No. 13-1061

IN THE
Supreme Court of the United States

MOUNT SOLEDAD MEMORIAL ASSOCIATION, *Petitioner*,
v.
STEVE TRUNK, *ET AL.*, *Respondents*.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Ninth Circuit

Brief *Amicus Curiae* of U.S. Justice Foundation, Joyce Meyer Ministries, Public Advocate of the United States, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioner

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June 4, 2014

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INTEREST OF *AMICI CURIAE*[1]

U.S. Justice Foundation, Joyce Meyer Ministries, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Public Advocate of the United States and The Abraham Lincoln Foundation for Public Policy Research, Inc. are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4).

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes, and questions related to human and civil rights secured by law. Each organization has filed many *amicus curiae* briefs in this Court and other federal courts.

U.S. Justice Foundation has been involved as *amicus curiae* in the Mount Soledad Cross litigation for many years, including filing an *amicus* brief in the

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

U.S. District Court for the Southern District of California on January 8, 1996 (No. 89-cv-820), and an *amicus* brief in the U.S. Court of Appeals for the Ninth Circuit on July 28, 2006 (No. 06-55769).

SUMMARY OF ARGUMENT

The petition presents the issue of the constitutionality of the Latin Cross situated in the Mount Soledad War Memorial, a "case that is of ... imperative public importance" under the First Amendment's Establishment Clause, thereby meeting the requirement of Supreme Court Rule 11. For decades this Court and the lower federal courts have wrestled under the cloud of a "bankrupt" Establishment Clause jurisprudence, one that led in many directions, often on a collision course with itself.

On May 5, 2014, that confusing era finally came to an end with this Court's decision in Town of Greece v. Galloway. Abandoning the infamous Lemon test, and rejecting its derivative tests of "no endorsement" and "divisiveness," this Court returned to and reinvigorated Marsh v. Chambers, its 41-year-old decision upholding legislative prayer under the Establishment Clause. Instead of viewing Marsh as an exception to its modernized Establishment Clause jurisprudence, this Court discarded its atextual "no endorsement" and "divisiveness" tests, opting instead for two principles that accord with the historic meaning and purpose of the Establishment Clause.

First, in Town of Greece, the Court recognized that the Establishment Clause drew a jurisdictional line

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

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

Neither of the panel's findings would now support a claim of a violation of the Establishment Clause, bringing the decision of the court below into direct conflict with Town of Greece, and with this Court's corrective restatement of Establishment Clause principles.

Not only does the petition present a question of imperative public importance, but also it commands the attention of this Court at this time, without the need for yet another proceeding below particularly

where a petition for rehearing *en banc* already has been denied. Moreover, there is no need for a remand to augment the record below developed over decades of litigation, it appearing to be fully sufficient to enable this Court to decide the constitutionality of the Memorial Cross under the Establishment Clause principles enunciated in Town of Greece.

ARGUMENT

I. THE PETITION PRESENTS A QUESTION OF IMPERATIVE PUBLIC IMPORTANCE REQUIRING THIS COURT'S IMMEDIATE ATTENTION PURSUANT TO RULE 11 OF THIS COURT.

For decades, this Court's Establishment Clause jurisprudence has been doctrinally bankrupt. *See, e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639, 688 (2002) (Souter, J., dissenting). Justices across the ideological spectrum have shared this view. For example, Justice Scalia once observed that this Court's Establishment Clause cases constitute a "geometry of crooked lines and wavering shapes,"[2] while 13 years previously, Justice Stevens bemoaned the Court's unenviable "sysiphean task of trying to patch together 'the blurred, indistinct and variable barrier' described in *Lemon*."[3]

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

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

At one point, this Court attempted to justify the "hopeless disarray"[4] of precedents, explaining that the Court's Establishment Clause jurisprudence "'sacrifices clarity and predictability for flexibility.'" *See* Edwards v. Aguillard, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting and quoting from Committee for Public Educ., 444 U.S. at 662). As Professor Jesse Choper has observed, however, this explanation is a "euphemism ... for ... the absence of any principled rationale." J. Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. PITT. L. REV. 673, 680-81 (1980).

A. Town of Greece v. Galloway Strongly Supports this Petition.

Just one month ago, this Court decided Town of Greece v. Galloway, 572 U.S. ___, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014) upholding the constitutionality of a city council opening its meetings with prayer. In doing so, the Court reaffirmed Marsh v. Chambers,[5] its 41-year-old precedent which "found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds." *See* Town of Greece, 188 L.Ed.2d at 845.

But the Court did much more than that. In addition to reaffirming Marsh, it elevated Marsh to a

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

[5] 463 U.S. 783 (1983).

new status. Long considered to be an exception to this Court's Establishment Clause jurisprudence, Marsh — as rearticulated and explained in Town of Greece — has now become the rule. *See id.* at 845-55. Indeed, on close analysis, Town of Greece marks a seismic shift in this Court's Establishment Clause jurisprudence. After Town of Greece, establishment claims no longer are to be measured by the three-part Lemon test[6], or by Lemon's derivative no "endorsement" test, or any "divisiveness" test that falls short of actual coercion.

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

Even before Town of Greece, five judges on the United States Court of Appeals for the Ninth Circuit dissented from a denial of rehearing *en banc* in this case, concluding that the Ninth Circuit panel "applied the wrong test." Mount Soledad Memorial Association v. Trunk, 660 F.3d 1091, 1093 (9th Cir. 2011). Although the Ninth Circuit remanded the case to the district court to fashion an appropriate remedy, the Memorial Association sought review by petition for a writ of certiorari, which was denied on the sole ground that the petition came to the Court "in an interlocutory

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[6] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

posture." *See* Mount Soledad Memorial Association v. Trunk, 567 U.S. __, 132 S.Ct. 2535 (2012).

Once again, the Memorial Association is seeking review by this Court before an entry of final judgment in the Ninth Circuit. In a Statement explaining the previous denial of certiorari on procedural grounds, Justice Alito noted both that (i) "[t]his Court's Establishment Clause jurisprudence is undoubtedly in need of clarity," and (ii) "the constitutionality of the Mount Soledad Veterans Memorial is a question of substantial importance." *Id.* Now that the Court has clarified, and indeed modified, its Establishment Clause jurisprudence in Town of Greece, the constitutionality of the cross on Mount Soledad presents a federal question of imperative public importance that warrants review on the merits under Rule 11 of this Court's Rules.

B. Town of Greece Restated and Enhanced Marsh v. Chambers.

Until Town of Greece, and dating back to Justice O'Connor's concurring opinion in Lynch v. Donnelly,[7] this Court had found a violation of the Establishment Clause if a particular government-sponsored religious display, monument, or other activity sends a