular interest group. One story now told about the Jesus Shrine is that retiring WWII veterans wanted such a religious shrine like those they saw in Europe, but this does not make the shrine any less a religious display. A shrine is a shrine, and here, the intent and purpose remain just such, *i.e.*, a place of comfort for Catholics.

The Defendants' argument, reduced to its essence, otherwise would mean that religious iconography on public land is acceptable if supported by popular interest groups. The Establishment Clause, in other words, would be subject to majoritarian or popular demand, according to the Defendants. That, however, is not the lesson of our Constitution -- nor a paradigm for historical success, as world-wide religious conflict attests. The Establishment Clause is intended as a prophylactic against divisiveness, rather than a remedy in search of sectarian conflict.

Religious icons on public land can not be sanctified by local celebrity status. Here, Jesus on Big Mountain has achieved notoriety because it is incongruously sited on government land. The Jesus Shrine derives its cachet from being out-of-place in the middle of Forest Service land. Move the statue to a local church and it is far less notable

as a memorable religious display. Religious promoters, like the Knights of Columbus, therefore, benefit with their religious icons on public land precisely it makes them stand out. The dissonance of a religious shrine in a government forest may result in irreverence by some, but only because the shrine is perceived as a misplaced religious display.

The Defendants' argument that the Jesus Shrine is historically significant, but not a war memorial or a religious display, is not credible. It is historically significant because it is a religious display. In fact, the oral histories documented by the Defendants' own historian confirm the local perception of the statue as being religiously significant. The Defendants' "comforting" description of the Jesus Shrine derives from its religious imagery.

The suggestion, moreover that a stand-alone religious shrine should remain on public land because it has been there a long time is not constitutionally sound. The Supreme Court has consistently recognized that unconstitutional acts are not justified solely because they have previously gone uncorrected. Here, the Jesus Shrine originated, and remains, identifiably and deliberately religious. That is the perception of a reasonable observer.

The Forest Service itself has documented that the Shrine is inappropriate on Big Mountain -- but the Forest Service has perpetuated its presence in order to avoid criticism by religious proponents. The Forest Service has recognized that the Jesus Shrine would not be approved under applicable standards, but Knights of Columbus's Sacred Heart of Jesus Shrine has been preferentially finagled and permitted. Just as individuals offended

by the Jesus Shrine are discouraged from making objection, so too the Forest Service has been influenced by the cacophony of Christian supporters of the Shrine.

The perception of the Jesus Shrine on Big Mountain as a religious icon cannot be denied. The Shrine is a distinctively religious icon, in a stand-alone location on public land, so as to draw attention to it as a religious symbol. Such a striking display, preferentially and permanently located on government land, gives the unmistakable impression of religious endorsement, and that violates the Establishment Clause.

Government land cannot constitutionally be used for permanent religious displays. The attempt here to make religious orthodoxy a matter of popular acclaim is the reason that the Establishment Clause prohibits government endorsement of religion, in order to protect matters of conscience for all. The separation of church and state is the *sine qua non* of the Establishment Clause.

II. BRIEF SUMMARY OF FACTS

The looming Shrine on Big Mountain, consisting of a six-foot statue of the Sacred Heart of Jesus, stands by itself on Forest Service property as a striking figure. (Bolton Dec.; Exh. 19.) The Statue is patently recognizable as Jesus Christ, an obvious Christian religious figure. (PSDF ¶ 132).¹ The Christ figure stands alone and is not part of a larger display of historical figures or artifacts. The Statue is six-foot tall, on a seven-foot pedestal, overlooking one of the most beautiful sights on the Mountain. (PSDF ¶ 71.) The image of Christ, in short, provides a dramatic sight to passing skiers on nearby trails.

¹ Plaintiff's Statement of Disputed Facts is filed herewith. References to Plaintiffs' Statement of Disputed Facts are identified in this Brief as "PSDF."

(Bolton Dec.; Exh. 19.) In fact, the Shrine is a well-known sight on Big Mountain. (PSDF ¶ 69.)

The Christ Statue on Big Mountain is intended as a religious shrine. (PSDF ¶ 6-7.) The application for permit to the Forest Service makes that unambiguous. The authorization from the Forest Service further makes clear that the intent of the Forest Service was to approve the permit “for the purpose of erecting a religious shrine overlooking the Big Mountain ski run.” (PSDF ¶ 12.) Contemporary descriptions of the dedication of the Christ Statute in 1954 further make clear that the Shrine was intended for its religious significance. (PSDF ¶ 40.) The Knights, moreover, still adhered to this original intent even in its October 2011 Appeal Letter, stating:

The Statue has been in place and permitted to exist there on National Forest land since 1953. WWII veterans and local Knights of Columbus applied for and received permission to locate the memorial there for the purpose of perpetually remind themselves and others what it was that sustained them through the horrors of the war. (Bolton Dec.; Exh. 8.)

The Shrine on Big Mountain is unconvincingly defended as a war memorial -- no contemporaneous historical evidence supports that conclusion. (PSDF ¶ 66.) The current creation story for the Shrine, however, does not deny the religious significance of the Jesus Statue. According to recent lore, returning Roman Catholic veterans were inspired by religious shrines in the mountains of Europe, and the Shrine on Big Mountain allegedly is intended as a similar religious display. (PSDF ¶ 64.) In essence, the recent explanation for the Shrine does not deny its religious significance or purpose, but simply defends it as the desire of its sponsors. Even the Defendants’ commissioned historical

research, however, does not deny that a supposed war memorial can have religious significance. (PSDF ¶ 126.)

The Shrine on Big Mountain is not typical of war memorials, in any event. (PSDF ¶ 70, 81, 82.) Conventional memorials obviously exist that include images or references to local war heroes, including war memorials on private land. What makes the Shrine on Big Mountain distinctive, however, is its obvious religious significance. As one defender of the Shrine aptly noted, “if the Statue on our mountain had been anything other than Christ, it’d be a non-event ... If it had been, you know, a statue of a 10th Mountain Division soldier carrying a rifle, there would have been a non-event today.” (PSDF ¶ 82.) The fact that the Shrine depicts Christ, however, is the constitutionally significant point.

The Shrine’s uniqueness makes the presence of Christ on the Mountain a well-known fact and attraction. (PSDF ¶ 69.) The Defendants’ commissioned history notes that the Christ Statue is a popular meeting place, although the Shrine is “discreetly” located for its serene and meditative emphasis. (PSDF ¶ 65.) Despite the fact that even the nearby ski resort does not identify itself with the Shrine in advertising or promotion, the skiers who come to Big Mountain, nonetheless, are unavoidably exposed to this religious icon.

The Defendants’ historical research confirms repeatedly that the Statue of Christ is recognized for its religious significance. (PSDF ¶ 73, 77, 84, 88 , 97.) The researcher, Ian Smith, interviewed several local residents, many of whom commented on the distinctly religious meaning that the Statue of Christ has for them. As one individual commented, “it’s just a reminder that He is constantly watching over us and protecting us

in His, in one of His own ways we have no control over.” (PSDF ¶ 77.) Despite such direct evidence of the religious perception of the Christ Statue, however, the researcher allegedly made no attempt to determine whether the Christ Statue is perceived as religious. (PSDF ¶ 114-116.)

The historian acknowledges that the Shrine actually is used periodically for religious services. (PSDF ¶ 67.) According to Mr. Smith, however, most people just observe the Statue, which he considers a secular “use,” regardless whether skiers perceive the Shrine as having religious significance.

Mr. Smith, instead spends considerable time discussing the “playful and irreverent” interactions by some with the Jesus Statue. Mr. Smith, however, has no idea what percentage of persons exposed to the Shrine engage in such behavior. (PSDF ¶ 118m 122.) He also did not consider whether playfulness and irreverence result from the perception that a Catholic Shrine on public land is incongruously out-of-place. (PSDF ¶ 124.) Mr. Smith interviewed no one who engaged in such behavior. (PSDF ¶ 124.)

The Forest Service, however, has long recognized that a shrine does not meet established standards for government approval. The Forest Service, however, has repeatedly decided to renew authorization in order to avoid “notoriety.” (PSDF ¶ 54.) In April of 2011, Forest Service personnel nonetheless recognized the inappropriateness of reauthorizing the Shrine, but officials still wanted to avoid controversy; therefore, they advised that the Forest Service should “play up the historic nature of the site.” (PSDF ¶ 50.) As Margaret Gorski emphasized, “push the historic significance,” by calling the

Shrine a “heritage site,” and “push the story behind the 10th Mountain Division.” (PSDF ¶ 49.) Other Forest Service officials, however, have recognized that the Forest Service “would not entertain one of these permit requests today.” (PSDF ¶ 49.)

The Forest Service had already recognized, on February 22, 2011, that the questions before the Forest Service were quite simple: “Do we reissue the permit? Even though it is a religious monument on FS (Forest Service) land? Do we continue Free Use/Fee Waiver as done in the past, even though this does not fit a category for fee waiver?” (PSDF ¶ 51) The answer to these questions, Forest Service officials recognized, would be affected by the media attention that the Missoulian and Beacon bring to the matter. (PSDF ¶ 52.)

The Knights of Columbus, for their part, were still acknowledging the Jesus Statue’s religious significance in a meeting with Forest Service officials in June of 2011. At that meeting, the Knights described the Statue as a “multi-denominational religious statue” that “speaks to all religions.” (PSDF ¶ 43.) The Forest Service Heritage Specialist, however, concluded that the Statue did not have “historical significance.” (PSDF ¶ 44.) The Forest Service also significantly noted that it “had “rejected proposals from other groups to put monuments, grave markers, crosses, etc., on Forest Service land (for instance, grave markers in the Jewel Basin Hiking Area, war memorial crosses near the Desert Mountain Communications Site, memorial signs/plaques at various trailheads; spreading cremation ashes at the North Fork, air dropping cremation ashes in the Bob Marshall Wilderness, etc.).” (PSDF ¶ 45.)

As a result, the Forest Service initially denied renewal of reauthorization for the Shrine because of its religious significance, and “furthermore, the Statue and its religious objective can be accommodated on adjacent private land.” (PSDF ¶ 16-17.) The Defendant Weber further concluded that “Supreme Court decisions and recent case law that set the precedent regarding monuments with religious themes and icons with religious themes,” prohibit such religious displays on public land. (PSDF ¶ 18.)

The Forest Service, as it feared, faced immediate criticism of its decision by religious and veterans interests, including intense lobbying by Representative Denny Rehberg. (PSDF ¶ 21.) Within a week of denying authorization, therefore, the Forest Service asked the Montana State Historic Preservation Office (MSHPO) to “concur” in a statement that the Shrine was eligible for listing on the National Register of Historic Places. (PSDF ¶ 24-28.) The record does not indicate any Forest Service study or analysis underlying its “historical” about-face. The Forest Service, however, did recognize the fancy footwork needed to reach such a disingenuous conclusion, noting that “the Statue of Jesus cannot be considered eligible for its association either with the soldiers who fought in WWII, nor for its association with Jesus.” (PSDF ¶ 26.) The Forest Service, therefore, asked the MSHPO to agree that the Jesus Statue now has no association with Jesus or WWII veterans.

The MSHPO then dutifully did “concur” that the Jesus Shrine “is not believed to be a religious site because unlike Lourdes or Fatima, people do not go there to pray.” (PSDF ¶ 29.) The MSHPO did not explain, however, how a statue of Christ has no

association with Christ or WWII veterans. The MSHPO also described no investigation or study to support its concurrence.

After capitulating to popular opinion, the Forest Service considered how to manipulate public perception of the Statue, including by directing “focus on historical values rather than religious ones.” (PSDF ¶ 54.) Forest Service personnel were told to emphasize “the Statue’s association with early ski hill development, and then as secular (people go there to play) rather than a religious context (people go there to pray).” (PSDF ¶ 59.) With these guiding principles, the Forest Service then reapproved the Shrine on Big Mountain. (PSDF ¶ 32.)

The fact remains, however, that many non-believers, and non-Christians, are offended and marginalized by the government’s preferential treatment of the Jesus Shrine on Big Mountain. The Forest Service received public comments opposing the Statue, although not as many as the 70,000 form letters submitted by a Christian advocacy group and the 10,000 letters solicited by Representative Rehberg. (PSDF ¶ 30.) FFRF also received contact from persons offended by the religious icon, including honored veterans. (PSDF ¶ 42.) FFRF member Pamela Morris, moreover, has deliberately avoided Big Mountain precisely because of the Shrine. (PSDF ¶ 168, 170, 178.) Bill Cox, another FFRF member, still skis on Big Mountain, but he finds the Jesus Statue to be wholly inappropriate and offensive, including to his Jewish wife. (PSDF ¶ 156.)

The Flathead Valley, however, is a very Christian-fundamentalist area where outspoken opposition to a Catholic Shrine is not quickly forgiven; in fact, it is discouraged. (PSDF ¶ 161-162.) FFRF member Doug Bonham lives in the Flathead

Valley and he knows from personal experience that the Shrine is perceived as a religious symbol and reminder of the Christian values that the majority in the Valley promote. (PSDF ¶ 159.) The presence of Jesus on Big Mountain is known to skiers and non-skiers alike in the Valley, and it is perceived as and understood to be a recognized symbol of the religious majority. (PSDF ¶ 160.) Objection to the Statue, therefore, is implicitly, if not explicitly, discouraged. (PSDF ¶ 161.) The Shrine, nonetheless, literally and figuratively looms over the Valley, where it has the effect of making non-believers, like Mr. Bonham, feel marginalized in their own local community. (PSDF ¶ 162.)

III. MEMBERS OF FFRF HAVE HAD UNWANTED EXPOSURE TO THE JESUS STATUE SO AS TO CONFER ASSOCIATIONAL STANDING

A. Unwelcome Contact With, Or Avoidance Of, An Offensive Religious Display On Public Land Provides A Basis For Standing.

Article III standing exists for individuals who have unwelcome contact with an offensive religious display on public land. The Ninth Circuit Court of Appeals has consistently reached this conclusion, after recognizing that “the concept of a ‘concrete’ injury is particularly elusive in the Establishment Clause context ... because the Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary nature.” *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010). With this in mind, the Court has consistently upheld standing on the basis of contact with religious images, including in numerous display cases. *Id.* at 1050.

As the Court noted in *Vasquez v. Los Angeles*, 487 F.3d 1246, 1250 (9th Cir. 2007), *citing Suhre v. Haywood County*, 131 F.3d 1083, 1085 (4th Cir. 1997), the

injury that gives standing to plaintiffs in the Establishment Clause context is the injury caused by unwelcome contact with a religious display that appears to be endorsed by the state. *Id.* at 1251. This is just such a case, where FFRF's members, including William Cox, have had direct proximity to the Shrine on Big Mountain. Similarly, Ms. Morris has affirmatively altered her conduct in order to avoid Big Mountain.

FFRF member Doug Bonham also is affected by the omnipresence of the Jesus Statue, as a participating member of the Flathead Valley local community. As the court recognized in *Suhre*, 131 F.3d at 1087, "plaintiffs who are part of the community where a challenged religious symbol is located and are directly affronted by the presence of this symbolism certainly have more than an abstract interest in seeing that the government observes the Constitution." Thus, where there is a personal connection between the plaintiff and the challenged display in his or her home community, standing is established by the proximity to the conduct challenged.

The majority of other Circuits also have held that spiritual harm resulting from contact with an offensive religious symbol provides a sound basis for Article III standing. *Vasquez*, 487 F.3d at 1253. Unwelcome contact, even without avoidance, therefore, is enough to establish a legally cognizable injury and, therefore, standing. *Id.* at 1250 n. 4. *See also, Newdow v. LeFevre*, 598 F.3d 638 (9th Cir. 2010) (plaintiff had standing to challenge statute requiring inscription of "In God We Trust" on currency because he was forced to "encounter a religious belief he finds offensive").

The Ninth Circuit, moreover, does not distinguish between ideological and religiously-motivated objections to religious displays, although the objectors here are all

non-believers. In *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004), the defendants suggested that the Supreme Court's decision in *Valley Forge* required that a plaintiff's offense be grounded in religious beliefs, rather than ideological values. The Ninth Circuit rejected this interpretation, concluding that in *Valley Forge*, the plaintiffs lacked standing because their sense of offense was unaccompanied by a personal affront suffered as a consequence of the alleged constitutional violation. According to the Ninth Circuit, the lack of a consequential personal injury, not the origin of the offense, resulted in the denial of plaintiffs' standing. In *Valley Forge*, unlike the present case, the plaintiffs had no proximity to the site of their complaint.

The "psychological consequence" of unwanted exposure to religious displays, therefore, does constitute concrete harm where it is produced by direct exposure in one's own community. *Catholic League*, 624 F.3d at 1052. *See also, Vasquez*, 487 F.3d at 1252 ("unlike plaintiffs in *Valley Forge*, who were physically removed from defendant's conduct, Vasquez is a member of the community where the allegedly offending symbol is located"). FFRF's members satisfy this criterion.

The Ninth Circuit also has consistently found standing where an offensive religious display on public land has caused "affirmative avoidance" of the display, leading to an "impaired ability to freely and unreservedly use public land." *Buono v. Norton*, 371 F.3d 543, 547 (9th.Cir. 2004). Affirmative avoidance is sufficient to establish standing, but the Ninth Circuit does not require it. "Unwelcome direct contact, without avoidance, is enough to establish a legally cognizable injury for purposes of standing." *Vasquez*, 487 F.3d at 1252-53. *See also, Barnes-Wallace v. City of San*

Diego, 530 F.3d 776, 784 (9th Cir. 2008) (plaintiffs had standing when they would not use public land because of religious use); *Ellis v. La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (standing found to exist where plaintiffs avoided using land on which cross was displayed).

The Defendants' reliance on *Caldwell v. Caldwell*, 545 F.3d 1126 (9th Cir. 2008), is misplaced in the present case. The alleged injury in *Caldwell* was found to be too tenuous, in context, but the Court did not disavow direct contact or affirmative avoidance of a religious display as sufficient for purposes of standing. *Caldwell*, more pointedly, held that the plaintiff lacked standing to raise an Establishment Clause claim arising from discussion of religious views on a website created and maintained by the University of California. *Id.* at 1132. The Court denied standing in *Caldwell* because the plaintiffs' objection was too "abstract" and "tenuous." *Id.* *Caldwell* is distinguishable from the present case, however, because the Plaintiffs here are not mere bystanders. *Barnes-Wallace*, 530 F.3d at 785-86. On the contrary, the Court has held in numerous cases that injury is sufficient to establish standing under the Establishment Clause where an individual affirmatively avoids public land in order to resist exposure to a religious display. That is the case in the present matter.

B. FFRF Members Have Had Direct Contact With, Or They Have Avoided, The Shrine On Big Mountain, Which is Sufficient For Purposes Of Standing.

FFRF member Pamela Morris has affirmatively avoided Big Mountain because of the Shrine. Ms. Morris is a long-time skier in Montana, for more than 60 years, but she has skied clear of Big Mountain in order not to have direct contact with the Jesus Statue.

(PSDF ¶ 168, 170.) Ms. Morris' avoidance has continued ever since she first encountered the Shrine as a teenager, at which time she was profoundly offended. (PSDF ¶ 168.)

FFRF member William Cox also has had continuing direct unwanted contact with the offensive display on Big Mountain. (PSDF ¶ 156.) The Defendants unpersuasively try to discredit Mr. Cox's sincere and profound objection to the Jesus Shrine, as a simple disagreement with the government's decision to reauthorize the religious shrine on Big Mountain. The Defendants characterize Cox as suffering mere psychological injury caused by disagreement with the government. Where the offense is caused by direct contact, within one's own community, however, this is precisely the type of concrete and personal injury sufficient to confer standing. Mr. Cox has had frequent and regular unwanted contact with the Jesus Statue at issue. He lives only 15 miles from Big Mountain and he regularly skis there each winter. Both his past and future exposures to the Shrine, therefore, are sufficient to establish standing in Cox's own right under applicable Ninth Circuit precedent and this court's own prior rulings.

The effect of the Shrine, moreover, impacts both skiers and non-skiers in the Flathead Valley. FFRF member Doug Bonham explains that the Jesus Shrine has a looming omnipresence throughout the Valley which impacts him even though he is no longer able to ski. (PSDF ¶ 159.) Within his community, the Shrine is widely recognized and perceived as a symbol of religious preference and endorsement. (PSDF ¶ 159.) According to Mr. Bonham, moreover, persons who object to the Jesus Statue being on Big Mountain are discouraged and marginalized within the Valley. (PSDF

¶ 162.) Where such personal impact of a religious display occurs within one's own political community, the offense is sufficiently concrete for purposes of standing.

C. FFRF Has Associational Standing Based On The Standing Of Its Individual Members.

An organization may sue on behalf of its members who would have standing to sue in their own right. *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 181 (2000); *Pacific Rivers Council v. United States Forest Service*, 689 F.3d 1012 (9th Cir. 2012). In the present case, FFRF has submitted declarations from three different members who would have standing in their own right to raise objections to the Jesus Statue on Big Mountain, including Mr. Cox, Ms. Morris, and Mr. Bonham. In the case of Mr. Cox, personal standing is based upon past and continuing direct unwanted contact with the Jesus Statue. In the case of Ms. Morris, she has affirmatively avoided a significant and beautiful ski area in order to avoid the Jesus Statue. With respect to Mr. Bonham, he resides in the community in which the Jesus Statue exerts an omnipresent endorsement of religion and marginalization of non-believers like himself.

D. FFRF Has Members With Personal Standing Sufficient To Provide Associational Standing and if not, then a curative amendment is appropriate.

The Knights of Columbus object to FFRF's associational standing because FFRF supposedly did not have members with standing at the time that the complaint in this matter was filed on February 8, 2012. In fact, however, both Pamela Morris and Doug Bonham quite willingly became members of FFRF on February 3, 2012, because of

FFRF's common objection to the Shrine on Big Mountain. (*United States Forest Service*, 188-189.)

The objection to Mr. Cox, moreover, ignores the reality that he has functionally always been represented by FFRF since the outset of this litigation. The Knights of Columbus note that Mr. Cox officially became a member of FFRF on February 18, 2012, 10 days after the suit was filed. On the other hand, the Knights do not deny that his interest in this suit is in complete alignment with the Freedom From Religion Foundation, and he premises his objection to the Shrine on the same operative facts and cause of action instituted by FFRF. Mr. Cox seeks to vindicate the same claims advanced by FFRF, *i.e.*, the very same cause of action that is at stake. Even if the pending complaint was to be dismissed without prejudice for want of jurisdiction, therefore, Mr. Cox could simply file a new lawsuit, with the same claims now pending in this Court. Judicial economy warrants that this action proceed now without such delay and waste precipitated by a second filing.

If the Court deems Mr. Cox's membership date decisive, however, then FFRF alternatively requests the Court for leave to amend the pleadings to allege specifically that Mr. Cox, Ms. Morris and Mr. Bonham are present FFRF members. FFRF alternatively moves to add these members as plaintiffs. Requiring them to file a new action would needlessly consume the additional resources of the parties and the Court.

This Court, moreover, would not exceed its power by exercising jurisdiction over this controversy as long as there exists a substantial identity of interest between FFRF and its members, and as long as the pleadings set forth the same facts upon which the

parties base their invocation of the Court's jurisdiction. *Cf. Delta Coal Program v. Libman*, 743 F.2d 852, 856 (11th Cir. 1984); *Smith v. CHF Industries*, 811 F. Supp. 2d 766, 774 (S.D.N.Y. 2011) (substitution would not alter substance of action and is wiser answer to starting over). Here, Mr. Cox, Ms. Morris and Mr. Bonham each has such an identity of interest with Freedom From Religion Foundation, and their claims have functionally been before the Court since the outset. The operative facts and the cause of action would not be changed, but only the formally named plaintiffs, if Mr. Cox, Ms. Morris and Mr. Bonham are added as named plaintiffs.

IV. THE BIG MOUNTAIN SHRINE HAS THE PURPOSE AND EFFECT OF ADVANCING RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE

A. The *Lemon* Test Is Applicable To Religious Displays Like The Big Mountain Shrine.

The traditional test applied by the Supreme Court to determine whether governmental action violates the Establishment Clause was set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). To be constitutional, the government conduct at issue must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster an excessive government entanglement with religion.

The *Lemon* test has recently led a checkered existence. In two relatively recent Establishment Clause cases, the Supreme Court reached differing results under distinct tests of constitutionality. In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court held that the display of a monument inscribed with the Ten Commandments on the grounds of the

Texas capitol did not violate the Establishment Clause. The plurality opinion stated that the *Lemon* test was not useful in dealing with this sort of passive monument that Texas had erected on its capitol grounds. *Id.* at 686. On the other hand, in *McCreary County v. ACLU*, 545 U.S. 844 (2005), the Court held that the display of loaned copies of the Ten Commandments on the walls of two courthouses violated the Establishment Clause because the placement of the displays evidenced a religious purpose, thus failing the first prong of the *Lemon* test.

The Ninth Circuit discussed the impact of these cases in *Card v. City of Everett*, 525 F.3d 1009, 1016 (9th Cir. 2008), a case like *Van Orden* involving a 10 Commandments display that was as part of a larger display with numerous secular monuments. The Court came to two conclusions: (1) that the three-part test set forth in *Lemon* remains the general rule for evaluating whether an Establishment Clause violation cause exists; and (2) that the *Lemon* test does not apply to determine the Constitutionality of some long-standing religious displays that convey a historical or secular message in a non-religious context. *Card*, 520 F.3d at 1016. *See also*, Public Displays of Affection for God: Religious Monuments after McCreary and Van Orden, 32 Harv. J. L. & Pub. Pol’y., 231, 246 (2009) (“Most courts of appeals have concluded that the *Lemon* tripartite test of purpose, effect, and entanglement still stands after *Van Orden*.”). Here, the present case does not fit the exception discussed in *Van Orden*. Under either test, however, the Shrine on Big Mountain violates the Establishment Clause under the Ninth Circuit’s reasoning in *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011), in

which the Court held that a veterans' memorial dominated by a cross violated the Establishment Clause. (*Trunk* Decision attached hereto as Exhibit A.)

B. The Big Mountain Shrine Was And Is Intended As A Religious Display.

Under both *Lemon* and *Van Orden*, the Court first considers whether the purpose of government action is predominantly secular in nature. When the government acts with the ostensible and predominant purpose of advancing religion, it violates a central value of the Establishment Clause. *McCreary*, 545 U.S. at 860. The underlying value of the Establishment Clause is violated, moreover, when the government manifests a purpose to favor one faith over another faith -- or over non-believers. The Supreme Court explained in *McCreary* that the purpose inquiry does not call for "any judicial psychoanalysis." *Id.* at 862. Rather, "the eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history and implementation." *Id.* Finally, the secular purpose must "be genuine, not a sham." *Id.* at 864.

In the present case, the Forest Service's authorization of a permanent religious shrine on Big Mountain evinces a purpose that cannot be characterized as "predominantly secular." The Knights of Columbus requested authorization to erect a religious shrine. The request made no mention of a memorial or any secular purpose. Contemporary accounts from 1954 confirm that the Shrine was dedicated atop Big Mountain with the assistance of a Catholic Priest. (Bolton Dec., Exh. 2.) The Knights, in fact, specifically dedicated the Shrine "To the Honor and Glory of God." *Id.* The Knights, moreover,

were and are an exclusive membership organization for Catholic men -- and the Knights constructed numerous similar Catholic shrines around the country. (*United States Forest Service*,9-10.) The Knights constitute an exclusively Roman Catholic organization for which “church-related activities are essential to its work as an organization of Catholic laymen.” (PSDF, ¶ 9-10).

The Forest Service, for its part, granted the Knights authorization, without cost, to put a shrine on public land. (*United States Forest Service*,12.) That was the purpose of the request and that was the stated purpose of the approval. No “psychoanalysis,” therefore, is necessary to determine anybody’s purpose. This is not a public forum, moreover; it is regulated use land, and permitted uses do not allow for religious shrines to be constructed permanently in National Forests!

Subsequent attempts to re-write history, moreover, do not detract from the original religious purpose of the Catholic Shrine. The story has surfaced that returning Roman Catholic WWII veterans had seen “religious shrines” in Europe and so the Knights who already had a history of erecting religious shrines, supposedly adopted this justification. Even that attempted rationalization, however, does not contradict that the Shrine on Big Mountain was intended for its religious significance.

The claim that veterans wanted a religious shrine does not make it suddenly non-religious. The inquiry is not who wanted a Shrine, but why. Here, the stated purpose for the Shrine confirms its religious significance. As the Tenth Circuit Court of Appeals recognized in *American Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1122 (10th Cir. 2010), a memorial cross, which is not a generic symbol of death, does not nullify religious

sectarian content. Dedicating a patently Catholic shrine to a veteran's group also does not magically transform the shrine into a secular symbol. The Court stated in *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961, 974 (W.D. Wis. 2003), that "it is difficult to see how dedicating a monument to a particular group can diminish its religious nature ... Building a church in memory of a beloved parishioner does not make it any less a place of worship." In *Freedom From Religion Foundation v. Marshfield*, 203 F.3d 487 (7th Cir. 2000), moreover, the Court held that a similar KOC statue of Jesus, arms open in prayer, gave the appearance of endorsement, including because the statue "portrays a figure of particular importance to one religious group." In fact, "Jesus Christ is, if anything, more fundamental to the doctrine of Christianity than the Ten Commandments are to either Judaism or Christianity." *Washegesic v. Bloomington Public Schools*, 813 F. Supp. 559, 563 (W.D. Mich. 1993).

As recently as June of 2011, moreover, the Knights continued to describe the Shrine on Big Mountain as a "non-denominational religious statue," which supposedly "appeals "to all religions." The reality, of course, is that Jesus is a distinctively Christian figure, and the Knights did not disavow their original intent that the Shrine was intended to reflect obvious religious significance.

The Forest Service's own purpose in favoring the Christ monument is indicated by the sham tactics used to justify reauthorization. The Forest Service recognized that war memorials and religious statues are not appropriate for approval under government regulations. The Government's own Brief, at page 2, confirms that a religious shrine does not fit any of the stated purposes for federal permits. The Forest Service, moreover,

recognized that it had denied non-Christian groups permission to utilize public land for religious purposes. The Forest Service, therefore, responded to criticism of its initial decision of August 24, 2011, by attributing “historical significance” to the Shrine as part of an area ski resort. The ski resort, however, has never advertised or promoted the Shrine, nor is the Shrine even situated as an obvious part of the resort, according to the defendants. In fact, the Defendants argue that the Shrine is “discreetly” remote from the groomed ski trails, although this has not always been the case. (PSDF ¶ 36). Nonetheless, knowing the tightrope it had to walk, the Forest Service coached personnel to make the remarkable argument that the Statue of Jesus has neither religious significance, nor is it a war memorial. (PSDF ¶ 26-27.)

The Forest Service’s “refined” justification crystallized one week after being criticized for its initial decision -- and the administrative record shows no study or analysis even being done along the lines being suggested by the Forest Service. Similarly, the Montana State Historical Preservation Office “concurred” with the Forest Service without any study or analysis. MSHPO simply concluded that the Shrine is not like Lourdes where people come to worship. This napkin analysis, however, completely ignores the fact that religious displays are often not destination sites, such as a nativity scene on a courthouse lawn.

Unwanted exposure to religious displays, plainly violates the Establishment Clause. MSHPO’s reasoning, if adopted, would sanction permanent religious displays on government land as long as people came to the site without intending to be exposed to

religious iconography. The Establishment Clause, therefore, would countenance unwanted exposure to religious displays -- if unintended or unavoidable.

According to the Forest Service's present analysis, even a stand-alone nativity scene on government property would not be objectionable because courthouse observers did not come, in the first instance, to see the nativity scene. Unexpected and unwanted exposure to religious displays on public property, by this reasoning, would by definition render the display constitutional under the Establishment Clause. Realistically, the Forest Service probably does not believe this, but the Forest Service finds itself in this untenable position because it has engaged in contrived reasoning to preferentially reapprove the Shrine on Big Mountain.

In the end, the honest evidence undisputedly establishes that the Catholic Shrine on the Forest Service's property was intended and approved as a religious Shrine. That is the current purpose as well, and the Government's subterfuges merely reflect the Government's continuing purpose.

C. The Shrine On Big Mountain Has The Primary Effect Of Advancing Religion, Including Because The Shrine Gives The Appearance Of Endorsement.

The Ninth Circuit's recent decision in *Trunk* is highly instructive in evaluating the present. *Trunk* involved a Veterans' Memorial dominated by a Christian cross. In its analysis, the Court considered "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." 629 F.3d at 1110.

The government contended in *Trunk* that the relevant factors demonstrated that the Memorial's primary effect was patriotic and nationalistic, not religious. The Court disagreed. Taking all of the factors into account and considering the entire context of the Memorial, the Court concluded that "the Memorial today remains a predominantly religious symbol. The history and absolute dominance of the Cross are not mitigated by belated efforts to add less significant secular elements to the Memorial." *Id.*

The Court first acknowledged the obvious in *Trunk*, *i.e.*, that the Latin Cross "Is the preeminent symbol of Christianity." *Id.* According to the Court, the Cross also is "exclusively a Christian symbol, and not a symbol of any other religion." *Id.* at 1111. Similarly, in the present case, the figure of Jesus Christ on Big Mountain is unambiguously a symbol of Christian faiths, and more particularly, the Catholic faith. Nothing in the record, moreover, detracts from this meaning, *i.e.*, the Christ figure has not acquired an alternate, non-religious meaning.

The Court in *Trunk* next considered whether the Latin Cross had a "broadly-understood ancillary meaning as a symbol of military service, sacrifice and death." The Court rejected the Defendant's argument that the Cross had such an ancillary meaning:

The reasoning behind our prior decision is straight forward. A sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion. *Ellis*, 990 F.2d at 1527. Thus, the use of exclusively Christian symbolism in a memorial would, as Judge O'Scannlain has put it, "Lead observers to believe the City has chosen to honor only Christian veterans." *SCSC*, 93 F.3d at 626 (O'Scannlain, J., *concurring*). And in so far as the Cross is "not a generic symbol of death" but rather "a Christian symbol of death, that signifies or memorializes the death of a Christian," *American Atheists*, 616 F.3d at 1161, a reasonable observer would view a memorial cross as sectarian in nature. 629 F.3d at 1112.

Again, in the present case, nothing in the record suggests that the Catholic Shrine on Big Mountain has acquired an ancillary meaning as a secular war memorial. In fact, the Defendants' historian found no contemporaneous evidence that the Christ figure on the Mountain was erected as a war memorial. In any event, shrines with Statues of Christ certainly have never become a common symbol for military cemeteries in the United States. On the contrary, the evidence in this case shows that the Shrine on the Mountain is not typical of a memorial -- or even as an ancillary part of a resort.

The evidence does not support the conclusion that Catholic shrines have been used as a default symbol memorializing veterans buried in the United States; very few if any war memorials include catholic shrines or other religious imagery; and the Shrine on Big Mountain does not subordinate the figure of Christ to patriotic or secular symbols. In fact, no patriotic or secular symbols are present at all. On the basis of the evidence, therefore, the Court can only conclude that the Jesus Statue does not possess an ancillary meaning as a secular or non-sectarian war memorial. Christ remains, as intended, an exclusively Christian symbol.

The Court in *Trunk* further considered whether secular elements, coupled with the history and physical setting of the Latin Cross had transformed the sectarian message of government endorsement of a particular religion. *Id.* at 1117. The Court concluded that such a transformation had not occurred, but the Court did "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.” *Id.* at 1118. The Court, in fact, did not doubt that the Memorial at issue was intended, at least in part, to honor the sacrifices of the Nation’s soldiers. Nonetheless, the Court concluded that a reasonable observer would perceive the Memorial as projecting a message of religious endorsement, not simply secular memorialization.

The Court in *Trunk* also considered important the fact that the Memorial had consisted for most of its life with the Cross alone; the Cross was dedicated in 1954 with no physical indication that it was intended as a war memorial until a plaque was belatedly added in 1989, in response to litigation; when seeking permission to erect the Cross, the applicant sought authorization to “create a park worthy to be a setting for (this) symbol of Christianity;” the Cross was dedicated in a ceremony that included a Christian religious service; and the Cross’s importance as a religious symbol was a rallying cry for many involved in the litigation surrounding the Memorial. *Id.* at 119-120.

Likewise, in the present case, secularizing factors are not present. The Big Mountain Shrine was intended and dedicated for its religious significance; returning veterans allegedly saw similar religious shrines in Europe, after which the Jesus Shrine is supposedly modeled; the Shrine was dedicated by Catholic officiates, according to contemporary reports; and long-time local residents testify to the continued religious significance and perception of the Statue.

The fact that the Catholic Shrine on Big Mountain has no surrounding secular features also is significant. In *Van Orden*, upon which the Defendants rely, challenge was made to an Eagle’s-donated monolith on the grounds of the Texas capitol, was

surrounded by 22 acres of land, which “contains 17 monuments and 21 historical markers commemorating the people, ideals, and events that compose Texan identity.” 545 U.S. at 681. This context in *Van Orden* was significant to Justice Breyer in his concurring decision because “when placed in the midst of numerous other, non-religious monuments, a display of the (Ten) Commandments can also impart a secular moral message.” *Id.* As a result, such a display, like a Crèche among secular objects, may be permissible. *Trunk*, 629 F.3d at 1118. By contrast, however, in the present case, the Catholic Shrine is not in the midst of other non-religious symbols, and unlike the Ten Commandments, undisputedly does not impart a “secular moral message.” Treating a ski slope as a museum would be a dangerously slippery slope.

Finally, the Court in *Trunk* considered physical setting to be a relevant factor. The Court concluded, in this respect, that the Memorial’s physical setting “amplified the message of endorsement and exclusion projected by its history and usage.” In particular, the Court noted that the Cross remains the Memorial’s central feature, *i.e.*, it dominates the site. *Id.* at 1122-23. “From the perspective of drivers on Interstate 5, the Cross is the only visible aspect of the Memorial, and the secular elements cannot neutralize the appearance of sectarianism. For these drivers, the Cross does not so much present itself as a war memorial, but rather as a solitary symbol atop a hill.” *Id.* at 1123.

The physical setting in the present case “amplifies” even more the message of endorsement. Here, the Shrine has no secular elements at all, and to those looking at it from distant ski trails, the sectarian effect is even more dramatic. In addition, as the Defendants emphasize, the Statue is located away from the commercial ski trails so that it

too “does not so much present itself as a war memorial, but rather as a solitary symbol atop a mountain.” Moreover, locals testify that the serenity of the site presents a meditative opportunity to reflect at this religious site.

This point is not a simple matter of aesthetics. In *Van Orden*, the secular, historical and moral messages of the Ten Commandments display were highlighted by the fact that they were part of an assortment of monuments that supposedly shared a unifying, cohesive secular theme. *Van Orden*, 545 U.S. at 701-702 (Breyer, J., *concurring*). That theme supposedly reflected the historical ideals of Texans, which allegedly were grounded on moral principles involving ethics and law. The present case, however, has no such theme, but only a message that is unambiguously religious.

The fact that some skiers may behave “playfully and irreverently” around the statue does not change the equation. Such behavior, in fact, may as much be the result of the incongruity of a religious shrine in the forest -- and it may also evidence the religious perception of the shrine. The significant point is that individual responses to unavoidable exposure to religious displays is not mandated by the Constitution.

The fact that few locals may be devout enough to brave inclement weather to actively worship at the Shrine also is irrelevant, as is the fact that local ministers may not motivate their congregants to trek to the Shrine. The Defendants again misconstrue the Establishment Clause as if it only prohibited religious “uses” of public land for formal services, without any prohibition on religious displays that unexpectedly confront the passer by.

A religious shrine, moreover, is no less religious if visitors and tourists recognize the shrine as a meeting spot. Such “use” does not destroy the religious nature of the shrine, any more than tourists meeting in front of Notre Dame destroy the religious nature of that church.

After examining the entirety of the Big Mountain Shrine in context, and considering its history, its religious and non-religious uses, its exclusively sectarian features, and the uniqueness and dominance of the Shrine, this Court should conclude, as in *Trunk*, that the Shrine primarily conveys a message of government endorsement of religion that violates the Establishment Clause. Context carries the weight in the Establishment Clause calculation, and should be considered. In the context of the Flathead Valley, the Government’s authorization of a religious shrine on Big Mountain has the impermissible purpose and primary effect of endorsing religion in violation of the Establishment Clause.

V. ENFORCEMENT OF THE ESTABLISHMENT CLAUSE DOES NOT EVINCE HOSTILITY TO RELIGION

The Defendants, in the end, argue unpersuasively that removal of the Shrine on Big Mountain would constitute unacceptable hostility to religion. This argument, if accepted, would eviscerate the Establishment Clause. As the Ninth Circuit recognized in *Vasquez*, 487 F.3d at 1256, “it is well-established that governmental actions primarily aimed at avoiding violations of the Establishment Clause have a legitimate secular purpose.” Establishment Clause jurisprudence would be unworkable if it were any other way: “To hold that the removal of objects to cure an Establishment Clause violation

would itself violate the Establishment Clause would result in an inability to cure an Establishment Clause violation and thus totally eviscerate the Establishment Clause.” *Id.* at n.8, *quoting McGinley v. Houston*, 282 F. Supp. 2d 1304, 1307 (M.D. Ala. 2003), *aff’d*, 361 F.3d 1328 (11th Cir. 2004). *See also Johnson v. Poway Unified School District*, 658 F.3d 954, 972 (9th Cir. 2011) (action taken to avoid conflict with the Establishment Clause does not inhibit nor excessively entangle government with religion).

The Defendants apply a bootstrap approach to the Establishment Clause. As the Supreme Court recognized in *Marsh v. Chambers*, 463 U.S. 783, 790 (1983), however “standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees.” The Establishment Clause invokes no such statute of repose. In *Marsh*, the Court upheld the practice of opening legislative sessions with solemnizing prayer, but only after concluding that the practice had the secular effect of solemnizing important occasions. In the present case, however, the Shrine on Big Mountain has no such pedigree. On the contrary, the Jesus Shrine solemnizes only the Christian memory of Christ, while providing a serene meditative site to reflect upon Him.

The present case, therefore, presents a situation unlike in *Salazar v. Buono*, 130 S. Ct. 1803 (2010). The Defendants, again, rely heavily on dicta in *Salazar*, but the only issue actually before the Court in *Salazar* was the validity of a congressional land-transfer statute, adopted as a curative measure for a religious display found to violate the Establishment Clause. The merits of the constitutional violation were not on review by the Supreme Court, but the Court nonetheless did comment in the context on which the

statute was enacted and the reasons for its passage. The Court noted, for example, that Congress had previously designated the Cross at issue in *Salazar* as a national memorial for more than 300,000 WW-I Veterans. *Id.* at 1817. The Court also noted that the Cross had not been originally intended to promote a Christian message. *Id.* at 1816. Finally, taking account of the fact-specific context involved, the Court felt that statue at issue was part of a “broader moral and historical message reflective of a cultural heritage.” *Id.* at 1817.

The factual context of the present case, however, is quite different than in *Salazar*. The Shrine in this case was originally intended for, and is still perceived for, its religious significance. Also, it is not part of a broader moral and historical message. Nor is it a “public acknowledgment of religion’s role in society,” as the Defendants suggest. Instead, this case is most analogous to the Ninth Circuit’s subsequent decision in *Trunk*, which issued after the Supreme Court’s decision in *Salazar*.

The Defendants also try to make more of the supposed lack of objection to the Big Mountain Shrine than is justified. In fact, the record in this case reflects that individuals have been long-offended by the Statue, including Mr. Cox who has been affected by the Shrine for 20 years. Similarly, Ms. Morris has deliberately avoided skiing at Big Mountain, after being first offended by the Shrine. Mr. Bonham, moreover, advises that criticism and objection to the Shrine is discouraged by the local Christian-Fundamentalist majority in the Flathead Valley. Such silencing, moreover, is not at all unusual, but that does not mean that the Establishment Clause should not be enforced. The heckler’s veto is an unreliable test to apply, in any event, as even prior public complaints went

unacknowledged by the Supreme Court in *Van Orden*. (PSDF ¶ 193-94.) In short, the resolve necessary to object is evidenced by the response to this very suit. (PSDF ¶ 190.)

The Establishment Clause protects the freedom of conscience and minimizes civic divisiveness, by prohibiting government endorsement of religion. *McCreary*, 545 U.S. at 876. “By enforcing the (Religion) Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish.” *Id.* at 882 (O’Connor, J., *concurring*). While it may be true, therefore, that many Americans find religious symbols like the Statue of Christ to be in accord with their personal beliefs, “we do not count heads before enforcing the First Amendment.” *Id.* at 884.

The Supreme Court’s cautionary admonitions in *McCreary* are appropriate at this point to consider. The Defendants argue in this case that permanent religious monuments on government property should be allowed if supported by a majority. The Establishment Clause, however, is not, and should not, be merely precautionary while subject to the overriding whims of religious majorities.

Nor does the present case raise an issue of Free Speech. As the Supreme Court held in *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S. Ct. 1125, 1138 (2009), the Free Speech Clause’s forum analysis “simply does not apply to the installation of permanent monuments on public property.” Cases like *Capitol Square Review and*

Advisory Board v. Pinette, 515 U.S. 753 (1995), involving temporary displays on a public square, have no applicability to the present case. As the Supreme Court recognized in *Summum*, 555 U.S. at 470-71, permanent monuments on government land do give the appearance of government sponsorship:

Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. It is certainly not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. Because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely -- and reasonably -- interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or public property, such as national, state, or city park land.

A permanent monument on public land is considered government speech, even if ownership of the display remains private. See *American Atheists*, 637 F.3d at 1115. "There is little doubt that Utah would violate the Establishment Clause if it allowed a private group to place a permanent unadorned 12-foot Cross on public property without any contextual or historical elements that served to secularize the message conveyed by such a display." *Id.* at 1120. As a result, the Court concluded in *American Atheists*, a case of particular relevance and similarity to the present case, that the permanent placement of memorial crosses on public lands had the impermissible effect of conveying a message of religious endorsement. (*American Atheist* decision attached hereto as Exhibit B).

The Forest Service, in the present case, similarly conveys a message of religious endorsement by allowing the Knights of Columbus to maintain a permanent Catholic shrine on federal forest lands. Such a permanent, and striking, Christian display derives enhanced significance by virtually its incongruous siting. The situation is made worse by discovery that the Forest Service actually has given preferred consideration to this Catholic Shrine; engaged in subterfuge; and finally reauthorized the Shrine in spite of the fact that such requests have otherwise been denied by the Forest Service, and they are inappropriate for fee-waiver under Forest Service regulations. The record in this case, in short, does not show neutrality either in fact or in the perceptions of reasonable observers.

CONCLUSION

For all the above reasons, the Defendants' Motions for Summary Judgment should be denied.

Dated this 13th day of February, 2013.

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To the best of my knowledge, there are no parties in this case that require service by means other than electronic service using the Court's NEF. The original document on file with the filing party contains a valid original signature.

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STEVE TRUNK, Plaintiff, and JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA, INC.; RICHARD A. SMITH; MINA SAGHEB; JUDITH M. COPELAND, Plaintiffs-Appellants, v. CITY OF SAN DIEGO; UNITED STATES OF AMERICA; ROBERT M. GATES, Secretary of Defense, Defendants-Appellees. STEVE TRUNK, PHILIP K. PAULSON, Plaintiffs-Appellants, and RICHARD A. SMITH; MINA SAGHEB; JUDITH M. COPELAND; JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA, INC., Plaintiffs, v. CITY OF SAN DIEGO; UNITED STATES OF AMERICA; MOUNT SOLEDAD MEMORIAL ASSOCIATION, Real parties in interest; ROBERT M. GATES, Secretary of Defense, in his official capacity, Defendants-Appellees,

No. 08-56415, No. 08-56436

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

629 F.3d 1099; 2011 U.S. App. LEXIS 53

December 9, 2009, Argued; December 30, 2010, Submitted, Pasadena, California
January 4, 2011, Filed

SUBSEQUENT HISTORY: Rehearing denied by, Rehearing, en banc, denied by Trunk v. City of San Diego, 660 F.3d 1091, 2011 U.S. App. LEXIS 20829 (9th Cir. Cal., 2011)

PRIOR HISTORY: [1]**

Appeal from the United States District Court for the Southern District of California. D.C. Nos. 3:06-cv-01597-LAB-WMC 3:06-cv-01728-LAB-WMC. D.C. Nos. 3:06-cv-01597-LAB-WMC 3:06-cv-01728-LAB-WMC. Larry A. Burns, District Judge, Presiding.
Trunk v. City of San Diego, 568 F. Supp. 2d 1199, 2008 U.S. Dist. LEXIS 58549 (S.D. Cal., 2008)

DISPOSITION: REVERSED AND REMANDED.**CASE SUMMARY**

PROCEDURAL POSTURE: Plaintiff individuals and veterans organization filed suit against defendant city and federal government alleging a veterans' memorial dominated by a cross violated the Establishment Clause. The United States District Court for the Southern District of California denied plaintiffs' motion for summary judgment and granted the government's motion for summary judgment. Plaintiffs appealed.

OVERVIEW: The court did not need to resolve the issue of whether Lemon or Van Orden controlled its analysis of the memorial because both cases guided it to the same result. Congress's acquisition of the memorial was predominantly secular in its goals. However, taking into account factor including the meaning or meanings of the Latin cross at a

memorial's center, the memorial's history, its secularizing elements, its physical setting, and the way the memorial was used and considering the entire context of the memorial, the memorial remained a predominantly religious symbol. The history and absolute dominance of the cross were not mitigated by the belated efforts to add less significant secular elements to the memorial. The entirety of the memorial, when understood against the background of its particular history and setting, projected a government endorsement of Christianity. The fact that the memorial also commemorated the war dead and served as a site for secular ceremonies honoring veterans could not overcome the effect of its decades-long religious history. The use of such a distinctively Christian symbol to honor all veterans sent a strong message of endorsement and exclusion.


OUTCOME: The grant of summary judgment to the government was reversed. The case was remanded for entry of summary judgment in favor of plaintiffs and for further proceedings consistent with the opinion.

CORE TERMS: memorial, religious, symbol, veteran, secular, monument, message, war memorial, religion, display, sectarian, site, soldier, observer, dedicated, erected, endorsement, honoring, convey, summary judgment, declaration, creche's, public land, plaque, secular purpose, world wars, sacrifice, national cemeteries, symbolism, military


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Civil Procedure > Summary Judgment > Appellate Review > Standards of Review 

HN1  A circuit court of appeals reviews de novo a district court's decision on cross motions for summary judgment. It must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. More Like This Headnote | *Shepardize*: Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 


HN2  The First Amendment provides that Congress shall make no law respecting an establishment of religion. U.S. Const. amend. I. The touchstone of Establishment Clause jurisprudence is the requirement of governmental neutrality between religion and religion, and between religion and nonreligion. However, because neutrality is a general principle, it cannot possibly lay every issue to rest, or tell courts what issues on the margins are substantial enough for constitutional significance. Where the Establishment Clause is at issue, tests designed to measure neutrality alone are insufficient. In particular, courts do not apply an absolute rule of neutrality because doing so would evince a hostility toward religion that the Establishment Clause forbids. Neutrality is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation by the First Amendment. An untutored devotion to neutrality can lead to a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Courts must undertake a more nuanced analysis. More Like This Headnote | *Shepardize*: Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 


HN3  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 U.S. Supreme Court essentially has


collapsed these last two prongs to ask whether the challenged governmental practice has the effect of endorsing religion. More Like This Headnote | *Shepardize*: Restrict By Headnote


Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

HN4  Displays demand a fact-intensive assessment of whether they are faithful to the underlying purposes of the Establishment Clause. This flexible assessment entails a range of factors, including the monument's purpose, the perception of that purpose by viewers, the extent to which the monument's physical setting suggests the sacred, and the monument's history. Notably, this inquiry does not dispense with the Lemon factors, but rather retains them as useful guideposts. This analysis thus incorporates many of the same factors that figure in a Lemon analysis—in particular, the predominant purpose of the monument and its effect on viewers—while refusing to be bound to any lock-step formula. This establishes an exception to the Lemon test in certain borderline cases regarding the constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a non-religious context. More Like This Headnote | *Shepardize*: Restrict By Headnote


Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

HN5  The purpose inquiry does not call for any judicial psychoanalysis of a drafter's heart of hearts. Rather, the eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act. Although the secular purpose must be genuine, not a sham, when a statute is at issue, courts must defer to Congress's stated reasons if a plausible secular purpose may be discerned from the face of the statute. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

HN6  Majority support for a measure indicates simply that—majority support. It does not illuminate whether the measure approved has a secular or religious purpose. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 


HN7  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," courts are not concerned with all forms of government approval of religion—many of which are anodyne—but rather 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. Although it is often difficult to pinpoint a community ideal of reasonable behavior in an area where communities are so often divided in their views, courts conduct their inquiry from the perspective of an informed and reasonable observer who is familiar with the history of the government practice at issue. More Like This Headnote | *Shepardize*: Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

HN8 Under Van Orden, courts are required to exercise their legal judgment to determine whether a public display is at odds with the underlying purposes of the First Amendment's Religion Clauses. Those Clauses seek to assure the fullest possible scope of religious liberty and tolerance for all. They seek to avoid that divisiveness based upon religion that promotes social conflict. They seek to maintain that separation of church and state that has long been critical to the peaceful dominion that religion exercises in the United States. More Like This Headnote | *Shepardize*: Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

HN9 There is no question that the Latin cross is a symbol of Christianity, and that its placement on public land violates the Establishment Clause. More Like This Headnote | *Shepardize*: Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

HN10 A sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion. Thus, the use of exclusively Christian symbolism in a memorial would lead observers to believe that the government has chosen to honor only Christian veterans. And insofar as the cross is not a generic symbol of death but rather a Christian symbol of death that signifies or memorializes the death of a Christian, a reasonable observer would view a memorial cross as sectarian in nature. More Like This Headnote | *Shepardize*: Restrict By Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Scintilla Rule 

HN11 The mere existence of a scintilla of evidence is not enough to create a genuine issue of material fact in order to preclude summary judgment. More Like This Headnote | *Shepardize*: Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

HN12 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. More Like This Headnote | *Shepardize*: Restrict By Headnote


Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 


HN13 Like the creche, the text of the Ten Commandments conveys an undeniably religious message. When placed in the midst of numerous other, non-religious monuments, however, a display of the Commandments can also impart a secular moral message. As a result, such a display is, like the creche among secular objects, permissible—at least when the monument was privately donated and stood without legal controversy for forty years. More Like This Headnote | *Shepardize*: Restrict By Headnote


Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 


HN14 A secular purpose is merely one element of the larger factual and historical context that courts consider in order to determine whether a display has an impermissible


effect on the reasonable observer. More Like This Headnote


Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 




HN15  When assessing the effect of a religious display, courts must consider history carefully: reasonable observers have reasonable memories, and precedents sensibly forbid an observer to turn a blind eye to the context in which a policy arose. The reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears. More Like This Headnote



Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 




HN16  The proximity of a religious display to government buildings is not dispositive as to constitutionality. More Like This Headnote


Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

HN17  That a cross may be permissible when it is merely one facet of a large, secular memorial in which it does not hold a place of prominence does not speak to the constitutionality of a cross that is the centerpiece of and dominates a memorial, the secular elements of which are subordinated to the cross. Faced with such a cross, a reasonable observer would perceive a sectarian message of endorsement. More Like This Headnote

COUNSEL: John David Blair-Loy, ACLU Foundation of San Diego and Imperial Counties, San Diego, California; Matthew T. Jones  [argued], Adam Raviv , Wilmer Hale LLP, Washington, DC; Daniel Mach , American Civil Liberties Union, Washington, DC, for the plaintiffs-appellants.

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JUDGES: Before: Harry Pregerson , M. Margaret McKeown , and Richard A. Paez , Circuit Judges. Opinion by Judge McKeown .

OPINION BY: M. Margaret McKeown 

OPINION

[*1101] McKEOWN , Circuit Judge:

The forty-three foot cross ("Cross") and veterans' memorial ("Memorial") atop Mount Soledad in La Jolla, California, have generated controversy for more than twenty years. During this time, the citizens of San Diego **[**2]** (where La Jolla is located), the San Diego City Council, the United States Congress, and, on multiple occasions, the state and federal courts have considered its fate. Yet no resolution has emerged. Indeed, we believe that no broadly applauded resolution is possible because this case represents the difficult and intractable intersection of religion,

patriotism, and the Constitution. Hard decisions can make good law, but they are not painless for good people and their concerns.

Much lore surrounds the Cross and its history. But the record is our guide and, indeed, except for how they characterize the evidence, the parties essentially agree about the history. A cross was first erected on Mount Soledad in 1913. That cross was replaced in the 1920s and then blew down in 1952. The present Cross was dedicated in 1954 "as a reminder of God's promise to man of everlasting life and of those persons who gave their lives for our freedom" The primary objective in erecting a Cross on the site was to construct "a permanent handsome cast concrete cross," but also "to create a park worthy of this magnificent view, and worthy to be a setting for the symbol of Christianity." For most of its history, **[**3]** the Cross served as a site for annual Easter services. Only after the legal controversy began in the late 1980s was a plaque added designating the site as a war memorial, along with substantial physical revisions honoring veterans. It was not until the late 1990s that veterans' organizations began holding regular memorial services at the site. ¹

FOOTNOTES

¹ We include as Appendix A photographs from the record that depict the Cross up close and from a distance.

More fundamentally, this war memorial—with its imposing Cross—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.

The Latin cross, long acknowledged as a preeminent Christian symbol, remains, as a towering forty-three foot structure, the dominant feature of the Memorial. As we concluded the last time we considered this matter, albeit under the California Constitution, **[**4]** "[this] sectarian war memorial 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 (9th Cir. 1993). But we revisit the question in this case because the **[*1102]** Cross, originally on city land, was transferred to the federal government through a 2006 congressional initiative. This suit requires us to consider whether the Memorial, with the Cross as its defining feature, violates the First Amendment to the federal Constitution.

Simply because there is a cross or a religious symbol on public land does not mean that there is a constitutional violation. Following the Supreme Court's directive, we must consider the purpose of the legislation transferring the Cross, as well as the primary effect of the Memorial as reflected in context, history, use, physical setting, and other background. Although we conclude that Congress did not harbor a sectarian purpose in establishing the Memorial in 2006, the resolution of the primary effect of the Memorial is more nuanced and is driven by the factual record. We do not look to the sound bites proffered by both sides but instead to the extensive **[**5]** factual background provided in the hundreds of pages of historical documents, declarations, expert testimony, and public records. Here, a fact-intensive evaluation drives the legal judgment.

The Supreme Court's framework for evaluating monuments on public lands and for resolving Establishment Clause cases under the First Amendment leads us to conclude that the district court erred in declaring the Memorial to be primarily non-sectarian, and granting summary judgment in favor of the government and the Memorial's supporters. We are not faced with a decision about what to do with a historical, longstanding veterans memorial that happens to include a cross. Nor does this case implicate military cemeteries in the United States that include headstones with crosses and other religious symbols particular to the deceased. Instead we

consider 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. We do not discount that the Cross is a prominent landmark in San Diego. But **[**6]** a few scattered memorial services before the 1990s do not establish a historical war memorial landmark such as those found in Arlington Cemetery, Gettysburg, and the Vietnam Veterans Memorial in Washington, D.C. Resurrection of this Cross as a war memorial does not transform it into a secular monument.

We acknowledge the good intentions and heartfelt emotions on all sides of this dispute, and recognize the sincere anguish that will be felt regardless of whether we affirm or reverse the district court. We also acknowledge the historical role of religion in our civil society. In no way is this decision 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. At the same time, in adopting the First Amendment, the Founders were prescient in recognizing that, without eschewing religion, neither can the government be seen as favoring one religion over another. The balance is subtle but fundamental to our freedom of religion.

BACKGROUND

Mount Soledad is an 822-foot hill in the La Jolla community of San Diego, California, between Interstate 5 and the Pacific Ocean. There **[**7]** has been a Latin cross atop Mount Soledad since 1913. After the first cross was destroyed by vandals in 1923, a new cross was erected. That cross stood until it blew down in 1952. The current Cross was erected in 1954 and was dedicated as a memorial to American service members and a tribute to God's "promise **[*1103]** of everlasting life." The Cross is quite large—twenty-nine feet high and twelve feet across—stands atop a fourteen foot high base, and weighs approximately twenty-four tons. As a result, the Cross is visible from miles away and towers over the thousands of drivers who travel daily on Interstate 5 below. The Mount Soledad Memorial Association ("the Association"), the civic organization that erected the Cross, has largely paid for the Cross's maintenance, though some public funds have been expended as well. *Paulson v. City of San Diego*, 294 F.3d 1124, 1125 (9th Cir. 2002) (en banc).

Although the Cross stood alone for most of its history, it has, since the late 1990s, become the centerpiece of a more extensive war memorial. This Memorial now features six concentric walls around the base of the Cross and approximately 2,100 black stone plaques honoring individual veterans, platoons, **[**8]** and groups of soldiers. Brick paving stones also honor veterans; twenty-three bollards, or posts, honor community and veterans' organizations; and an American flag flies from a large flagpole. Until the events leading up to this suit, the Memorial stood on land belonging to the City of San Diego ("the City").

The Memorial has been the subject of contentious litigation for the last two decades. In 1989, two Vietnam veterans sued the City, seeking to enjoin it from allowing the Cross to remain on city land. *Murphy v. Bilbray*, 782 F. Supp. 1420, 1424 (S.D. Cal. 1991). Ultimately, the district court enjoined the display of the Cross—which, at the time, stood alone—as a violation of the No Preference Clause of the California Constitution. ² *Id.* at 1438. We affirmed the injunction in *Ellis*, 990 F.2d at 1527-28, holding that the Cross, to the extent that it could be characterized as a memorial, was "[a] sectarian war memorial carr[ying] an inherently religious message and creat[ing] an appearance of honoring only . . . servicemen of [a] particular religion." *Id.* at 1527. We did not reach the issue of whether the Cross violated the federal Constitution's Establishment Clause.

FOOTNOTES

² The No Preference Clause **[**9]** provides that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed." Cal. Const. art. I, § 4.

In response to the injunction, the City submitted a ballot initiative known as Proposition F to authorize the sale of a twenty-two square foot parcel of land sitting directly beneath the Cross to the Association. Seventy-six percent of those voting approved the measure. In October 1994, the City sold the land to the Association without soliciting offers or proposals from any other prospective buyers. See *Paulson*, 294 F.3d at 1126. The district court invalidated the sale, however, holding that the City's failure to consider other prospective buyers created the appearance that the City preferred the Christian religion and that the primary purpose of the sale was to preserve the Cross. *Murphy v. Bilbray*, No. 90-134 GT, 1997 U.S. Dist. LEXIS 23707, 1997 WL 754604, *10-11 (S.D. Cal. Sept. 18, 1997). The City responded by soliciting bids for a second land sale, ultimately selling the land to the Association in September 1998. The Association then proceeded to modify the property to incorporate elements directly honoring veterans.

After further litigation, our court, sitting en banc, held **[**10]** that the 1998 sale violated California's No Preference Clause because it was structured to give "a direct, immediate, and substantial financial advantage to bidders who had the sectarian purpose of preserving the cross." *Paulson*, 294 F.3d at 1133. Following that decision, the parties then reached a settlement that would move the Cross to a neighboring church. In July 2004, the City Council passed a resolution to compel the City to accept the **[*1104]** settlement if voters did not approve Proposition K, which would have required a third sale of the land to the highest bidder. City voters rejected Proposition K.

Soon after the failure of Proposition K, two local members of Congress, then-Representative Randy Cunningham and Representative Duncan Hunter, inserted a rider into the 2005 omnibus budget bill designating the Mount Soledad property as a national veterans' memorial and authorizing the federal government to accept its donation. Consolidated Appropriations Act, Pub. L. No. 108-447, § 116, 118 Stat. 2809, 3346-47 (codified at 16 U.S.C. § 431 note). The Thomas More Law Center,³ whose West Coast Director, Charles LiMandri, was a signatory of the ballot argument in favor of Proposition K, lobbied **[**11]** local members of Congress to intervene. President George W. Bush signed the omnibus bill into law on December 8, 2004.

FOOTNOTES

³ The Thomas More Law Center is a "not-for-profit public interest law firm dedicated to the defense and promotion of the religious freedom of Christians, time-honored family values, and the sanctity of human life."

The City Council declined to donate the Mount Soledad property to the federal government.⁴ A new organization formed by LiMandri and others launched a referendum petition to "save the Mount Soledad cross" via transfer to the federal government. The City Council rescinded its decision and submitted the donation question to the voters as Proposition A. Proposition A garnered seventy-six percent of the vote, but a state trial court enjoined its implementation. See *Paulson v. Abdelnour*, 145 Cal. App. 4th 400, 51 Cal. Rptr. 3d 575, 585 (Cal. Ct. App. 2006).

FOOTNOTES

⁴ The then-City Attorney formally opined that the donation would violate the federal and state constitutions.

While the appeal of the state court injunction was pending, the federal district court issued an order directing the City to remove the Cross within ninety days or pay a daily fine of \$5,000. *Paulson v. City of San Diego*, No. 89-0820 GT, 2006 U.S. Dist. LEXIS 44740, 2006 WL 3656149,

at *2 (S.D. Cal. May 3, 2006) **[**12]**. The City appealed and sought a stay pending appeal, which our court denied. Justice Kennedy then granted the City's stay application. *See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302, 126 S. Ct. 2856, 165 L. Ed. 2d 941 (2006).

In June 2006, Representatives Hunter, Issa, and Bilbray introduced H.R. 5683 ("the Act"), which proposed to seize the Memorial by eminent domain. ⁵ The House approved the bill by a vote of 349 to 74. 152 Cong. Rec. H5434 (daily ed. July 19, 2006). The Senate approved the measure by unanimous consent.

FOOTNOTES

⁵ LiMandri stated publicly that he helped draft the legislation, a fact that the government contests. The Thomas More Law Center also lobbied Senator Jeff Sessions, the sponsor of the Senate version of the bill, for his support.

The Act authorized the land transfer "in order to preserve a historically significant war memorial, designated the Mt. Soledad Veterans Memorial in San Diego, California, as a national memorial honoring veterans of the United States Armed Forces" *Id.* at H5422, § 2(a). In support of the acquisition, Congress found that the Memorial has stood as a tribute to U.S. veterans for over **[**13]** fifty-two years, *id.* § 1(1), and "now serves as a memorial to American veterans of all wars," *id.* § 1(2). The Act also declared that "[t]he United States has a long history and tradition of memorializing members of the Armed Forces who die in battle with a cross or other religious emblem of their faith, and a memorial cross is fully integrated as the centerpiece of the multi-faceted Mt. Soledad **[*1105]** Veterans Memorial that is replete with secular symbols." *Id.* § 1(3). The Act required the Department of Defense, which has since assigned the duties to the Navy, to manage the property and enter a memorandum of understanding with the Association for the Memorial's "continued maintenance." *Id.* § 2(c). ⁶

FOOTNOTES

⁶ This court dismissed the City's appeal of the district court's order as moot in light of the Act. *Paulson v. City of San Diego*, 475 F.3d 1047, 1048 (9th Cir. 2007). The California Court of Appeal also reversed the trial court's injunction of Proposition A, holding that the City's effort to donate the memorial to the United States did not violate the state or federal Constitutions. *Abdelnour*, 51 Cal. Rptr. 3d at 589-603.

The federal government took possession of the Memorial in August 2006. Pub. L. No. 109-272, § 2(a), 120 Stat. 770 (2006). **[**14]** That same month, Steve Trunk and Philip Paulson (now deceased) filed suit against the City and the United States in district court, alleging violations of the U.S. and California Constitutions. ⁷ Jewish War Veterans, which describes itself as "the oldest active national veterans' service in America" and as a group that "engages in extensive advocacy in support of religious liberty," also filed suit against the Secretary of Defense, complaining that the display of the Cross violated the Establishment Clause. The district court consolidated the two cases. ⁸

FOOTNOTES

⁷ Trunk later filed an amended complaint seeking, among other things, a declaration that the Act was void *ab initio*. The district court held that Trunk lacked standing to challenge the Act, dismissed that claim for lack of jurisdiction, and dismissed the City as a party.

⁸ We refer to Trunk, Paulson, and Jewish War Veterans collectively as "Jewish War Veterans," and to the United States and the Secretary of Defense collectively as "the government."

In 2008, the district court denied Jewish War Veterans's motion for summary judgment and granted the government's motion for summary judgment. Applying the Supreme Court's frameworks set forth **[**15]** in both *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), and *Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005), the district court held that Congress had acted with a secular purpose in acquiring the Memorial and that the Memorial did not have the effect of advancing religion. This appeal followed.

ANALYSIS

I. THE LEMON AND VAN ORDEN FRAMEWORKS

HN1 We review de novo the district court's decision on cross motions for summary judgment. See *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1030 (9th Cir. 2010). "We must determine, viewing the evidence in the light most favorable to . . . the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the [relevant] substantive law." *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004). We have jurisdiction to review the district court's denial of the Jewish War Veterans's summary judgment motion because the district court considered cross motions for summary judgment and granted the government's motion. The district court's grant of summary judgment was a final decision, giving us jurisdiction. See *Abend v. MCA, Inc.*, 863 F.2d 1465, 1482 n.20 (9th Cir. 1988).

HN2 The First Amendment provides that **[**16]** "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. As the Supreme Court has explained, the "touchstone" of Establishment Clause jurisprudence is the requirement of " 'governmental neutrality between religion **[*1106]** and religion, and between religion and nonreligion.' " *McCreary County v. ACLU*, 545 U.S. 844, 860, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968)). However, because "neutrality" is a general principle, it "cannot possibly lay every issue to rest, or tell us what issues on the margins are substantial enough for constitutional significance." *McCreary*, 545 U.S. at 876; see also *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment) ("[W]here the Establishment Clause is at issue, tests designed to measure 'neutrality' alone are insufficient.").

In particular, we do not apply an absolute rule of neutrality because doing so would evince a hostility toward religion that the Establishment Clause forbids. Thus the Court in *McCreary* approvingly cited Justice Harlan's observation that " 'neutrality' . . . is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation" by the **[**17]** First Amendment. *McCreary*, 545 U.S. at 876 (quoting *Sherbert v. Verner*, 374 U.S. 398, 422, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) (Harlan, J., dissenting)); see also *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (Goldberg, J., concurring) (cautioning that an "untutored devotion to . . . neutrality" can lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious"). We must undertake a more nuanced analysis.

The Supreme Court has articulated two related constructs that guide our analysis: the test set forth in *Lemon*, which—through various twists and turns—has long governed Establishment Clause claims, and the analysis for monuments and religious displays more recently articulated in *Van Orden*. **HN3** 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. *Lemon*, 403 U.S. at 612-13. 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." *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1043 (9th Cir. 2007) **[**18]** (reviewing cases). Although *Lemon* has been strongly criticized, the Supreme Court has never overruled it, and in fact applied the *Lemon* test to a Ten Commandments display

in an opinion issued the same day as *Van Orden*. *McCreary*, 545 U.S. at 859-64; see also *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008) (discussing the Supreme Court's criticism and use of the *Lemon* test).

In *Van Orden*, the Court declined to apply *Lemon* to a Ten Commandments monument on the grounds of the Texas State Capitol. Addressing whether that monument violated the Establishment Clause, the plurality struggled with reconciling "the strong role played by religion and religious traditions throughout our Nation's history" with the constitutional separation of church and state. *Van Orden*, 545 U.S. at 683. The plurality concluded that the *Lemon* test was "not useful in dealing with the sort of passive monument that Texas ha[d] erected on its Capitol grounds." *Id.* at 686. Instead, its analysis focused on "the nature of the monument and . . . our Nation's history." *Id.* Taking into consideration the role of God and the Ten Commandments in the nation's founding and history, *id.* at 686-87, 689-90, the monument's **[**19]** passive use, and its "undeniable historical meaning," *id.* at 690, the plurality concluded **[*1107]** that the display passed constitutional muster, *id.* at 692.

As we have recognized, Justice Breyer's concurrence provides the controlling opinion in *Van Orden*. *Card*, 520 F.3d at 1017-18 n.10. Justice Breyer envisioned a set of "difficult borderline cases" like the Texas Capitol monument for which there could be "no test-related substitute" *Lemon* or otherwise—"for the exercise of legal judgment." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment). Rather than requiring the application of a test, Justice Breyer concluded, ^{HN4} displays like the Texas monument demand a fact-intensive assessment of whether they are faithful to the underlying purposes of the Establishment Clause. See *id.* He explained that this flexible assessment entails a range of factors, including the monument's purpose, the perception of that purpose by viewers, the extent to which the monument's physical setting suggests the sacred, and the monument's history. See *id.* at 701-03. Notably, this inquiry does not dispense with the *Lemon* factors, but rather retains them as "useful guideposts." *Id.* at 700. Justice Breyer's **[**20]** analysis thus incorporated many of the same factors that figure in a *Lemon* analysis—in particular, the predominant purpose of the monument and its effect on viewers—while refusing to be bound to any lock-step formula. See *id.* at 701-04.

Van Orden expressly establishes an "exception" to the *Lemon* test in certain borderline cases regarding the "constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a non-religious context." *Card*, 520 F.3d at 1016. Unfortunately, Justice Breyer did not explain in detail how to determine whether a case was borderline and thus less appropriate for the typical *Lemon* analysis. *Card*—the only Ninth Circuit case to date to apply the *Van Orden* exception—considered a monument that was almost identical to the monument in *Van Orden* and therefore provides little additional guidance. See *Card*, 520 F.3d at 1018 ("We cannot say how narrow or broad the 'exception' may ultimately be However, we can say that the exception at least includes the display of the Ten Commandments at issue here.").

Ultimately, we need not resolve the issue of whether *Lemon* or *Van Orden* controls our analysis of the Memorial. Both **[**21]** *Lemon* and *Van Orden* 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. On the detailed record here, which includes extensive evidence relevant to each of the factors in *Van Orden* and to the purpose and effect prongs of *Lemon*, both cases guide us to the same result.

II. CONGRESSIONAL PURPOSE IN ACQUIRING THE MEMORIAL

Under both *Lemon* and *Van Orden*, we first inquire as to the purpose of the government action to determine whether it is predominantly secular in nature. See *Van Orden*, 545 U.S. at 701-02; *Lemon*, 403 U.S. at 612. We hold that Congress's acquisition of the Memorial was predominantly secular in its goals.

As an initial matter, Jewish War Veterans argues that, to determine purpose, we need look no

further than the Cross itself. In its view, "the government action itself besp[eaks] the purpose" because the Latin cross is the "preeminent symbol" of Christianity. This argument is at bottom one regarding the Memorial's predominant effect, and we consider it more appropriate to address in our discussion of effects below. See *infra* Section III.

[*1108] The Supreme Court explained in *McCreary* **[**22]** that ^{HNS}the purpose inquiry does not call for "any judicial psychoanalysis of a drafter's heart of hearts." *McCreary*, 545 U.S. at 862. Rather, "[t]he eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *Id.* (internal quotation marks omitted). Although the secular purpose must "be genuine, not a sham," *id.* at 864, when a statute is at issue, we must defer to Congress's stated reasons if a "plausible secular purpose . . . may be discerned from the face of the statute," *Mueller v. Allen*, 463 U.S. 388, 394-95, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983).

The purpose of Congress's acquisition of the Memorial was predominantly secular in nature. The Act sought "to preserve a historically significant war memorial . . . as a national memorial honoring veterans of the United States Armed Forces." Pub. L. No. 109-272, § 2(a). As the district court noted, the statute is "not directed to the cross *per se*, nor does it require the continued presence of the cross as part of the memorial; it simply requires the Mount Soledad site be maintained as a veterans' memorial."

The **[**23]** Act's statement of purpose likely ends the inquiry. See *Mueller*, 463 U.S. at 394-95. Nevertheless, the Act is arguably ambiguous to the extent that it seeks "to preserve a *historically significant* war memorial." Pub. L. 109-272 § 2(a) (emphasis added). In *Paulson*, the case invalidating the City's 1998 land sale to the Association, we held that only the Cross on Mount Soledad bears historical significance. *Paulson*, 294 F.3d at 1132 n.5 (emphasis added). Under *Paulson*, the Act could be read to aim at preserving the Cross, which would arguably make its purpose predominantly religious.

But even assuming that the Act is ambiguous, the legislative history reflects Congress's predominantly secular purpose in acquiring the Memorial. ⁹ Representative Hunter, for example, described the Cross as "not only a religious symbol," but also "a venerated landmark beloved by the people of San Diego for over 50 years" and "a fitting memorial to all persons who have served and sacrificed for our Nation as members of the Armed Forces." 152 Cong. Rec. H5423 (daily ed. July 19, 2006); see also *id.* at H5422-02 (stating that Mount Soledad "is without question a world-class memorial, dedicated to all of those, **[**24]** regardless of race, religion [,] or creed, who have served our armed services"). Representative Issa similarly stated that the Memorial "was intended to do what it does for the vast majority of San Diegans and people who come to our fair city. It honors our war veterans for the sacrifice they made." *Id.* at H5424. According to Representative Issa, the acquisition was "consistent with how we as Americans have honored our war dead and those who have given in service to our country" and advanced the "freedom for people to observe their God as they chose fit." *Id.*

FOOTNOTES

⁹ These legislative recitations do not bind us as to our evaluation of the actual history and chronology of the Cross. They are simply instructive as to congressional perspective and purpose. We must evaluate the Cross itself on the basis of the record before us, which includes not only the Act, but also hundreds of pages of documents about the Cross's history and setting and about the use of crosses in war memorials more generally that were not before Congress when it acquired the Memorial.

Representative Bilbray argued for the Act on the grounds of religious tolerance and the memorial's secular historical significance. He cited **[**25]** the presence of "many **[*1109]** religious symbols on public lands" in San Diego County and argued that "this is not about

religion; it is about the tolerance of our heritage and the memorials to those who have fought for our heritage across the board." *Id.* at H5425.

Finally, although Senator Sessions introduced the Senate bill as intended "to preserve the cross that stands at the center of Mt. Soledad Veterans Memorial . . . that is under attack by the ACLU," he underlined that the Cross was "part of a memorial that has secular monuments also." 152 Cong. Rec. S8364 (daily ed. July 27, 2006). Taken together, the floor statements support the text's demonstration of Congress's predominantly secular purpose in acquiring the Memorial.

Jewish War Veterans's arguments to the contrary do not change our view. In particular, the evidence of the role of Christian advocacy organizations in the Act's passage is not probative of Congress's objective. Although such advocacy can form part of the context for determining an act's purpose, *see, e.g., Epperson*, 393 U.S. at 107-09 & n.16, we must take into account the often complex, attenuated, and mediated relationship between advocacy and legislation. Although the **[**26]** advocacy by Christian organizations may have been a contributing factor to the Act's drafting and passage, the record does not establish that the sectarian goals of the advocates can be reasonably attributed to Congress as a whole. In the end, "what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law." *Mergens*, 496 U.S. at 249 (emphases omitted). ¹⁰ In crediting congressional purpose, we underscore, however, that these congressional statements reflect congressional sentiment and are not necessarily reflective of the factual record before us. We turn to the actual record to assess the primary effect of the Memorial.

FOOTNOTES

¹⁰ It bears noting that we do not adopt the district court's inference of a secular purpose from the overwhelming majority support for the Act and relative absence of debate over its passage. ^{HN6} Majority support for a measure indicates simply that—majority support. It does not illuminate whether the measure approved has a secular or religious purpose. *See McCreary*, 545 U.S. at 884 (O'Connor, J., concurring) (noting that "we do not count heads before enforcing the First Amendment").

The district court **[**27]** also cited the heterogeneity of religions in Congress as a basis for inferring secular purpose. We cannot credit this speculation as a foundation for our decision. Resolution does not rest on a popularity contest about the Cross. Importantly, nothing in the record suggests that the legislators voted based on their personal religious beliefs. Congress's religious profile, without more, is an insufficient basis to infer its predominant purpose.

III. THE EFFECT OF THE MEMORIAL

The heart of this controversy is the primary effect of the Memorial. ^{HN7} 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." *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1398 (9th Cir. 1994). By "endorsement," we are not concerned with all forms of government approval of religion—many of which are anodyne—but rather 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" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) **[**28]** (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O'Connor, J., concurring)).

[*1110] Although it is often difficult to pinpoint "a community ideal of reasonable behavior" in an area where communities are so often divided in their views, *see Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 780, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995)

(O'Connor, J., concurring in part and concurring in the judgment) (internal quotation marks omitted), we conduct our inquiry from the perspective of an "informed and reasonable" observer who is "familiar with the history of the government practice at issue," *Kreisner v. City of San Diego*, 1 F.3d 775, 784 (9th Cir. 1993).

The analysis required by *Van Orden* is similar. ^{HNS} Under *Van Orden*, we are required to exercise our legal judgment to determine whether the Memorial is at odds with the underlying purposes of the First Amendment's Religion Clauses. See 545 U.S. at 700 (Breyer, J., concurring in the judgment). Those clauses

seek to assure the fullest possible scope of religious liberty and tolerance for all. They seek to avoid that divisiveness based upon religion that promotes social conflict They seek to maintain that separation of church and state that has long been critical **[**29]** to the peaceful dominion that religion exercises in this country

Id. at 698 (internal citations and quotation marks omitted).

In our analysis, we 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. See, e.g., *id.* at 700-02; *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 598-602, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989). The government contends that these factors demonstrate that the Memorial's primary effect is patriotic and nationalistic, not religious. We disagree. Taking 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.

A. THE LATIN CROSS

We begin by considering the potential meanings of the Latin cross that serves as the centerpiece and most imposing element of the Mount Soledad Memorial. We have repeatedly recognized that "[t]he Latin cross is the preeminent **[**30]** symbol of Christianity." *Buono v. Norton*, 371 F.3d 543, 544-45 (9th Cir. 2004) (internal quotation marks omitted); *accord Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620 (9th Cir. 1996) (per curiam) ("SCSC"); *Carpenter v. City & County of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996); *Ellis*, 990 F.2d at 1525, 1527. The other courts of appeals that have considered challenges to Latin crosses have unanimously agreed with our characterization of the cross. See *Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995); *Murray v. City of Austin*, 947 F.2d 147, 149 (5th Cir. 1991); *Harris v. City of Zion*, 927 F.2d 1401, 1403 (7th Cir. 1991); *ACLU v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986); see also *Gonzales v. North Township*, 4 F.3d 1412, 1418 (7th Cir. 1993) ("[W]e are masters of the obvious, and we know that the crucifix is a Christian symbol."); *Friedman v. Bd. of County Comm'rs*, 781 F.2d 777, 779 (10th Cir. 1985) (en banc) (recounting testimony concerning the Christian nature of the cross); *ACLU v. Raburn County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110-11 (11th Cir. 1983) (same); *Jewish War Veterans of the U.S. v. United **[**111]** States*, 695 F. Supp. 3, 12 (D.D.C. 1988) **[**31]** ("Running through the decisions of all the federal courts addressing the issue is a single thread: that the Latin cross . . . is a readily identifiable symbol of Christianity.").

The cross is also "exclusively a Christian symbol, and not a symbol of any other religion." *Buono*, 371 F.3d at 545. Thus, ^{HNS} "[t]here is no question that the Latin cross is a symbol of Christianity, and that its placement on public land . . . violates the Establishment Clause." SCSC, 93 F.3d at 620; see also *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., dissenting) (stating that "the permanent erection of a large Latin cross on the roof of city hall" "would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion"); *American Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1159-60 (10th Cir. 2010) ("[T]here is little

doubt that [a state] would violate the Establishment Clause if it allowed a private group to place a permanent unadorned twelve-foot cross on public property without any contextual or historical elements that served to secularize the message conveyed by such a display.").

This principle that the cross represents Christianity is not an absolute one. In certain **[**32]** circumstances, even a quintessentially sectarian symbol can acquire an alternate, non-religious meaning. For example, a red Greek cross on a white background is so closely identified with the American Red Cross that it has largely shed any religious symbolism. *City of St. Charles*, 794 F.2d at 272. Notably the Red Cross cross does not include the Latin cross's iconic horizontal arm that is shorter than the vertical arm. The cross can also have localized secular meanings. Because the name of Las Cruces, New Mexico means "The Crosses," "it is hardly startling that [the city] would be represented by a seal containing crosses." *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1035 (10th Cir. 2008). In Las Cruces, the cross possesses a local "symbolism [that] is not religious" but civic. *See id.*; *see also Murray*, 947 F.2d at 155 (upholding the use of a part of Stephen F. Austin's coat of arms, including a Latin cross, in the insignia of the City of Austin). ¹¹ The cross can even be forced to serve non-religious ends by a small group: As Justice Thomas has recognized, "[t]he erection of . . . a cross [by the Ku Klux Klan] is" "not a Christian [act]" but rather "a political act" of "intimidation **[**33]** and harassment." *Pinette*, 515 U.S. at 771 (Thomas, J., concurring). Nonetheless, the Latin cross remains an iconic Christian symbol.

FOOTNOTES

¹¹ The argument that a cross has a historic connection cannot, of course, be treated as "an argument which [can] always 'trump' the Establishment Clause[] because of the undeniable significance of religion and religious symbols in the history of many [American] communities." *Robinson*, 68 F.3d at 1232; *see also Zion*, 927 F.2d at 1414-15 (holding that even a city with "a unique history" "may not honor its history by retaining [a] blatantly sectarian seal, emblem, and logo").

B. CROSSES AS WAR MEMORIALS

The relevant question in this case is whether, as the district court concluded, the Latin cross has a "broadly-understood ancillary meaning as a symbol of military service, sacrifice, and death." Our prior cases counsel caution in ascribing this meaning to the cross. We have, in fact, previously held that the Mount Soledad Cross contravened the No Preference Clause of the California state constitution even while recognizing that the Cross is "dedicated to veterans of World Wars I & II." *Ellis*, 990 F.2d at 1527. We have similarly rejected the view that a cross **[**34]** erected on public land in Oregon conveyed **[*1112]** a secular message simply because it was identified as a war memorial. *See SCSC*, 93 F.3d at 619; *id.* at 625-26 (O'Scannlain, J., concurring); *see also Ellis*, 990 F.2d at 1525 ("We find unpersuasive the fact that the cross was built and dedicated as a memorial to a private individual This alone cannot transform the cross into a secular memorial.").

The reasoning behind our prior decisions is straightforward. ^{HN10} "A sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion." *Ellis*, 990 F.2d at 1527. Thus, the use of exclusively Christian symbolism in a memorial would, as Judge O'Scannlain has put it, "lead observers to believe that the City has chosen to honor only Christian veterans." *SCSC*, 93 F.3d at 626 (O'Scannlain, J., concurring). And insofar as the cross is "not a *generic* symbol of death" but rather "a *Christian* symbol of death that signifies or memorializes the death of a *Christian*," *American Atheists*, 616 F.3d at 1161, a reasonable observer would view a memorial cross as sectarian in nature.

Nothing in the record suggests that our reasoning **[**35]** in *SCSC* and *Ellis* was mistaken or that the Latin cross possesses an ancillary meaning as a secular war memorial. The Jewish War

Veterans have provided two expert declarations from G. Kurt Piehler, a professor of history and Director of the Study for War and Society at the University of Tennessee. Those declarations provide extensive evidence that the cross is not commonly used as a symbol to commemorate veterans and fallen soldiers in the United States. ¹² Piehler's history is not rebutted by the government's experts, and the record supports Piehler's conclusion that the vast majority of war memorials in the United States do not include crosses. We accordingly recount Piehler's history at some length.

FOOTNOTES

¹² The district court "discounted" Piehler's statements on the grounds that the "declaration circumscribe[d] its focus on an individual element of the memorial" and "fail[ed] to fully consider other well-recognized meanings of the Latin cross." In "discounting" the expert's opinion, the district court was not gatekeeping but weighing the evidence, indeed inserting evidence, which is improper on summary judgment. See *Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9th Cir. 2010). The district **[**36]** court's reasons for minimizing the weight of the expert's conclusions were also erroneous and not a fair reading of the evidence. The district court simply assumed that the Latin cross has an ancillary meaning as a war memorial and leveraged that assumption to reject Piehler's declarations and other contrary evidence in the record. In doing so, the district court failed to consider the evidence in the light most favorable to Jewish War Veterans before granting summary judgment to the government. See *id.* More specifically, the district court erroneously branded Piehler's declarations as conclusory, ignoring the detailed listings and historical analysis provided in the record. At the same time, the district court accepted without comment the statements of the government's expert, Professor Linenthal, who offered a number of wholly conclusory statements without historical reference or supporting facts.

Piehler's declarations address both the individual commemoration of soldiers in national cemeteries and the large number of monuments that stand in tribute to groups of soldiers or to the veterans of particular wars. Piehler recounts that the first national cemeteries were established after **[**37]** the Civil War and were deliberately devoid of religious symbols. Even today, the only religious symbol that can be found in Civil War cemeteries is the Southern cross of honor, which has been allowed since 1930 on headstones built in memory of Confederate soldiers. The graves of soldiers who died before World War I and are buried in national cemeteries are similarly **[*1113]** marked "only [by] the soldier's name, his unit, and his date of death."

Military cemeteries have not, of course, remained entirely free of religious symbolism. Most famously, American soldiers who fell in battle during World War I and World War II are movingly memorialized with "thousands of small crosses in foreign fields" in Europe and the Pacific. *Salazar v. Buono*, 130 S. Ct. 1803, 1820, 176 L. Ed. 2d 634 (2010) (plurality op.). But while the image of row upon row of small white crosses amongst the poppies remains an exceedingly powerful one, not all soldiers who are memorialized at those foreign battlefields are honored with crosses. Jewish soldiers are instead commemorated with Stars of David. *American Atheists*, 616 F.3d at 1161. The cross was a marker of an individual grave, not a universal monument to the war dead. And tellingly, the **[**38]** universal symbol emanating from those foreign wars is the poppy, not the cross.

Significantly, the cross never became a default headstone in military cemeteries in the United States. A visitor to Arlington or another national cemetery does not encounter a multitude of crosses but rather the "flat upright stone monument[s]" that mark the graves of individual soldiers. Symbols of faith are carved into the headstones, but those symbols are not restricted to crosses and now include everything from a Bahai nine-pointed star to a Wiccan pentacle. See *id.* The cross, in other words, has never been used to honor all American soldiers in any military cemetery, and it has never been used as a default gravestone in any national cemetery in the United States. ¹³ Whatever memory some may have of rows of crosses as the predominant

symbol for honoring veterans is not reflected in this record.

Crosses have also been incorporated only rarely into monuments commemorating groups of soldiers. Piehler's declarations reveal that few war memorials were built in the antebellum United States, and those that were constructed most frequently took the form of an obelisk. Many more monuments—at least 3,500—were built **[**39]** to commemorate the Civil War. Only 114 of these 3,500 monuments include some kind of cross, however, and the cross is generally "subordinated to symbols that emphasize American nationalism and sacrifice of the fallen." The memorial to Major General John Sedgwick at West Point, for example, includes a cross, but that cross is set off by "an eagle perched on a shield" and is overshadowed by a large statue of Sedgwick.

FOOTNOTES

13 The article cited by the district court in support of its view that the cross is a generic war memorial reinforces this point. The article discusses a memorial display set up by anti-war protestors on the beach at Oceanside, California. The memorial does include a large number of crosses—each dedicated to an American soldier who died in Iraq—but those crosses represent dead *Christian* soldiers. As the article cited by the district court notes, the display also includes "a handful of Buddhist, Hindu, Muslim and Jewish symbols" presumably representing fallen soldiers of those faiths. Bruce V. Bigelow, *Beach exhibit calls attention to fallen*, *San Diego Union-Tribune* Nov. 11, 2007, available at http://www.signonsandiego.com/uniontrib/20071111/news_1mc11crosses.html.

In the **[**40]** late nineteenth and early twentieth centuries, the number of crosses used in memorials increased slightly. Crosses and other religious symbols nevertheless were "seldom . . . dominant" and "usually [remained] subordinated to a commemoration of American nationalism." For instance, the first chapel dedicated to the Civil War opened in Arlington National Cemetery in 1920—but the chapel is a small basement room annexed to a much larger outdoor auditorium.

This trend of emphasizing the secular nature of commemoration continued **[*1114]** throughout the twentieth century. Monuments erected in honor of World War I soldiers remained predominantly secular, with statues of doughboys providing perhaps the most common theme. Some of these monuments were later updated to commemorate World War II veterans as well. And many memorials constructed to remember those who fought in both world wars are, in fact, not stone monuments but rather secular "living memorials"—parks, hospitals, and other facilities that were built both to honor veterans and for daily use. The City of San Diego itself built in 1950, and still operates, a War Memorial Auditorium in Balboa Park that consists of "3,150 square feet of wood dance **[**41]** floor and a stage[] plus two smaller classrooms." No cross or religious symbol is part of the memorial. The use of such living memorials has lately declined in favor of traditional stone monuments, but newer monuments remain secular in their imagery—as illustrated by the most recent additions to the National Mall in Washington, D.C., including the memorials to the Korean War and World War II.

On the basis of this detailed history, Piehler concludes that "the overwhelming majority of war memorials in the United States . . . avoid using religious symbols and inscriptions." In particular, he states that "[t]here are few precedents for use of the Latin Cross in war memorials on public land," and "when war memorials use religious imagery, [that imagery] generally [is] subordinated to symbols and inscriptions that commemorate American nationhood."

None of Piehler's history is contested by the government. The government instead cites to a small number of crosses that are incorporated into war memorials, but these examples do not create a material issue of fact concerning the meaning of the Latin cross. Nor do those few examples fairly lead to the conclusion that the cross has become a secularized

[42]** representation of war memory. Overwhelming evidence shows that the cross remains a

Christian symbol, not a military symbol.

Several of the crosses the government references are parts of much larger secular or multi-faith complexes. The most significant examples are located in Arlington National Cemetery—the Canadian Cross of Sacrifice, the Argonne Cross, and a cross commemorating the Mexican Civil War. None of these crosses is a prominent or predominant feature of the cemetery, and the overall image and history of this military burial ground are not founded on religion. All three crosses stand among, if not immediately next to, the countless headstones of soldiers buried in Arlington and alongside a large number of other monuments that do not incorporate religious imagery.¹⁴ Headstone after headstone, punctuated by the eternal flame at President Kennedy's grave site, represent the imagery of Arlington. Much the same can be said for the Irish Brigade Monument and the monument to the 142nd Pennsylvania Infantry. Those monuments, which stand at Gettysburg National Military Park, are also surrounded by other statues and monuments—including over 100 other monuments honoring Pennsylvania **[**43]** troops alone—that do not feature the cross.¹⁵ The Arlington and Gettysburg crosses are, in other words, non-dominant features of a much larger landscape providing a "context of history" and memory that overwhelms the sectarian nature of the crosses themselves. **[*1115]** *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in the judgment). These crosses are not comparable to the Mount Soledad Cross, which dominates the small park of which it is the centerpiece and can be seen from miles away.

FOOTNOTES

¹⁴ The same is true of the French Cross at Cypress Hill National Cemetery, which, as its name suggests, commemorates French soldiers.

¹⁵ The Irish Brigade Monument cross is a Celtic cross and may celebrate the Irish origin of the soldiers instead of their religion.

We do not question or address the constitutionality of the crosses at Arlington Cemetery and Gettysburg. While we conclude on this record that the Latin cross is a sectarian symbol, many monuments that include sectarian symbols do not have the primary effect of advancing religion. See Part III.C.1, *infra*. Our holding that the presence of the Mount Soledad Cross on federal land contravenes the Establishment Clause is driven by the history, setting, **[**44]** and appearance of that Cross—features that, as we discuss below, sharply distinguish the Cross from other war memorials containing religious symbols.

Aside from the Arlington and Gettysburg memorials, only two other crosses that serve as war memorials in the United States are mentioned in the record. One, the Mojave Cross, now stands on private land. See *Buono*, 130 S. Ct. at 1811, 1815-21 (rejecting a challenge to the "statute that would transfer [that] cross and the land on which it stands to a private party"). The other cross referenced, the Memorial Peace Cross in Bladensburg, Maryland, may or may not stand on public land. The record does not inform us.

Prior decisions inform us of just a handful of other standalone crosses that have been dedicated as war memorials on public land. These prior decisions do little to establish that the cross is a prevalent symbol to commemorate veterans. In two of the four cases we found in which crosses were used as war memorials, the crosses in question were only designated as war memorials after the start of litigation. See, e.g., *SCSC*, 93 F.3d at 618 (relating that Latin cross designated as a war memorial following rulings by the state courts that **[**45]** the cross violated the federal and state constitutions); *Greater Houston Chapter of the ACLU v. Eckels*, 589 F. Supp. 222, 225, 234-35 (S.D. Tex. 1984) (noting that three crosses and a Star of David were rededicated as a war memorial after litigation commenced). In a third case, the plaintiffs similarly alleged that the cross in question was rededicated as a memorial after a complaint from a Jewish naval officer that the cross violated the doctrine of separation of church and state, while the defendants claimed the cross had always been a memorial. *Jewish War Veterans*, 695 F.

Supp. at 5. We could locate only one case in which it was undisputed that the cross in question was dedicated as a war memorial from the outset. *Gonzales*, 4 F.3d at 1414, 1421-23 (holding unconstitutional a crucifix in a public park "to honor the heroic deeds of servicemen who gave their life in battle"). In light of the multitude of war memorials in the United States, however, these few examples do not cast doubt on our conclusion and that of the Jewish War Veterans's expert, that the cross has not been a universal, or even a common, feature of war memorials. ¹⁶

FOOTNOTES

¹⁶ The parties and *amici* mention several other memorials, **[**46]** none of which raises a material question of fact as to whether the cross possesses an ancillary meaning as a war memorial. Three of these monuments—the Cape Henry Memorial Cross, the statue of Father Junipero Serra in the U.S. Capitol, and a statue at Cabrillo National Monument in San Diego—are not war memorials but tributes to the memory and achievements of particular (Christian) Europeans. Another, the Navy memorial at Fort Rosecrans, does not include a cross. Two others stand on property owned by Christian churches. Finally, the government and *amici* name several other war memorials without offering a description of the memorials' physical characteristics. These passing references provide no basis for any comparison with the Cross on Mount Soledad.

[*1116] In sum, 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. On another record, **[**47]** we might reach a different result, but on the basis of the evidence here, we can only conclude that the Latin cross does not possess an ancillary meaning as a secular or non-sectarian war memorial. There is simply "no evidence . . . that the cross has been widely embraced by"—or even applied to—"non-Christians as a secular symbol of death" or of sacrifice in military service. *American Atheists*, 616 F.3d at 1162. ¹⁷ It is thus unsurprising that, as the government's expert admits, "[o]ver the course of time, Mount Soledad and its cross became a generic Christian site." The Latin cross can, as in Flanders fields, serve as a powerful symbol of death and memorialization, but it remains a sectarian, Christian symbol. ¹⁸

FOOTNOTES

¹⁷ We recognize that one of the government's experts, Edward T. Linenthal, submitted a declaration opining that "[c]rosses at battle sites, or memorials to veterans' service are not sectarian religious symbols" but instead "signify enduring national themes of" American civil religion, such as "redemptive blood sacrifice and the virtue of selfless service." Linenthal's declaration discusses American civil religion, its "[r]itual expression[s]," and its symbols in some detail **[**48]** and specifically lists the symbols used to celebrate Memorial Day, including "the American flag, the meticulous decorating of graves . . . [and] parades of civic groups, high school bands, and veterans of the American Legion and Veterans of Foreign Wars." But Linenthal attempts to incorporate crosses into American civil religion only by stating that war memorials are part of the civil religion and then listing a few of the monuments discussed above. In light of the uncontested history submitted by Jewish War Veterans, the few memorials cited by Linenthal provide less than a scintilla of evidence to support his conclusion that the Latin cross serves as a non-sectarian war memorial. Linenthal's conclusory declaration is insufficient to create an issue of material fact on this issue. See, e.g., *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081 (9th Cir. 1996) (**HN11** "The mere existence of a scintilla of evidence is not enough to create a genuine issue of material fact in order to preclude summary judgment.") (internal quotation marks omitted).

¹⁸ In *Buono*, Justice Kennedy, writing for the plurality, suggested that a Latin cross may be a

generic symbol of memorialization, noting that "one Latin cross **[**49]** in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." 130 S. Ct. at 1820.

We note that the Court in *Buono* was not addressing the merits of the Establishment Clause challenge to the cross at issue in that case. Nonetheless, we have thoroughly considered Justice Kennedy's opinion. As we have discussed, the record before us does not establish that Latin crosses have a well-established secular meaning as universal symbols of memorialization and remembrance. On the record in this appeal, the "thousands of small crosses" in foreign battlefields serve as individual memorials to the lives of the Christian soldiers whose graves they mark, not as generic symbols of death and sacrifice. Even assuming that a Latin cross can convey a more secular message, however, Justice Kennedy himself states that the meaning of the cross cannot be "divorced from its background and context." *Id.* As we discuss below, the background and context of the Mount Soledad Cross projects a strongly sectarian message that overwhelms any undocumented association **[**50]** with foreign battlefields or other secular meanings that the Cross might possess.

Further, we cannot overlook the fact that the Cross is *forty-three feet tall*. It physically dominates the Memorial, towering over the secular symbols placed beneath it, and is so large and placed in such a prominent location that it can be seen from miles away. A forty-three foot cross that was erected in part to celebrate Christianity, and that serves as the overwhelming centerpiece to a memorial is categorically different from the small crosses used to mark the graves of individual Christian soldiers. The size and prominence of the 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. See *American Atheists*, 616 F.3d at 1162 ("The massive size of the crosses displayed on Utah's rights-of-way and public property unmistakably conveys a message of endorsement, proselytization, and aggrandizement of religion that is far different from the more humble spirit of small roadside crosses.").

[*1117] C. THE MOUNT SOLEDAD MEMORIAL

Our conclusion that the Latin cross is a Christian religious symbol **[**51]** of remembrance or memorialization does not, of course, end the matter. The cross on Mount Soledad does not stand alone. Instead, it is the overwhelming centerpiece of a memorial that now consists of approximately 2,100 plaques, six concentric stone walls, twenty-three bollards, and an American flag. These other elements are either uniquely secular or contain symbols of varying faiths. These changes are, however, of recent vintage, and we must gauge the overall impact of the Memorial in the context of its history and setting.

1. The Importance of Setting and History

HN12—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. In *County of Allegheny*, for instance, the Supreme Court upheld a holiday display—located outside a public building—consisting of an eighteen foot menorah, a forty-five foot Christmas tree that the Court deemed a typically secular emblem of the holidays, and a sign saluting liberty. See 492 U.S. at 616-17. Although Justice O'Connor's controlling opinion considered the menorah to be an entirely sectarian

[52]** object, she determined that the display as a whole communicated a secular message. In the same way that a museum might convey the message of art appreciation without endorsing a religion even though individual paintings in the museum have religious significance, the holiday display in *Allegheny* conveyed a message of religious pluralism and freedom, even though some elements of the display were sectarian. *Id.* at 635 (O'Connor, J., concurring in part and concurring in the judgment).

By contrast, the Court in *Allegheny* held that a creche displayed on the Grand Staircase of the county courthouse violated the Establishment Clause. The creche is a Christian display, and the creche in *Allegheny* "st[ood] alone" on the staircase in a "floral frame," which, "like all good frames, serve[d] only to draw one's attention to the message inside the frame." *Id.* at 598-99. The creche therefore "convey[ed] a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community." *Id.* at 626 (O'Connor, J., concurring in part and concurring in the judgment).

But to complicate things, **[**53]** in the line of Establishment Clause jurisprudence, the display of a creche on public property does not always convey such a message. The Christmas display sponsored by the City of Pawtucket, Rhode Island, for example, included both a creche and secular decorations such as "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, [and] cutout figures" of animals and a clown. *Lynch*, 465 U.S. at 671. Given the presence of these secular elements, "[t]he evident purpose of including the creche in the larger display was not **[*1118]** promotion of the religious content of the creche but celebration of the public holiday through its traditional symbols." *Id.* at 691 (O'Connor, J., concurring).

HN13 ¶ Like the creche, the text of the Ten Commandments conveys an "undeniably . . . religious message." *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment). When placed in the midst of numerous other, non-religious monuments, however, a display of the Commandments can also impart a "secular moral message." *Id.* As a result, such a display is, like the creche among secular objects, permissible—at least when the monument was privately donated and stood without **[**54]** legal controversy for forty years. See *id.* at 701-03.

The question, then, is whether the entirety of the Mount Soledad Memorial, when understood against the background of its particular history and setting, projects a government endorsement of Christianity. We conclude it does. In so holding, we do 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. We do not doubt that the present Memorial is intended, at least in part, to honor the sacrifices of our nation's soldiers. This intent, however, is insufficient to render the Memorial constitutional. Rather, we must inquire into the overall effect of the Memorial, taking into consideration its entire context, not simply those elements that suggest a secular message. See *American Atheists*, 616 F.3d at 1159 (**HN14** ¶ "[A] secular purpose is merely one element of the larger factual and historical context that we consider in order to determine whether [the display] would have an impermissible effect on the reasonable observer."). In conducting this **[**55]** inquiry, we learned that the Memorial has a long history of religious use and symbolism that is inextricably intertwined with its commemorative 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.

2. History of the Mount Soledad Memorial and La Jolla

The Supreme Court has instructed that, **HN15** ¶ when assessing the effect of a religious display, we must consider history carefully: "reasonable observers have reasonable memories, and [the Court's] precedents sensibly forbid an observer to 'turn a blind eye to the context in which [the] policy arose.'" *McCreary*, 545 U.S. at 866 (quoting *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308); accord *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears."); *Buono*, 371 F.3d at 550. The Memorial's history stretches back more than five decades, **[**56]** and we must consider how the Memorial was used and the message it conveyed throughout this entire period, and not just in the short time that it has stood on federal land.

Congress' acquisition of the Cross in 2006 did not erase the first fifty-two years of its life, or even its history dating back to the beginning of the twentieth century. As the district court noted, when Congress acquired the Memorial, it was obligated to "tak[e] history as it [found] it."

History would lead the reasonable observer to perceive a religious message in **[*1119]** the Memorial. For most of its life, the Memorial has consisted of the Cross alone. The Cross is the third in a line of Latin crosses that has stood on Mount Soledad since 1913. Mount Soledad was chosen as the site for the first cross because it was considered "a fitting place on which to erect an emblem of faith." The earlier crosses were not dedicated as war memorials, but served as the site of intermittent Easter sunrise services. When the Cross was erected in 1954, it was dedicated "as a lasting memorial to the dead of the first and second World Wars and the Korean conflict." There was no physical indication that the Cross was intended as a war memorial, **[**57]** however, until a plaque was added to the site in 1989, after litigation over the Cross had begun.

At the same time, the Cross's religious nature has been widely recognized and promoted since it was first erected. When seeking permission from the La Jolla Town Council to erect the Cross, the Association explained that its objective was to "create a park . . . worthy to be a setting for [this] symbol of Christianity." The Association sent out fundraising letters that called on potential donors to support "this manifestation, this symbol, of our faith." The Association also raised funds for the Cross at Easter services and through the performance of a Christian play, "Paul of Corinth," at a local church.

The Cross was dedicated on Easter Sunday in a ceremony that included a Christian religious service. The Cross was dedicated not only to fallen soldiers, but also to Jesus Christ with the hope that it would be "a symbol in this pleasant land of Thy great love and sacrifice for all mankind." The program for the ceremony referred to the Cross as "a gleaming white symbol of Christianity."

After the Cross's dedication in 1954, the Association held Easter services at the Memorial annually until **[**58]** at least 2000, and other religious ceremonies have been held there since. The annual Easter services included readings from the Bible, a Christian prayer and benediction, and songs such as "Jesus Christ is Risen Today" and "All Hail the Power of Jesus' Name." Until the early 1990s, the program for the annual Easter service recounted the Cross's history and described it as "a gleaming white Cross" that serves as a "reminder of God's Promise to man of redemption and everlasting life." During this same time period, the Cross was referred to as the "Easter Cross" on local maps.

In contrast to this ample evidence of religious usage, the record of secular events at the Memorial is thin. The Association represented in its 1998 bid for the land sale that it had conducted annual memorial services at the site for forty-six years, but the government's expert historian could point to evidence of only two Veterans day ceremonies—one in 1971 and one in 1973—that occurred prior to 1989. The government provides record evidence of secular events at the Memorial only from 1996 onward—after the litigation began and after the government started attempting to transform the site.

The Cross's importance as **[**59]** a religious symbol has been a rallying cry for many involved in the litigation surrounding the Memorial. ¹⁹ LiMandri and the Thomas **[*1120]** More Law Center were integral in devising the plan to designate the land as a national veterans' memorial. They publicly characterized the campaign to save the Cross in religious terms—for example, as a "spiritual battle." LiMandri declared that "Christ won the war on Calvary. These are just kind of mop-up battles" LiMandri also participated in a fifty-four day prayer movement in front of the Cross that opened with the singing of "Immaculate Mary," and the prayer of twenty mysteries of the rosary.

FOOTNOTES

19 The district court largely discounted this fact, holding that it was "neither logical nor proper" to impute the motivations of the Association and City to the federal government. This reasoning is correct on its own terms, *see Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S. Ct. 1125, 1136, 172 L. Ed. 2d 853 (2009) (distinguishing the intent of private donors and the government's objectives in accepting a monument) and *Card*, 520 F.3d at 1019-20 (same), but something of a red herring. Regardless of the issue of imputed intent, the history of the Memorial is relevant to determining **[**60]** its effect on the reasonable viewer. Thus, while this evidence may not be relevant to congressional purpose, it cannot be ignored in assessing the history and context of the Cross, which remains on public land. Again, simply because the Cross was transferred from the local government to the federal government does not wipe out the history of the site. The transfer did not divest the Cross of its Christian symbolism or of the long history and association of the site as one of religious significance.

Other Christian advocacy groups like the American Family Association, the American Center for Law & Justice, and Fidelis launched national petition campaigns for the Cross; an intercessory prayer movement was held by the Christian Defense Counsel outside the White House. Representatives from many of these groups participated in a meeting of the San Diego City Council to consider whether to accept the federal transfer. At the meeting, participants advocated for the transfer by invoking the Cross's importance as a Christian symbol, and denouncing their opponents as "Satanists" or "hate[rs] of Christianity." When the Act passed, the Christian Coalition "commend[ed] the great efforts . . . in **[**61]** saving this historic symbol of Christianity in America." The starkly religious message of the Cross's supporters would not escape the notice of the reasonable observer. *See Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in the judgment) ("[T]he short (and stormy) history of the courthouse Commandments' displays [at issue in *McCreary*] demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them.").

The wide recognition of the Cross as a religious symbol and its long "and stormy" history of religious usage distinguishes the Memorial from the displays in *Van Orden* and *Card*. The Ten Commandments monuments at issue in those cases passed muster in part because they were not used as religious objects—they simply adorned the grounds of their respective government buildings in the company of other monuments. *See Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment) ("[T]o determine the message that the text [of the Ten Commandments monument] here conveys, we must examine how the text is used.") (emphasis in original). In *Van Orden*, Justice Breyer emphasized that the organization that **[**62]** erected the Ten Commandments monument "sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency." *Id.* at 701. Given the Monument's history and use in those cases, a reasonable viewer would not have inferred from the use of the monuments that their function was religious in nature. By contrast, a reasonable observer of the Memorial would be aware of the long history of the Cross, and would know that it functioned as a holy object, a symbol of Christianity, and a place of religious observance. The Cross's religious history heightens, rather than neutralizes, its "undeniably . . . religious message." *See id.* (finding that although the text of the Ten Commandments "undeniably has a religious message," that message did not predominate in the display **[*1121]** because the text was not used in a sectarian manner); *see also Eckels*, 589 F. Supp. at 235 ("[T]hat the effect of the symbols' presence is religious is evidenced by what the site has been used for since the [cross was] constructed [including Easter sunrise services]. There is nothing remotely secular about church worship.").

The fact that the Memorial also commemorates **[**63]** the war dead and serves as a site for secular ceremonies honoring veterans cannot overcome the effect of its decades-long religious history. *See Jewish War Veterans*, 695 F. Supp. at 5, 13-14 (holding that religious symbolism of a Latin cross and use of cross in religious ceremonies rendered it unconstitutional even though it had been dedicated as a war memorial). Although the Memorial was labeled a war memorial in 1954, for almost three decades—during which it served primarily as a site of religious

observance—the Memorial consisted of only the Cross, with no physical indication of any secular purpose. Further, recognition of the Memorial as a tribute to veterans has usually been coupled with Christian ceremonies and statements about the Cross's religious significance. The simultaneous invocation of the Cross as a tribute to veterans and a "gleaming white symbol of Christianity" lends a distinctly sectarian tone to the Memorial's secular message of commemoration. *See Carpenter*, 93 F.3d at 631 (holding cross was not constitutional in part because its secular history was "intertwined with its religious symbolism"). The Memorial's relatively short history of secular usage does not predominate **[**64]** over its religious functions so as to eliminate the message of endorsement that the Cross conveys. *See Van Orden*, 545 U.S. at 701-03.

La Jolla—where the Memorial is located and serves as a prominent landmark—has a history of anti-Semitism that reinforces the Memorial's sectarian effect. The record contains various documents reporting "long-standing, culturally entrenched anti-Semitism" in La Jolla from the 1920s through about 1970. The details of this history are well documented in a study that is part of the district court record.²⁰ *See Mary Ellen Stratthaus, Flaw in the Jewel: Housing Discrimination Against Jews in La Jolla, California*, 84 AM. JEWISH HISTORY 3, 189-219 (1996). The anti-Semitism manifested itself in various forms but "most prominently in the housing market." Until the late 1950s, Jews were effectively barred from living in La Jolla by a combination of formal and informal housing restrictions. La Jolla was forced to abandon these restrictions in 1959, in order to persuade the University of California to open a new campus—the University of California San Diego. The aura of anti-Semitism, however, continued at least through the 1960s. An informed observer is far more **[**65]** likely to see the Memorial as sending a message of exclusion against this backdrop than if it had been erected in a city without this pointed history.

FOOTNOTES

²⁰ The district court stated that there "is no history of religious discrimination" surrounding the Memorial. Presumably the district court was referring to the fact that there is no evidence of non-Christian groups requesting to use the Memorial and being denied access on the basis of their faith. We agree with the district court that there is no evidence of this type of religious discrimination, although we also note that there is hardly an extensive record of non-Christian religious events taking place at the site. More importantly, there *is* extensive evidence of religious discrimination in La Jolla, unrefuted by the government. Given that the Cross was constructed in La Jolla with a distinctly religious purpose, by La Jolla residents, during the height of this discriminatory period, we cannot ignore that such discrimination is part of the Memorial's history and context and informs the reasonable observer's views.

[*1122] La Jolla's anti-Semitic history also informs our conclusion that the historical lack of complaint about the Memorial is not **[**66]** a determinative factor in this case. *See Van Orden*, 545 U.S. at 702-03 (Breyer, J., concurring in the judgment). In *Van Orden*, there was little to explain why there had been no complaints about the Ten Commandments monument other than the hypothesis that people had not been especially bothered by it. Here, the Memorial stood in the heart of a largely homogenous and exclusionary community. Even the government's expert noted that, for residents of La Jolla, being religious meant "by definition, without really thinking about it as inclusive or exclusive today, [] being Christian." The Association's President noted that residents thought the site was primarily religious, although, in his view, it was primarily a veterans memorial. Under these circumstances, a lack of complaints from the minority population is hardly reflective of the lack of controversy.

As it turns out, the record indicates that the first questions about the constitutionality of the Memorial arose in 1969 or 1970, less than a decade after La Jolla real estate was opened up to Jews (and other minorities). This sequence of events lends support to the argument that the discriminatory housing policies of La Jolla may have **[**67]** stifled complaints about the Memorial early in its lifetime.²¹ In any case, the Memorial has been the subject of continuous

and heated litigation and political controversy for the last twenty years. However one assesses the early years, the Cross has long since become a flashpoint of secular and religious divisiveness.

FOOTNOTES

21 The district court discounted an article reporting the story of early questions about the Memorial's constitutionality. Again, the court appeared to be weighing evidence rather than crediting it to the nonmoving party. In any event, the article documents that "[a]round 1969 or 1970, the church-state question arose," and a member of the San Diego City Council "took up the cause and researched the legal status of the cross," ultimately determining that it did not violate the Establishment Clause. The article goes on to describe certain steps taken to "blunt any possible legal challenges" and quotes a La Jolla municipal employee as saying "the church-state question has come up." None of this suggests that a debate was raging over the Memorial in the 1960s and '70s, but it certainly shows that the constitutionality of the Memorial was questioned during that period, seriously **[**68]** enough that the Association took action to ward off litigation.

Moreover, the suggestion that the longevity and permanence of the Cross diminishes its effect has no traction. As the Seventh Circuit explained in *Gonzales*,

We believe this argument is much like [saying] the longer the violation, the less violative it becomes. The longer the cross is displayed in the Park, the more the effect is to memorialize rather than sermonize. We do not accept this sort of bootstrapping argument as a defense to an Establishment Clause violation, nor have we found any other case that adopted this reasoning.

4 F.3d at 1422.

Overall, a reasonable observer viewing the Memorial would be confronted with an initial dedication for religious purposes, its long history of religious use, widespread public recognition of the Cross as a Christian symbol, and the history of religious discrimination in La Jolla. These factors cast a long shadow of sectarianism over the Memorial that has not been overcome by the fact that it is also dedicated to fallen soldiers, or by its comparatively short history of secular events.

3. The Memorial's Physical Setting

The Memorial's physical setting amplifies the message of endorsement **[**69]** and exclusion **[*1123]** projected by its history and usage. Despite the recent addition of secular elements, the Cross remains the Memorial's central feature. The 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.

The engraved plaques and paving stones ring the hill on which the Cross sits, placed literally in the Cross's shadow. ²² The relationship of the Cross to the Memorial's secular features inverts the relationship between religious and secular that was presented in *County of Allegheny*. There, the forty-five foot tall secular Christmas tree was "clearly the predominant element of the city's display," occupying the central position in the display and towering over the eighteen foot menorah placed to one side. *County of Allegheny*, 492 U.S. at 617 (opinion of Blackmun, J.). The Supreme Court found that the display did not convey a religious message. *Id.* at 635 (O'Connor, J., concurring in part and in the judgment). **[**70]** Here, just the opposite is true: The way in which the Cross overshadows the Memorial's secular aspects presents a strongly sectarian picture. See *id.* at 617 (opinion of Blackmun, J.) (explaining that because the Christmas tree

overshadowed the menorah, it was "sensible to interpret the meaning of the menorah in light of the tree, rather than vice versa"); *id.* at 598-99 (finding that creche conveyed religious message because "nothing in the context of the display," including the secular flower wreath, "detracts from the creche's religious message"); *see also City of St. Charles*, 794 F.2d at 267 (holding cross in a multi-faceted Christmas display unconstitutional and noting that the cross was "an overpowering feature of the . . . decorations . . . and . . . there [was] no taller object in the city's Christmas display"). A reasonable observer would view the Cross as the primary feature of the Memorial, with the secular elements subordinated to it. It is the cross that catches the eye at almost any angle, not the memorial plaques.

FOOTNOTES

22 In holding that the Memorial's secular elements predominated, the district court emphasized that there were far more secular objects in the Memorial than religious **[**71]** ones. Our evaluation of the Memorial's setting, however, cannot rest on the total number of secular versus religious elements. Our analysis is not a numbers game. Rather, we must examine the primary *effect* of the Memorial's various elements, to determine whether they convey a secular or religious message. Here, the Memorial's religious element—the Cross—is by far its most prominent and dominant feature, completely eclipsing the more numerous plaques and bollards sitting beneath it.

From the perspective of drivers on Interstate 5, almost directly below, the Cross is the *only* visible aspect of the Memorial, and the secular elements cannot neutralize the appearance of sectarianism. For these drivers, the Cross does not so much present itself as a war memorial, but rather as a solitary symbol atop a hill. In fact, the Cross is the only element of the Memorial that can be seen from *anywhere* except the site of the Memorial itself—including from Interstate 15, which is much farther from Mount Soledad than Interstate 5.

As we explained in *Ellis*, the fact that the "Cross stands as the focal point of the park, visible to those looking at the hill from a substantial distance" contributes to its **[**72]** sectarian effect. 990 F.2d at 1527; *see also Buono*, 371 F.3d at 549 (highlighting the fact that cross is visible to vehicles on adjacent road from 100 yards away); *American Atheists*, 616 F.3d at 1160 (finding that secular elements of the highway **[*1124]** crosses did not diminish the message of endorsement in part because "a motorist driving by one of the memorial crosses . . . may not notice . . . the biographical information . . . [but] is bound to notice the preeminent symbol of Christianity"); *Gonzales*, 4 F.3d at 1414 (finding cross unconstitutional and noting that it "is located in an area . . . which borders a busy intersection . . . [and] is visible to virtually anyone who passes through"); *Rabun County Chamber of Commerce, Inc.*, 698 F.2d at 1101, 1111 (holding illuminated cross erected at the top of a mountain in a local state park unconstitutional and noting that it "[shines] over the North Georgia mountains" and "is visible for several miles from the major highways"). Although the Cross is located miles from downtown, it is located at the highest point in La Jolla—a place of particular prominence in San Diego. ²³ *See Ellis*, 990 F.2d at 1527.

FOOTNOTES

23 The district court held that the distance **[**73]** between the Memorial and government buildings weighed against a finding of endorsement, noting that the Memorial was "an unlikely place for government indoctrination." ^{HN16} The proximity of a religious display to government buildings is not dispositive as to constitutionality. We impute to the reasonable observer the awareness that the Memorial sits on public land. Whether identified by the public as city or federal land, it is well known that the site is a public park.

The centrality and prominence of the Cross in the 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. The crosses are on equal footing with these other monuments and do not dominate the landscape. The constitutionality of these crosses is not before us and we do not question their legitimacy. Their setting, however, is reflective of how crosses are incorporated within a larger memorial setting. ^{HN17} That a cross may be permissible when it is merely one facet of a large, secular memorial in which **[**74]** it does not hold a place of prominence does not speak to the constitutionality of a cross that is the centerpiece of and dominates a memorial, the secular elements of which are subordinated to the cross. Faced with such a cross, a reasonable observer would perceive a sectarian message of endorsement.

In addition to overshadowing the Memorial's secular elements, the Cross's central position within the Memorial gives it a symbolic value that intensifies the Memorial's sectarian message. The Memorial's secular elements—the plaques, paving stones and bollards—represent specific individuals or groups of veterans, but the Cross, at the center of the Memorial, is meant to represent *all* veterans, regardless of their faith. The Cross, however, is the "preeminent symbol"—a "gleaming white symbol"—of one faith, of Christianity. The particular history of this Cross only deepens its religious meaning. The Cross is not only a preeminent symbol of Christianity, it has been *consistently used* in a sectarian manner. As even the government's expert noted, "over time . . . Mount Soledad and its cross became a . . . Christian site." The Cross's history casts serious doubt on any argument that it was intended **[**75]** as a generic symbol, and not a sectarian one. *See Rabun County Chamber of Commerce, Inc.*, 698 F.2d at 1110-11 (finding that dedication of cross at Easter service and Easter services occurring at the cross were evidence that cross was erected for a religious purpose).

The use of such a distinctively Christian symbol to honor all veterans sends a strong message of endorsement and exclusion. It suggests that the government is so connected to a particular religion that it treats that religion's symbolism as its own, **[*1125]** as universal. To many non-Christian veterans, this claim of universality is alienating. As one World War II veteran who fought in both D-Day and the Battle of the Bulge put it:

I don't know if it is a Christian monument, but it does not speak for me. I was under Hitler and in a concentration camp and a cross does not represent me. The Cross does not represent all veterans and I do not know how they can say it represents all veterans. I do not think a cross can represent Jewish veterans.

One of the plaintiffs, Steve Trunk, explained that he was "a veteran who served his country during the Vietnam conflict [but] I am not a Christian and the memorial sends a very clear message to **[**76]** me that the government is honoring Christian war veterans and not non-Christians." ²⁴ *See also City of St. Charles*, 794 F.2d at 273 ("[T]he story of the death and resurrection of Christ, the story that the cross calls to mind, moves only Christians deeply.").

FOOTNOTES

²⁴ We note that not all veterans agree, and that a local Jewish veterans group opposes the effort of the national group to challenge the Cross.

By claiming to honor all service members with a symbol that is intrinsically connected to a particular religion, the government sends 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." *See Lynch*, 465 U.S. at 688 (O'Connor, J., concurring); *see also American Atheists*, 616 F.3d at 1160-61 ("[T]he fact that all of the fallen . . . troopers are memorialized with a Christian symbol conveys a message that there is some connection between [the state] and Christianity. . . . [T]he

significant size of the cross would only heighten this concern."); *Eckels*, 589 F. Supp. at 235 (the primary effect of crosses and Stars of David used as war **[**77]** memorials "is to give the impression that only Christians and Jews are being honored by the country"). This message violates the Establishment Clause. ²⁵

FOOTNOTES

²⁵ The fact that individual veterans can purchase plaques representing their own beliefs does not cure the constitutional problem with the Memorial. The Memorial appears to represent Christian veterans generally, even if non-Christian veterans can take steps to be honored specifically. Simply purchasing a single small plaque with a Star of David would do little to mute the overall effect of the Cross.

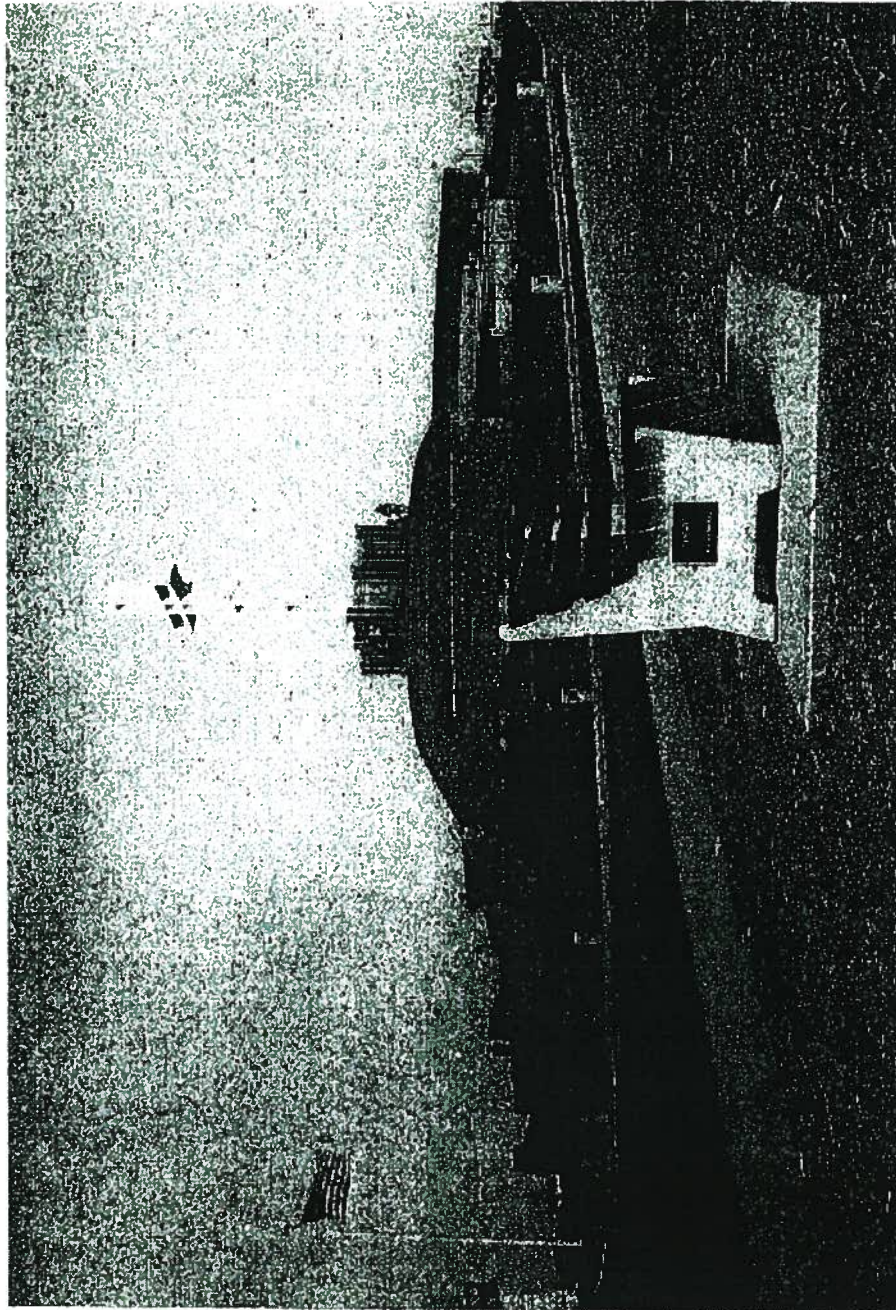
Accordingly, after examining the entirety of the Mount Soledad Memorial in context—having considered its history, its religious and non-religious uses, its sectarian and secular features, the history of war memorials and the dominance of the Cross—we conclude that the Memorial, presently configured and as a whole, primarily conveys a message of government endorsement of religion that violates the Establishment Clause. This 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.

We reverse the grant **[**78]** of summary judgment to the government and remand for entry of summary judgment in favor of the Jewish War Veterans and for further proceedings consistent with this opinion.

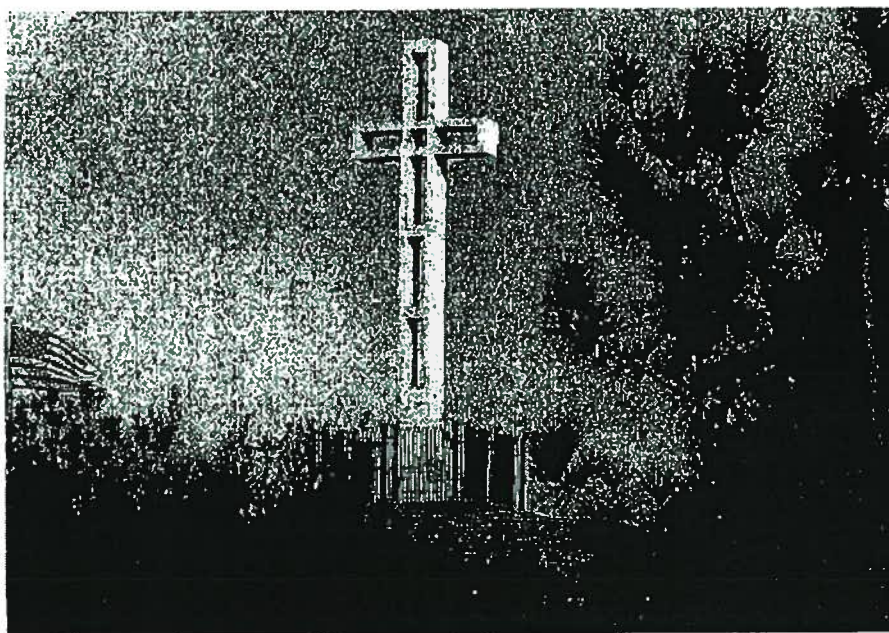
REVERSED AND REMANDED.

APPENDIX A

APPENDIX A



[*1126]



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AMERICAN ATHEISTS, INC., a Texas non-profit corporation; R. ANDREWS; S. CLARK; and M. RIVERS, Plaintiffs-Appellants, v. SCOTT T. DUNCAN, Colonel, Superintendent of Utah Highway Patrol; LANCE DAVENPORT, Superintendent, Utah Highway Patrol, in his official capacity; JOHN NJORD, Executive Director, Utah Department of Transportation; and F. KEITH STEPAN, Director Division of Facilities Construction and Management Department of Administrative Services, Defendants-Appellees, and UTAH HIGHWAY PATROL ASSOCIATION, Defendant-Intervenor-Appellee. THE UNITARIAN UNIVERSALIST ASSOCIATION; THE UNION FOR REFORM JUDAISM; THE SOCIETY FOR HUMANISTIC JUDAISM; THE INTERFAITH ALLIANCE; THE HINDU AMERICAN FOUNDATION; THE ANTI-DEFAMATION LEAGUE; EUGENE J. FISHER; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN HUMANIST ASSOCIATION; FOUNDATION FOR MORAL LAW; ROBERT E. MACKEY; THE AMERICAN LEGION; STATE OF COLORADO; STATE OF KANSAS; STATE OF NEW MEXICO; STATE OF OKLAHOMA; THE BECKET FUND FOR RELIGIOUS LIBERTY; GREGORY BELL; CURTIS BRAMBLE; ALLEN CHRISTENSEN; DAVID CLARK; MARGARET DAYTON; BRAD DEE; DAN EASTMAN; JOHN GREINER; WAYNE HARPER; JOHN HICKMAN; LYLE HILLYARD; SHELDON KILLPACK; PETER KNUDSON; MICHAEL MORLEY; WAYNE NIEDERHAUSER; HOWARD STEPHENSON; DENNIS STOWELL; AARON TILTON; JOHN VALENTINE; KEVIN VANTASSELL; CARLENE WALKER; CITY OF SANTA FE; UTAH SHERIFFS' ASSOCIATION, Amici Curiae.

No. 08-4061

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

637 F.3d 1095; 2010 U.S. App. LEXIS 26936

December 20, 2010, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 181 L. Ed. 2d 379, 2011 U.S. LEXIS 7919 (U.S., Oct. 31, 2011)

PRIOR HISTORY: [1]**

Appeal from the United States District Court for the District of Utah. (D.C. No. 2:05-CV-00994-DS). Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 2010 U.S. App. LEXIS 17249 (10th Cir. Utah, 2010) Am. Atheists, Inc. v. Duncan, 528 F. Supp. 2d 1245, 2007 U.S. Dist. LEXIS 85621 (D. Utah, 2007)

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs, an atheist advocacy group and two members, appealed a grant of summary judgment by the United States District Court for the District of Utah in favor of defendant state employees in plaintiffs' action under 42 U.S.C.S. § 1983 and Utah Const. art. I, challenging the legality of the placement of cross memorials on public lands under the Establishment Clause.

OVERVIEW: The memorials were twelve-foot high white crosses and were to honor fallen state troopers. The employees had authorized a trooper association to incorporate the state trooper logo on the memorial crosses and to place some of the memorials on state land. The district court held that the memorials did not violate the federal or state constitutions. The court found that the group members had standing under U.S. Const. art. III because they had direct personal and unwelcome contact with the crosses and a favorable judgment would redress their injuries. On review, the court reversed because the placement of the memorials on public land violated the Establishment Clause. The court held that the cross memorials at issue had to be analyzed not as private speech, but as government speech. The memorials had the impermissible effect of conveying to the reasonable observer the message that the state preferred or otherwise endorsed Christianity. Finally, although the court could discern a plausible secular purpose under the Lemon test, the crosses had an impermissible effect on the reasonable observer even though some contextual elements might help reduce the message of religious endorsement.

OUTCOME: The court reversed the grant of summary judgment to the employees and remanded for the district court to enter judgment for plaintiffs.

CORE TERMS: memorial, display, symbol, message, religious, secular, religion, observer, highway, endorsement, monument's, trooper, convey, declaration, public land, fallen, prong, insignia, roadside, conveyed, erected, marker, reverse, public property, displayed, quotation, endorse, patrol, joined, motive


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Civil Procedure > Justiciability > Standing > General Overview 

Civil Procedure > Appeals > Standards of Review > De Novo Review 


Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview 


HN1  An appellate court reviews the question of whether a plaintiff has constitutional standing de novo. [More Like This Headnote](#)

Civil Procedure > Justiciability > Standing > General Overview 


Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview 

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

HN2  To demonstrate standing, a plaintiff must allege actual or threatened personal injury, fairly traceable to the defendant's unlawful conduct and likely to be redressed by a favorable decision of the court. In Establishment Clause cases, allegations of personal contact with a state-sponsored image suffice to demonstrate this kind of direct injury. [More Like This Headnote](#)


Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Strike > General Overview 

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion 

HN3  A decision regarding a motion to strike is reviewed for an abuse of discretion. [More Like This Headnote](#)

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom 


HN4  The U.S. Supreme Court has held that just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. Thus, the Court has concluded, as a general matter, the Free Speech Clause's forum analysis simply does not apply to the installation of permanent monuments on public property. [More Like This Headnote](#)


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Civil Procedure > Appeals > Standards of Review > De Novo Review 


Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

HN5  An appellate court reviews de novo a district court's decision in a First Amendment case, and undertakes an independent examination of the whole record. More specifically, in Establishment Clause cases, the court considers a district court's findings on each part of the Lemon v. Kurtzman test to be constitutional facts that the court reviews de novo. Where the district court has granted summary judgment for the defendants, the court must ensure that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law. In so doing, the court views the evidence and draws reasonable inferences therefrom in the light most favorable to the nonmoving party. [More Like This Headnote](#)


Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

HN6  The first clause of the First Amendment provides, Congress shall make no law respecting an establishment of religion. U.S. Const. amend. I. This substantive limitation applies also to the legislative power of the states and their political subdivisions as a result of the Fourteenth Amendment. The Establishment Clause enshrines the principle that government may not act in ways that aid one religion, aid all religions, or prefer one religion over another. This concept is not, however, as simple as it may sound, and courts have struggled mightily to articulate when government action has crossed the constitutional line. [More Like This Headnote](#)

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

HN7  Although the U.S. Supreme Court is sharply divided on the standard governing Establishment Clause cases, the United States Court of Appeals for the Tenth Circuit has recently affirmed that the touchstone for Establishment Clause analysis remains the tripartite test set out in Lemon. [More Like This Headnote](#)

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 

HN8  The U.S. Supreme Court in Lemon has established three general tests to determine whether a state has violated the principles protected by the Establishment Clause: First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion. If any of these tests are violated, the state practice will be deemed unconstitutional. [More Like This Headnote](#)

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Religion > Establishment of Religion 


HN9 ➤ An appellate court interprets the purpose and effect prongs of Lemon in light of Justice O'Connor's endorsement test. Under that test, the purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. Justice O'Connor's modification of the Lemon test makes the inquiry very case-specific, as it asks the court to examine carefully the particular context and history of the displays before concluding what effect they would likely have on the reasonable observer. [More Like This Headnote](#)

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HN10 ➤ The question presented by the first prong of the Lemon test is whether the government conduct was motivated by an intent to endorse religion. In deciding whether the government's purpose was improper, a court must view the conduct through the eyes of an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act. The court will not lightly attribute unconstitutional motives to the government, particularly where the court can discern a plausible secular purpose. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN11 ➤ The United States Court of Appeals for the Tenth Circuit has recently observed that governments may not make adherence to a religion relevant in any way to a person's standing in the political community. And actions which have the effect of communicating governmental endorsement or disapproval, whether intentionally or unintentionally, make religion relevant, in reality or public perception, to status in the political community. [More Like This Headnote](#)

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HN12 ➤ When determining whether a display has the impermissible effect of communicating a message of governmental endorsement or disapproval of religion, a court looks through the eyes of an objective observer who is aware of the purpose, context, and history of the symbol. The objective or reasonable observer is kin to the fictitious reasonably prudent person of tort law. So the court presumes that the court-created objective observer is aware of information not limited to the information gleaned simply from viewing the challenged display. While the reasonable observer is presumed to know far more than most actual members of a given community, the court does not treat the reasonable observer as omniscient. [More Like This Headnote](#)

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HN13 ➤ Context can determine the permissibility of displays of religious symbols on public property. [More Like This Headnote](#)

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HN14 ➤ As the U.S. Supreme Court has recently explained, by accepting a privately donated monument and placing it on state property, a state engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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Robert V. Ritter of Appignani Humanist Legal Center, American Humanist Association, Washington, D.C., filed an amici curiae brief for American Humanist Association, Society for Humanistic Judaism, and Unitarian Universalist Association, in support of Plaintiffs-Appellants.

Evan M. Tager ↘ and David M. Gossett ↘ of Mayer Brown LLP, Washington, D.C., and Brian M. Willen ↘ of Mayer Brown LLP, New York, New York, Steven M. Freeman ↘, Steven C. Sheinberg ↘, and Michelle N. Deutchman ↘ of Anti-Defamation League, New York, New York, Mark J. Pelavin ↘ of Union for Reform Judaism, Washington, D.C., Ayesha N. Khan and Richard B. Katskee ↘ of Americans United for Separation of Church and State, Washington, D.C., and Suhag A. Shukla of Hindu American Foundation, Kensington, Maryland, filed an amici curiae brief for Americans United for Separation of Church and State, The Anti-Defamation League, The Hindu American Foundation, The Interfaith Alliance, The Union for Reform Judaism, and Dr. Eugene Fisher, in support of Plaintiffs-Appellants.

Roy **[**3]** S. Moore, John A. Eidsmoe ↘, and Benjamin D. DuPrè for Foundation for Moral Law, Montgomery, Alabama, filed an amicus curiae brief for Foundation for Moral Law, in support of Defendants-Appellees.

Michael A. Sink ↘ of Perkins Coie LLP, Denver, Colorado, filed an amicus curiae brief for Robert E. Mackey, in support of Defendants-Appellees.

John Ansbro ↘ of Orrick, Herrington, & Sutcliffe LLP, New York, New York, filed an amicus curiae brief for The American Legion, in support of Defendants-Appellees.

Chad N. Boudreaux ↘ and Adam J. White ↘ of Baker Botts, LLP, Washington, D.C., filed an amici curiae brief on behalf of Gregory Bell, Curtis Bramble, Allen Christensen, David Clark, Margaret Dayton, Brad Dee, Dan Eastman, John Greiner, Wayne Harper, John Hickman, Lyle Hillyard, Sheldon Killpack, Peter Knudson, Michael Morley, Wayne Niederhauser, Howard Stephenson, Dennis Stowell, Aaron Tilton, John Valentine, Kevin VanTassell and Carlene Walker (collectively "Utah Legislators") and City of Santa Fe, in support of Defendants-Appellees.

Kevin T. Snider ↘ of Pacific Justice Institute, Sacramento, California, filed an amicus curiae brief for Utah Sheriffs' Association, in support of Defendants-Appellees.

JUDGES: Before **[**4]** TACHA ↘*, KELLY ↘, LUCERO ↘, MURPHY ↘, HARTZ ↘, O'BRIEN ↘, TYMKOVICH ↘, GORSUCH ↘, and HOLMES ↘, Circuit Judges. EBEL ↘, Circuit Judge. KELLY ↘, Circuit Judge, dissenting from the denial of rehearing en banc, with whom O'BRIEN ↘, TYMKOVICH ↘, and GORSUCH ↘, Circuit Judges, join. GORSUCH ↘, Circuit Judge, joined by KELLY ↘, Circuit Judge, dissenting from the denial of rehearing en banc.

* Chief Judge Mary Beck Briscoe ↗ is recused in this matter and did not participate.

OPINION

[*1111] The Utah Highway Patrol Association ("UHPA"), with the permission of Utah state authorities, erected a number of twelve-foot high crosses on public land to memorialize fallen Utah Highway Patrol ("UHP") troopers. Plaintiffs-Appellants, American Atheists, Inc., a Texas non-profit organization, and three individual members of American Atheists who reside in Utah, challenge the legality of these memorials under the Establishment Clause of the federal constitution and Article I of Utah's constitution. We hold that these memorials have the impermissible effect of conveying to the reasonable observer the message that the State prefers or otherwise endorses a certain religion. They therefore violate the Establishment Clause of the federal constitution. In light **[**5]** of this conclusion, we need not reach the separate question of whether these displays also violate Utah's constitution.

I. Background

UHPA, a non-profit organization that supports UHP officers and their families, initiated the memorial project in 1998. The memorials are twelve-foot high crosses with six-foot horizontal cross-bars. The fallen trooper's name, rank, and badge number are printed in large letters on the horizontal cross-bar. Immediately underneath the place where the two bars meet hangs a large (approximately 12" high and 16" wide) depiction of the UHP's official "beehive" symbol. Beneath that are printed the year the trooper died and a small plaque containing a picture of the trooper and some biographical information.¹

FOOTNOTES

¹ Photos of some of these displays are attached to this opinion.

UHPA member and officer Lee Perry and his friend Robert Kirby came up with the idea for these memorials and designed the crosses, which UHPA approved. UHPA asserts that

[t]he purpose of these memorials is fourfold: (1) the memorials stand as a lasting reminder to UHPA members and Utah highway patrol troopers that a fellow trooper gave his life in service to this state; (2) the memorials remind highway **[**6]** drivers that a trooper died in order to make the state safe for all citizens; (3) the memorials honor the trooper and the sacrifice he and his family made for the State of Utah; and (4) encourage safe conduct on the highways.

(Aple. Supp. App. at 3112.) Perry and Kirby determined that "only a cross could effectively convey these weighty messages instantaneously" to motorists driving by a memorial. (Id. at 3165.) According to Perry, they chose a white Roman or Latin cross because

only a white cross could effectively convey the simultaneous messages of death, honor, remembrance, gratitude, sacrifice, and safety. I determined this because a cross is widely recognized as a memorial for a person's death and especially respect to those who have given their lives to insure the safety and protection of others.

(Aplt. App. at 420.) Moreover, a "cross, near the highway, with the inscriptions, symbols and plaques mentioned above, conveys the unmistakable message that a Utah Highway Patrolman died near this **[*1112]** spot while serving the people of Utah." (Id. at 423.)

Because generally drivers would be passing a memorial at 55-plus miles per hour, the UHPA determined that the cross memorials "needed to prominently **[**7]** communicate all of this instantaneously." (Aple. Supp. App. at 3165.) Further, to "effectively communicate these messages," the UHPA sought "to place each cross in a location that was: (1) visible to the public;

(2) safe to stop and view; and (3) as close to the actual spot of the trooper's death as possible." (Id.)

Before erecting any memorial, the UHPA obtained the consent of the fallen trooper's family. None of these families have ever objected to the use of the cross as a memorial or requested that the UHPA memorialize their loved one using a different symbol. However, "[b]ecause [the UHPA] exist[s] to serve family members of highway patrolmen, the UHPA would provide another memorial symbol if requested by the family." ² (Aplt. App. at 1869.)

FOOTNOTES

² Notwithstanding the UHPA's position, the State Defendants, in oral argument before the district court and in their briefs and argument before us, asserted that they would not allow any change in the memorial, whether to accommodate other faiths or otherwise.

UHPA erected its first memorial cross in 1998 on private property located approximately fifty feet from a state highway. Later, UHPA obtained permission from the State of Utah to erect additional **[**8]** memorial crosses on public property, including the rights-of-way adjacent to the State's roads, roadside rest areas, and the lawn outside a UHP office in Salt Lake County. ³ In permitting the memorials, however, the State has, on at least one occasion, expressly noted that it "neither approves or disapproves the memorial marker." (Id. at 2303.)

FOOTNOTES

³ A photo depicting the lawn outside this UHP office, where all of one and part of the other of these two memorial crosses are visible, is attached to this opinion.

Between 1998 and 2003, the UHPA erected a total of thirteen memorials. The memorials are all privately funded; UHPA retains ownership of the memorials and maintains them, while the State continues to own and control the state land on which some of the memorials are located. Local businesses and Boy Scout troops have aided the UHPA in funding, building and maintaining the memorial crosses.

II. This litigation

Plaintiffs brought this suit under 42 U.S.C. § 1983 and Article I of the Utah Constitution against several state employees who were responsible for authorizing the UHPA to incorporate the UHP logo on the memorial crosses and to place some of these crosses on state land. ⁴ Although **[**9]** Plaintiffs initially alleged violations of both the establishment and "free expression" clauses of these constitutions, Plaintiffs later dismissed their "free expression" claims. Based upon the alleged establishment clause violations, Plaintiffs seek, as relief, \$1 in nominal damages, an injunction ordering the removal of these memorial crosses from state property, an injunction ordering that the UHP insignia be removed from all UHPA memorial crosses, a declaration that these memorial crosses' presence on state property violates Plaintiffs' constitutional rights, a declaration that it is a constitutional violation to allow **[*1113]** the UHP insignia to be placed on these memorial crosses, and attorneys' fees. The district court allowed UHPA to intervene as a party-defendant.

FOOTNOTES

⁴ UHPA asserts that federal courts do not have subject matter jurisdiction to consider Establishment Clause claims asserted under 42 U.S.C. § 1983. This court, however, has previously rejected that argument. See *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784, 788 n.1 (10th Cir. 2009), cert. denied, 130 S. Ct. 1687, 176 L. Ed. 2d 180 (2010).

Upon the parties' cross-motions for summary judgment, the district court denied **[**10]** Plaintiffs' motions and granted summary judgment for all Defendants, holding that these memorial crosses did not violate the federal or state constitution. See *American Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245 (D. Utah 2007). Plaintiffs timely appealed that decision. We have jurisdiction to consider this appeal pursuant to 28 U.S.C. § 1291. ⁵ See *Green*, 568 F.3d at 788.

FOOTNOTES

⁵ This court delayed issuing this opinion, awaiting the Supreme Court's decision in *Salazar v. Buono*, 130 S. Ct. 1803, 176 L. Ed. 2d 634 (2010). *Buono* initially involved an Establishment Clause challenge to private citizens' erecting a white cross on federal land as a war memorial. See *id.* at 1811-12. The Ninth Circuit held that violated the Establishment Clause, a decision the defendants did not appeal. See *id.* at 1812-13. The Supreme Court, thus, did not address the merits of the Establishment Clause claim, but instead addressed a later procedural development, considering, instead, the plaintiff's attempt to enforce the judgment he obtained against the display of the cross on public land, in light of the government's subsequent transfer of the land at issue to private concerns. See *id.* at 1811-13, 1815-16 (Kennedy, **[**11]** J., joined by Roberts, C.J., and Alito, J); *id.* at 1824-25 (Scalia, J, joined by Thomas, J., concurring in the judgment); *id.* at 1828 (Stevens, J, joined by Ginsburg and Sotomayor, J., dissenting); *id.* at 1842-43 (Breyer, J., dissenting). The Court upheld the land transfer against the plaintiff's challenge. See *id.* at 1811 (Kennedy, J., joined by Roberts, C.J., and Alito, J); *id.* at 1824-25 (Scalia, J, joined by Thomas, J., concurring in the judgment).

III. Analysis

A. Standing

As a threshold matter, we must determine whether Plaintiffs have Article III standing to bring this case. See *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005). The district court held that Plaintiffs had standing because they "have experienced direct and unwelcome contact with the memorial crosses at issue in this case . . . [and] would have to alter their commutes in order to avoid contact with the memorials." *American Atheists*, 528 F. Supp. 2d at 1251. ^{HN1} "We review the question of whether a plaintiff has constitutional standing de novo." *Green*, 568 F.3d at 792.

^{HN2} "To demonstrate standing, a plaintiff must allege actual or threatened personal injury, fairly traceable to the defendant's unlawful conduct **[**12]** and likely to be redressed by a favorable decision of the court." *Foremaster v. City of St. George*, 882 F.2d 1485, 1487 (10th Cir. 1989). In Establishment Clause cases, "[a]llegations of personal contact with a state-sponsored image suffice to demonstrate this kind of direct injury." *O'Connor*, 416 F.3d at 1223.

Here, the individual named plaintiffs allege to have had "direct personal and unwelcome contact with the crosses." (Aplt. App. at 587, 596, and 682.) Under *O'Connor*, 416 F.3d at 1223, these allegations establish standing. See also *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1028-29 (10th Cir. 2008). Mr. Andrews, one of the named plaintiffs, also stated that he has "occasionally altered [his] travel route or [has] not stopped at a particular rest stop to avoid contact with the crosses." (Aplt. App. at 596.) Mr. Andrews's allegation that he was "forced to alter [his] behavior to avoid contact with the display, although not necessary for standing, further support[s] this conclusion." *O'Connor*, 416 F.3d at 1223. "Moreover, the Plaintiffs-Appellants' alleged injuries stem directly from the conduct of the [State]. . . . Lastly . . . a favorable judgment from the federal court would **[**13]** redress the injuries. As such, **[*1114]** the Plaintiffs-Appellants have standing to pursue [this case] before this court." *Weinbaum*, 541 F.3d at 1028-29.

Because the individual named plaintiffs here have standing, this court does not need to determine whether *American Atheists* would also have standing in its own right. See *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160, 102 S. Ct. 205, 70 L. Ed. 2d 309 (1981) (determining that because one of the plaintiffs "has standing, we do not consider the standing of the other plaintiffs");

see also Green, 568 F.3d at 793 n.5 ("Because we conclude that [Plaintiff-Appellant] Mr. Green has standing, . . . it is unnecessary to address the ACLU of Oklahoma's standing.").

B. Whether the district court abused its discretion in striking the declarations of O. Salah and D. Chatterjee

The district court ordered the parties, when submitting declarations, to identify which motion those declarations supported. The court further warned the parties that "[f]ailure to identify the declarations in this manner will result in their being stricken and not considered by the court." (D. Ct. doc. 132.) Subsequent to the district court's order, Plaintiffs submitted to the **[**14]** court the declarations of O. Salah and D. Chatterjee, but failed to identify the motion Plaintiffs sought to support with those declarations. The district court, therefore, struck them. The court did not abuse its discretion in doing so. ⁶ See Jones v. Barnhart, 349 F.3d 1260, 1270 (10th Cir. 2003) (^{HN3} reviewing decision regarding motion to strike for an abuse of discretion).

FOOTNOTES

⁶ In striking these declarations, the district court also noted that D. Chatterjee's declaration appears to be an attempt by Plaintiffs "to submit expert testimony under the guise of lay opinion testimony. The Chatterjee declaration is inadmissible because he was never identified as an expert and his testimony does not fit any other admissible category." (Aplt. App. at 2904-05.) We need not address the propriety of this additional reason for striking Chatterjee's declaration because the district court was justified in striking both declarations due to Plaintiffs' failure to identify which motions these declarations were intended to support.

C. Whether the Free Speech Clause Protects these Cross Memorials from Establishment Clause Scrutiny

As an initial matter, UHPA argues that the displays at issue in this case are UHPA's **[**15]** private speech, not the expression of the state of Utah and, therefore, that the Free Speech Clause, not the Establishment Clause, should govern our analysis in this case. Further, UHPA asserts that Utah would violate the Free Speech Clause by prohibiting the displays at issue in this case and, therefore, that the Establishment Clause cannot mandate the prohibition of these displays. The UHPA is supported in this position by amici curiae, the States of Colorado, Kansas, New Mexico, and Oklahoma, and The Becket Fund for Religious Liberty. These arguments fail in light of the Supreme Court's recent decision in Pleasant Grove City v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009).

In Pleasant Grove City, ^{HN4} the Supreme Court held that "[j]ust as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land." Id. at 1133. Thus, the Court concluded, "as a general matter, [the Free Speech Clause's] forum analysis simply does not apply to the installation of permanent monuments on public property." Id. at 1138.

As permanent monuments erected on public **[**16]** land, ⁷ the cross memorials at issue **[*1115]** in this case fall squarely within the rule pronounced by the Court in Pleasant Grove City and, therefore, must be analyzed not as private speech, but as government speech—the scope and content of which is restrained, inter alia, by the Establishment Clause. See id. at 1131-32; see also Green, 568 F.3d at 797 n.8.

FOOTNOTES

⁷ Although it appears that at least one memorial is located on private land, the UHPA does not base its argument on that fact.

Both at oral argument and in a letter submitted pursuant to Fed. R. App. P. 28 (j), the state amici

and the Becket Fund for Religious Liberty attempt to distinguish this case from Pleasant Grove City, arguing that even in light of the Court's opinion in Pleasant Grove City, the displays at issue in this case should be treated as private speech. They argue that Pleasant Grove City can be distinguished from our case in three ways: (1) in Pleasant Grove City, the city took ownership of the displays at issue, while in this case, the UHPA has retained ownership of the memorial crosses; (2) Utah has distanced itself from the message conveyed in these displays by issuing a statement that the Utah Department of Transportation **[**17]** "neither approves or disapproves the memorial marker" (Aplt. App. at 2303); and (3) unlike the displays at issue in Pleasant Grove City, these displays are not really permanent because both Utah and the UHPA retain the right to remove the display at any time. These distinctions are unpersuasive.

The fact that the UHPA retains ownership over these displays does not materially affect our analysis of whether the displays at issue in this case constitute government speech. In Pleasant Grove City, the Supreme Court noted that the city had taken ownership of "most of the monuments in the Park." 129 S. Ct. at 1134 (emphasis added). However, the Court gave no indication that only those monuments which the city actually owned constituted government speech. To the contrary, the Court strongly implied that all the monuments in that park were government speech, and further indicated that, in the vast majority of cases, a permanent monument on public land will be considered government speech. *Id.* at 1138. The fact that the Court thought all of the monuments in that park were government speech is perhaps best illustrated by the Court's choice of an example of a permanent monument on public land that **[**18]** would not be government speech: a "monument on which all the residents . . . could place the name of a person to be honored or some other private message." *Id.* The Court's choice to use a hypothetical example, and not just to point to some of the memorials in the park at issue that might be privately owned in that case indicates that the Court considered all the monuments in that park to be government speech. Thus, the fact that the UHPA, not Utah, owns the memorial crosses does not affect our determination of whether they are government speech.

Similarly, Utah's attempt to distance itself from the message conveyed by these memorial crosses, by stating that it neither "approves or disapproves" them, falls flat in light of the Supreme Court's discussion in Pleasant Grove City. In Pleasant Grove City, the Court explicitly rejected the respondent's argument that, in order for a monument to constitute government speech, the state must formally adopt the message conveyed by the display. The Court noted that the City's decision to display that permanent monument on its property "provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand . . . **[**19]** . ." *Id.* at 1134. Conversely, the government's actions in this case—allowing these memorial crosses to be displayed with the official UHP insignia primarily on public land—cannot be overshadowed by **[*1116]** its attempts to distance itself from the message conveyed by these displays.

Finally, we reject the state amici's contention that, because the UHPA and Utah each retained the right to remove these displays, they are not "permanent" and, therefore, the Court's decision in Pleasant Grove City does not cover this case. This project began more than ten years ago, and there is no evidence that any of the memorial crosses erected since that time have been removed. We think that is permanent enough to constitute government speech. See *id.* at 1138 (contrasting the "permanent" displays at issue in that case with the "temporary" sixteen-day display at issue in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995)).⁸

FOOTNOTES

⁸ At oral argument, the state amici also argued that this case is distinguishable from Pleasant Grove City because the memorials in this case were erected in places like the sides of the road, where space is less scarce than in public **[**20]** parks. We also find this distinction unpersuasive. Surely, the memorials placed in front of the UHP office are on land that is no less scarce than the land in most parks. Further, as the record in this case demonstrates, the State tightly controls the displays placed on the rights-of-way near its roads and, although those rights-of-way may cover a larger geographic area than the state's parks (an allegation we are unwilling to accept on the amici's say so), safety concerns and statutes like the federal Highway Beautification Act, 23 U.S.C. § 131, severely limit the area where memorials or other

monuments could be displayed.

D. Federal Establishment Clause claim

1. *Standard of Review*

HN5 This court reviews de novo a district court's decision in a First Amendment case, O'Connor, 416 F.3d at 1223; Snyder v. Murray City Corp., 159 F.3d 1227, 1230 n.7 (10th Cir. 1998) (en banc), and undertakes "an independent examination of the whole record." O'Connor, 416 F.3d at 1223; see also Weinbaum, 541 F.3d at 1029 ("We review *de novo* a district court's findings of constitutional fact and its ultimate conclusions regarding a First Amendment challenge.") (internal citations and quotations omitted). "More **[**21]** specifically, in Establishment Clause cases, we consider 'a district court's findings on each part of the Lemon[v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)] test' to be 'constitutional facts'" that we review de novo. Green, 568 F.3d at 795-96 (quoting Robinson v. City of Edmond, 68 F.3d 1226, 1230 n.7 (10th Cir. 1995)). Where, as here, the district court granted summary judgment for Defendants, "we must ensure that 'there is no genuine issue as to any material fact' and that [Defendants are] 'entitled to judgment as a matter of law.'" Weinbaum, 541 F.3d at 1029 (quoting Fed. R. Civ. P. 56(c)). In so doing, this court "view[s] the evidence and draw[s] reasonable inferences therefrom in the light most favorable to the nonmoving party." Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649 (10th Cir. 2006) (quoting Keys Youth Servs., Inc. v. City of Olathe, 248 F.3d 1267, 1270 (10th Cir. 2001)).

2. *The Lemon/Endorsement Test*

HN6 "The first clause of the First Amendment provides, 'Congress shall make no law respecting an establishment of religion' U.S. Const. amend. I. This substantive limitation applies also to the 'legislative power of the States **[**22]** and their political subdivisions' as a result of the Fourteenth Amendment." Weinbaum, 541 F.3d at 1029 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000)). The Establishment Clause "enshrines the principle that government may not act in ways that 'aid one religion, aid all religions, or prefer one religion over another.'" Id. **[*1117]** (quoting Snyder, 159 F.3d at 1230); see also County of Allegheny v. Am. Civil Liberties Union, 492 U.S. 573, 590, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (stating that the Establishment Clause guarantees "religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism'" (quoting Wallace v. Jaffree, 472 U.S. 38, 52, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985))). This concept is not, however, as simple as it may sound, and courts have struggled mightily to articulate when government action has crossed the constitutional line. See Bauchman ex. rel. Bauchman v. W. High Sch., 132 F.3d 542, 551 (10th Cir. 1997) (noting the Supreme Court's failure to "prescribe a general analytic framework within which to evaluate Establishment Clause claims," and that "many **[**23]** believe the Court's modern Establishment Clause jurisprudence is in hopeless disarray") (citation and quotation omitted).

HN7 Although the Supreme Court is sharply divided on the standard governing Establishment Clause cases, see Green, 568 F.3d at 797 n.8 (discussing the confusion generated by the Supreme Court's decision in Van Orden v. Perry, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005)), this court has recently affirmed that "the touchstone for Establishment Clause analysis remains the tripartite test set out in Lemon." Green, 568 F.3d at 796 (quoting Weinbaum, 541 F.3d at 1030); see also Gonzales v. N. Tp. of Lake County, 4 F.3d 1412, 1417-18 (7th Cir. 1993) ("Although the test is much maligned, the Supreme Court recently reminded us that Lemon is controlling precedent and should be the framework used by courts when reviewing Establishment Clause challenges.").

HN8 The Court in Lemon established three general tests to determine whether a state has violated the principles protected by the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the **[**24]** statute must not foster an excessive government entanglement with religion." Lemon, 403 U.S. at 612-13 (citations and quotations omitted). If any of these tests

are violated, the state practice will be deemed unconstitutional. See Green, 568 F.3d at 797-98 ("A governmental action violates the Establishment Clause if it fails to satisfy *any* of three prongs of the Lemon test.") (emphasis in original). On appeal, Plaintiffs argue that Defendants have violated the first and second Lemon tests.

Addressing the first and second Lemon tests, ^{HN9} "[t]his court 'interpret[s] the purpose and effect prongs of Lemon in light of Justice O'Connor's endorsement test.'" Weinbaum, 541 F.3d at 1030 (quoting O'Connor, 416 F.3d at 1224); see also Bauchman, 132 F.3d at 552 ("Justice O'Connor's 'endorsement test' is now widely accepted as the controlling analytical framework for evaluating Establishment Clause claims."). Under that test, "[t]he purpose prong of the Lemon **[**25]** test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." Lynch v. Donnelly, 465 U.S. 668, 690, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O'Connor, J., concurring). Justice O'Connor's modification of the Lemon test makes our inquiry very case-specific, as it asks this court to examine carefully the particular context and history of these displays before concluding what effect they would likely have on the reasonable observer. ⁹ See **[*1118]** County of Allegheny, 492 U.S. at 605-08 (defending the fact-specific nature of the Court's Establishment Clause jurisprudence which requires that courts "examine[] the particular contexts in which the government employs religious symbols").

FOOTNOTES

⁹ We reject Plaintiffs' argument that any time government conduct involves the use of a Latin cross, there is an Establishment Clause violation.

3. Plaintiffs Have Failed to Establish a Violation of the Purpose Prong of the Lemon Test

^{HN10} The question presented by the first prong of the Lemon test, then, is "whether the government conduct was **[**26]** motivated by an intent to endorse religion." Weinbaum, 541 F.3d at 1030. "In deciding whether the government's purpose was improper, a court must view the conduct through the eyes of an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." Id. at 1031 (quotations omitted). "We will not lightly attribute unconstitutional motives to the government, particularly where we can discern a plausible secular purpose." Id. (quotation, alteration omitted).

Here, we can discern a plausible secular purpose. Considering first the evidence of the UHPA's motivation, that organization has, throughout the course of this project, consistently asserted that its intent in erecting these memorials is only secular: to honor fallen troopers and to promote safety on the State's highways. The secular nature of the UHPA motive is bolstered by the fact that the memorials were designed by two individuals who are members of the Mormon faith, the Church of Jesus Christ of Latter Saints ("LDS Church"), a religion that does not use the cross as a religious symbol. These men explained **[**27]** that they were inspired to use the Latin cross for the fallen trooper memorials because of the presence of such crosses in military cemeteries, which honor fallen service members for their sacrifice, and roadside memorials found where traffic fatalities have occurred. Plaintiffs are unable to point to any evidence suggesting that the UHPA's motive is other than secular.

Nevertheless, the focus of this first Lemon test is on the government's purpose, and not that of a private actor. See Green, 568 F.3d at 800 n.10. But in this case the evidence supports our attributing the UHPA's motivation to the State Defendants. In allowing the UHPA to use the UHP insignia on the memorial crosses and in giving UHPA permission to place some of those crosses on public land, state officials accepted the UHPA's assertion of its motives and further acknowledged support for the UHPA's intent. Plaintiffs have failed to present any evidence that, to the contrary, suggested that the State Defendants' motivation was different than that expressed by UHPA. ¹⁰

FOOTNOTES

10 Plaintiffs argue that the State Defendants failed to present any evidence of their actual motive in permitting UHPA to use the UHP insignia and to place **[**28]** some of the memorials on public land. But Plaintiffs bear the burden of proving that the State Defendants have violated the Establishment Clause. See *Brooks v. City of Oak Ridge*, 222 F.3d 259, 265 n.4 (6th Cir. 2000).

Furthermore, in light of this evidence, there is no reason to conclude that the Defendants' proffered secular explanations were a sham. See *Weinbaum*, 541 F.3d at 1031 ("Unless the secular justification is a 'sham' or is 'secondary' to a religious purpose, we defer to the government's professed purpose for using the symbol.") (citation omitted). Nor can we say that the secular purpose advanced by Defendants is so implausible that they must have actually been motivated by a religious purpose, even if there is no direct evidence of such a **[*1119]** purpose. Cf. *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 930 (3rd Cir. 1980) (holding that Philadelphia's decision to build a massive stage adorned with a thirty-six-foot cross in preparation for the Pope's visit violated the purpose prong of the Establishment Clause despite the city's claim that its purpose in building this structure was for public relations, not to endorse a religion). Therefore, we uphold the district court's determination **[**29]** that the State Defendants did not violate Lemon's first test by acting with the impermissible motive of endorsing or favoring religion.

4. UHPA's Memorial Crosses Violate the Effect Prong of the Lemon/Endorsement Test

Next, we consider whether the State Defendants violated the second Lemon test. The Establishment Clause "mandate[s] governmental neutrality between religion and religion, and between religion and non-religion." *Weinbaum*, 541 F.3d at 1029 n.13 (quoting *O'Connor*, 416 F.3d at 1223). **HN11** ¶ Thus, this court recently observed that

[g]overnments may not "mak[e] adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 594, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)). And actions which have the effect of communicating governmental endorsement or disapproval, "whether intentionally or unintentionally, . . . make religion relevant, in reality or public perception, to status in the political community." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

Green, 568 F.3d at 799.

HN12 ¶ When determining whether a display **[**30]** has the impermissible effect "of communicating a message of governmental endorsement or disapproval" of religion, *Green*, 568 F.3d at 799, we

look[] through the eyes of an objective observer who is aware of the purpose, context, and history of the symbol. The objective or reasonable observer is kin to the fictitious "reasonably prudent person" of tort law. See *Gaylor[v. United States]*, 74 F.3d [214,] 217 [(10th Cir. 1996)]. So we presume that the court-created "objective observer" is aware of information "not limited to 'the information gleaned simply from viewing the challenged display.'" *O'Connor*, 416 F.3d at 1228 (quoting *Wells v. City & County of Denver*, 257 F.3d 1132, 1142-43 (10th Cir. 2001).

Weinbaum, 541 F.3d at 1031 (emphasis added). While the reasonable observer "is presumed to know far more than most actual members of a given community," *id.* at 1031 n.16, "we do not treat the reasonable observer as omniscient." *Green*, 568 F.3d at 800 (citing *Bauchman*, 132 F.3d at 560); see also *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004) ("How much information we will impute to a reasonable observer is unclear.").

a. Purpose

Separate from Lemon's first test, courts also consider the Government's **[**31]** purpose in

undertaking the challenged conduct as illustrative of the effect that that conduct conveys. See Weinbaum, 541 F.3d at 1031, 1033 (noting that "[e]ffects are most often the manifestation of a motivating purpose"). As previously stated, in this case the UHPA's stated purpose in erecting these memorial crosses, and the State Defendants' purpose in allowing the UHPA to incorporate the UHP symbol into the memorials and to place the crosses on public land, was secular. That fact, however, cannot be dispositive of whether the State has violated the effect prong of [*1120] the Lemon/endorsement test, or this second prong would be rendered meaningless. Rather, the State's secular purpose is merely one element of the larger factual and historical context that we consider in order to determine whether these memorial crosses would have an impermissible effect on the reasonable observer.

b. Context and history ¹¹

FOOTNOTES

¹¹ Here we deal with context and history together because there is no evidence of relevant historical factors apart from context information.

HN13 Context can determine the permissibility of displays of religious symbols on public property. See *Allegheny County*, 492 U.S. at 598 ("Under the Court's [****32**] holding in *Lynch*, the effect of a crèche display turns on its setting."); Weinbaum, 541 F.3d at 1035 (holding that the city of Las Cruces could use a three-cross symbol as part of its city seal because the context and history of that city "establishe[d] that the symbolism is not religious at all. Rather, it simply reflects the name of the City which, in turn, reflects a series of secular events that occurred near the site of the City."). The significance of context is perhaps best illustrated by the Supreme Court's two recent decisions involving displays of the Ten Commandments on public land. In *Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005), Justice Breyer, whose concurrence provided the deciding vote, concluded that the display of the Ten Commandments challenged in that case did not violate the Establishment Clause based largely on his analysis of the "context of the display," *id.* at 701 (Breyer, J. concurring), and his conclusion that "the context suggests that the State intended the display's moral message . . . to predominate," *id.* at 702 (Breyer, J., concurring). In contrast, the majority of the Court found the Decalogue display in *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 881, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005), [****33**] to be in violation of the Establishment Clause because it was placed there with a religious purpose as evidenced, in part, by the fact that it was initially displayed on its own. Thus, the context of a display can determine its legality.

This case involves memorials using a Latin cross, which "is unequivocally a symbol of the Christian faith." Weinbaum, 541 F.3d at 1022. In light of that, there is little doubt that Utah would violate the Establishment Clause if it allowed a private group to place a permanent unadorned twelve-foot cross on public property without any contextual or historical elements that served to secularize the message conveyed by such a display. See *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1100-01 (11th Cir. 1983) (holding that a lighted thirty-five-foot stand-alone cross could not be displayed in a state park); see also *County of Allegheny*, 492 U.S. at 599 (using the display of a cross in a central location in a government building on Easter as the prototypical example of a display that would convey government "endorsement of Christianity"); *Buono*, 371 F.3d at 544-45 (holding that an eight-foot cross intended as a war [****34**] memorial and located on land owned by the national government violated the Establishment Clause); cf. *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1202 (S.D. Cal. 2008) (holding that a cross that had become a long-standing landmark of the city and was only one part of a larger war memorial could be maintained on federal land). Thus, these displays of "the preeminent symbol of Christianity," [***1121**] *Buono*, 371 F.3d at 545 (citation and quotation omitted), can only be allowed if their context or history avoid the conveyance of a message of governmental endorsement of religion.

Here, we conclude that the cross memorials would convey to a reasonable observer that the state of Utah is endorsing Christianity. The memorials use the preeminent symbol of Christianity, and they do so standing alone (as opposed to it being part of some sort of display involving other symbols).

That cross conspicuously bears the imprimatur of a state entity, the UHP, and is found primarily on public land. ¹²

FOOTNOTES

¹² The record indicates that at least one, and perhaps several, of these memorials are located on private land near a state highway. That fact does not change our analysis, however, because those crosses, even though **[**35]** on private land, still bear the UHP insignia, which UHPA was authorized by UHP to use.

The fact that the cross includes biographical information about the fallen trooper does not diminish the governmental message endorsing Christianity. This is especially true because a motorist driving by one of the memorial crosses at 55-plus miles per hour may not notice, and certainly would not focus on, the biographical information. The motorist, however, is bound to notice the preeminent symbol of Christianity and the UHP insignia, linking the State to that religious sign.

Moreover, the fact that all of the fallen UHP troopers are memorialized with a Christian symbol conveys the message that there is some connection between the UHP and Christianity. This may lead the reasonable observer to fear that Christians are likely to receive preferential treatment from the UHP—both in their hiring practices and, more generally, in the treatment that people may expect to receive on Utah's highways. ¹³ The reasonable observer's fear of unequal treatment would likely be compounded by the fact that these memorials carry the same symbol that appears on UHP patrol vehicles. See *Friedman v. Bd. of County Comm'rs of Bernalillo County*, 781 F.2d 777, 778, 782 (10th Cir. 1985) **[**36]** (holding that a city's seal "bearing, among other things, a latin cross and the Spanish motto, 'CON ESTA VENCEMOS' ['With This We Conquer']," violated the Establishment Clause in part because "[a] person approached by officers leaving a patrol car emblazoned with this seal could reasonably assume that the officers were Christian police. . . . A follower of any non-Christian religion might well question the officers' ability to provide even-handed treatment. A citizen with no strong religious conviction might conclude that secular benefit could be obtained by becoming a Christian."). And the significant size of the cross would only heighten this concern.

FOOTNOTES

¹³ The connection between the UHP and Christianity is perhaps even more strongly conveyed by the two memorial crosses located immediately outside the UHP office. We are deeply concerned about the message these crosses would convey to a non-Christian walking by the UHP office or, even more troubling, to a non-Christian walking in against his will.

Defendants point to four contextualizing facts that, they argue, render these cross memorials sufficiently secular to pass constitutional muster: (1) these displays are clearly intended as memorials; **[**37]** (2) they are located in areas where similar memorials have long been displayed; (3) many of the designers and producers of these displays do not revere the cross as a symbol of their faith; and (4) a majority of Utahns do not revere the cross as a symbol of their faith. Although we agree that some of these contextual elements may help reduce the message of religious endorsement **[*1122]** conveyed by these displays, we think that these displays nonetheless have the impermissible effect of conveying to the reasonable observer that the State prefers or otherwise endorses Christianity.

i. These Displays are Clearly Intended as Memorials

Defendants argue that the placement of these displays, in combination with the troopers' names emblazoned on the crosses and the biographical information included in these displays, clearly conveys the message, instead, that these crosses are designed as memorials and, therefore, that they do not convey a message of religious endorsement. We agree that a reasonable observer would recognize these memorial crosses as symbols of death. However, we do not agree that this

nullifies their religious sectarian content because a memorial cross is not a generic symbol of death; **[**38]** it is a Christian symbol of death that signifies or memorializes the death of a Christian. The parties agree that a cross was traditionally a Christian symbol of death and, despite Defendants' assertions to the contrary, there is no evidence in the record that the cross has been widely embraced as a marker for the burial sites of non-Christians or as a memorial for a non-Christian's death. The UHPA acknowledges that when it asserts that it would honor the request made by a Jewish state trooper's family to memorialize him with a Star of David rather than a cross.

The State Defendants point to the use of crosses as markers for fallen soldiers as evidence that the cross has become a secular symbol of death. However, the evidence in the record shows that the military provides soldiers and their families with a number of different religious symbols that they may use on government-issued headstones or markers. Even in the American military cemeteries overseas, which include rows and rows of white crosses, fallen Jewish service members are memorialized instead with a Star of David. Thus, while the cross may be a common symbol used in markers and memorials, there is no evidence that it is widely **[**39]** accepted as a secular symbol.

Defendants and some of the amici urge this court to treat memorial crosses in much the same way as the Supreme Court has treated Christmas trees and historical displays that include depictions of the Ten Commandments. These arguments are unpersuasive. Courts have consistently treated Christmas as both a religious and secular holiday, and many courts have cited Justice Blackmun's statement that "[a]lthough Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas." *County of Allegheny*, 492 U.S. at 616 (Blackmun, J., concurring); see, e.g., *Adland v. Russ*, 307 F.3d 471, 485 (6th Cir. 2002); *American Civil Liberties Union v. Schundler*, 104 F.3d 1435, 1442 (3rd Cir. 1997). Unlike Christmas, which has been widely embraced as a secular holiday, however, there is no evidence in this case that the cross has been widely embraced by non-Christians as a secular symbol of death. We cannot, therefore, conclude that the cross—which has a long history as a predominantly religious symbol—conveys in this context a secular meaning that can be divorced from its religious significance. Compare *Weinbaum*, 541 F.3d at 1034 (concluding **[**40]** that the city of Las Cruces's use of a three-cross symbol did not violate the Establishment Clause at least in part because "symbols containing multiple crosses identify many secular businesses with the Las Cruces community"), with *Koenick v. Felton*, 190 F.3d 259, 266 n.7 (4th Cir. 1999) (rejecting the argument that Easter, like Christmas, had been embraced as a secular holiday because the "record [wa]s devoid" of evidence that there was a significant "number **[*1123]** of persons for whom the holiday has no religious significance but who nonetheless celebrate the occasion in some manner").

Similarly, the memorial crosses at issue here cannot be meaningfully compared to the Ten Commandments display that the Supreme Court upheld in *Van Orden*. The display at issue in *Van Orden* was part of a historical presentation of various legal and cultural texts and, in that context, the "nonreligious aspects of the tablets' message [] predominate[d]" over any religious purpose or effect. 545 U.S. at 701 (Breyer, J., concurring). In this case, on the other hand, the crosses stand alone, adorned with the state highway patrol insignia and some information about the trooper who died there.

*ii. Roadside Memorials **[**41]** Often Use the Symbol of the Cross and, in that Context, Crosses are not Seen as Religious Symbols*

Defendants argue that crosses are a fairly common symbol used in roadside memorials and, in that context, they are seen as secular symbols. However, the mere fact that the cross is a common symbol used in roadside memorials does not mean it is a secular symbol. There is no evidence that non-Christians have embraced the use of crosses as roadside memorials. Further, there is no evidence that any state has allowed memorial crosses to be erected on public property that, like the memorials at issue in this case, display the official insignia of a state entity. Finally, even if we might consider a roadside cross generally to be a secular symbol of death, the memorial crosses at issue in this case appear to be much larger than the crosses typically found on the side of public roads. Defendants provided a statement from a representative of the Montana American Legion White Cross Highway Fatality Marker Program in support of their claim that roadside crosses are common, recognizable symbols of highway fatalities. The cross memorials at issue here are ten times as large as those crosses, which are **[**42]** only between twelve and sixteen inches in

height. The massive size of the crosses displayed on Utah's rights-of-way and public property unmistakably conveys a message of endorsement, proselytization, and aggrandizement of religion that is far different from the more humble spirit of small roadside crosses. ¹⁴

FOOTNOTES

¹⁴ In fact, the massive size of these displays is such a deviation from the normal memorials of death seen on the sides of roads that they may convey to the reasonable observer a Christian religious symbol. Defendants assert the crosses must be as large as they are so motorists passing by at 55-plus miles per hour can see them. But the size far exceeds the size necessary to be seen from the highway. And, not all of the memorials are located near a highway. For example, several are located near a UHP office. The size of those crosses is particularly troubling.

iii. The Designers and Producers of These Displays do not Revere the Cross as a Symbol of their Faith

Nor are we persuaded of the significance of the fact that many of the designers and producers of these displays do not revere the cross as a symbol of their faith. ^{HN14} As the Supreme Court recently explained, "[b]y accepting a privately **[**43]** donated monument and placing it on [state] property, a [state] engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator." Pleasant Grove City, 129 S. Ct. at 1136. Thus, the designers' purpose in creating the displays at issue in this case may not always coincide with the displays' likely effect on the reasonable observer. We conclude that is the case here.

[*1124] *iv. Christians who Revere the Cross are a Minority in Utah*

Similarly, the fact that cross-revering Christians are a minority in Utah does not mean that it is implausible that the State's actions would be interpreted by the reasonable observer as endorsing that religion. In County of Allegheny, the Supreme Court held that Pittsburgh did not violate the Establishment Clause by placing a Channukah menorah on its property. However, in a vote-counting exercise, Justice Blackmun explained, in a portion of the opinion which no other Justice joined, that his conclusion that this "display cannot be interpreted as endorsing Judaism alone does not mean, however, that it is implausible, as a general matter, for a city like Pittsburgh to endorse **[**44]** a minority faith." 492 U.S. at 616 n.64 (Blackmun, J., concurring). Similarly, in her concurrence, Justice O'Connor noted that

[r]egardless of the plausibility of a putative governmental purpose, the more important inquiry here is whether the governmental display of a minority faith's religious symbol could ever reasonably be understood to convey a message of endorsement of that faith. A menorah standing alone at city hall may well send such a message to nonadherents, just as in this case the crèche standing alone at the Allegheny County Courthouse sends a message of governmental endorsement of Christianity

Id. at 634 (O'Connor, J., concurring). Three other Justices found that, in fact, the menorah/Christmas tree display violated the constitution, concluding that the city's display of Christmas and Hanukkah symbols was "the very kind of double establishment that the First Amendment was designed to outlaw." Id. at 655 (Stevens, J., concurring in part and dissenting in part). Thus, a majority of the Justices in County of Allegheny determined that a city could violate the Establishment Clause by publicly displaying the symbol of a religion whose members constituted a mere 12% of **[**45]** that city's population. See id. at 616 n.64 (noting that Jews constituted 45,000 of Pittsburgh's population of 387,000, or approximately 12% of the population) (Blackmun, J., concurring). In this case, the parties agree that cross-revering Christians comprise approximately 18% of the population in Utah, which is greater than the percentage of Jews in Pittsburgh at the time of the Court's decision in County of Allegheny. Thus, the fact that most Utahns do not revere the cross as a symbol of their faith does not mean that the State cannot

violate the Establishment Clause by conduct that has the effect of promoting the cross and, thereby, the religious groups that revere it.

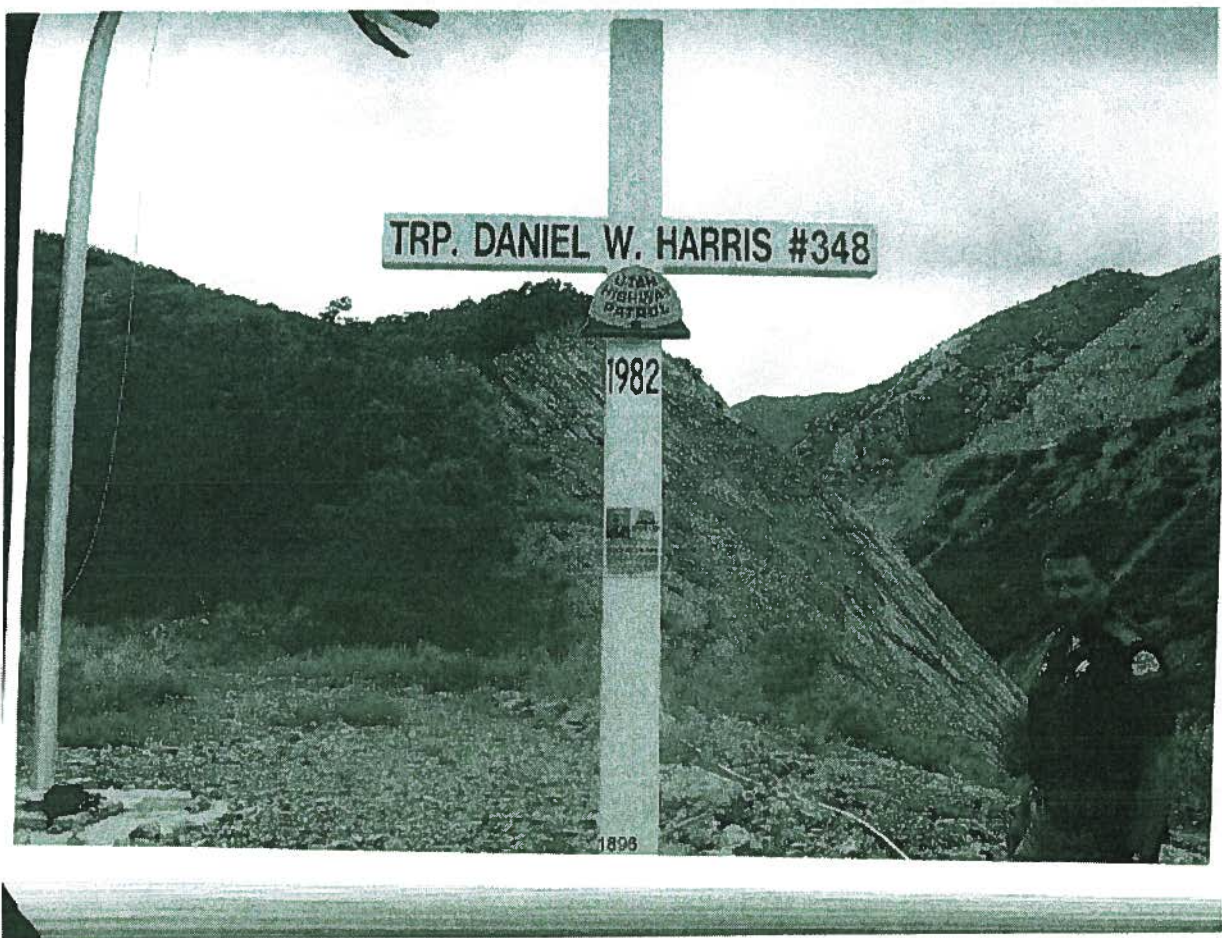
This appears to be especially true in this case because members of the majority LDS Church "may not necessarily share the same sensitivity to the symbol [of the cross] as a Jewish family." American Atheists, 528 F. Supp. 2d at 1256 n.6. Although the evidence indicates that LDS Church members do not use the cross as a symbol of their religion, they do "remember with reverence the suffering of the Savior." (Aplt. App. at 2241.) And, in any event, there are many cross-revering Christians and many non-Christians for whom **[**46]** the Roman cross has an unmistakable Christian meaning.

These factors that Defendants point to as secularizing the memorials do not sufficiently diminish the crosses's message of government's endorsement of Christianity that would be conveyed to a reasonable observer. Therefore, the memorials violate the Establishment Clause.

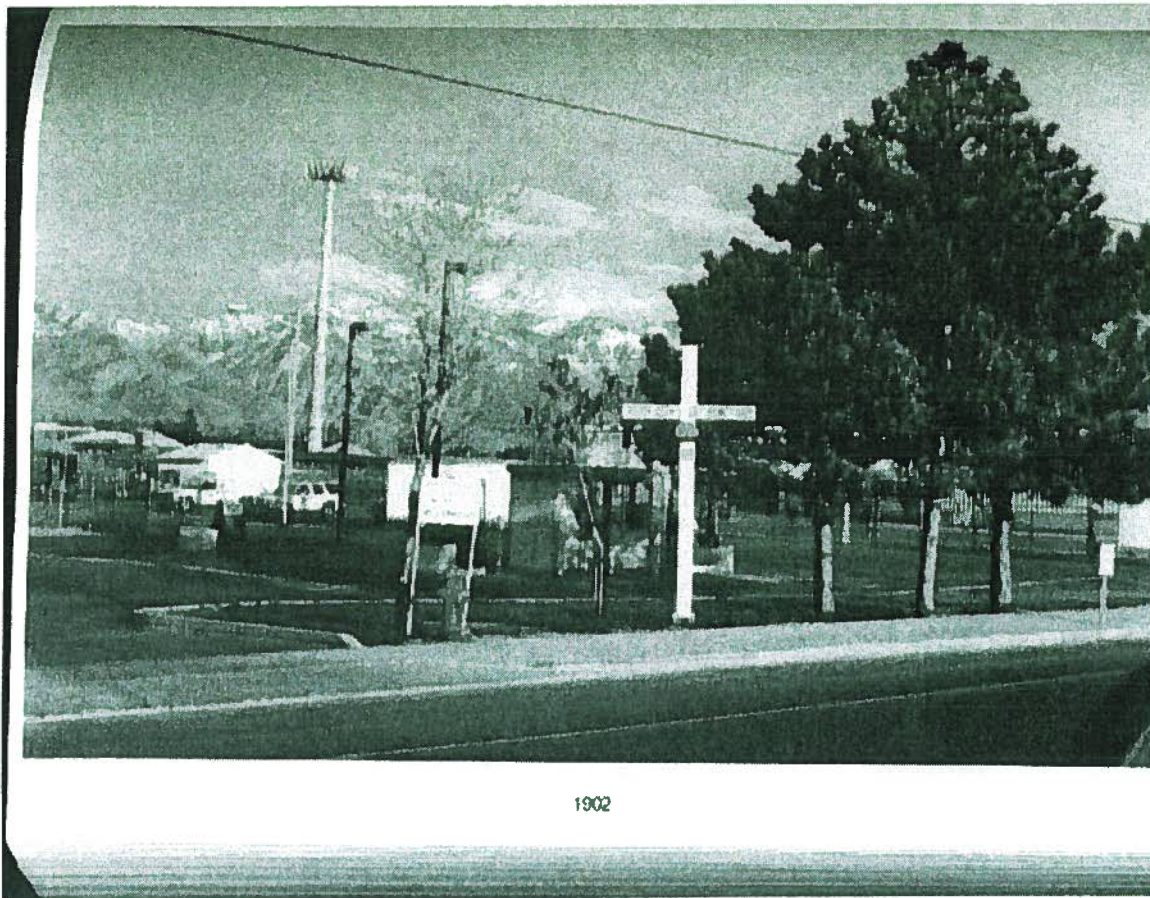
IV. Conclusion

Accordingly, we REVERSE the district court's decision granting summary judgment for Defendants, and REMAND the case to the district court to enter judgment for Plaintiffs consistent with this opinion.

[*1125]







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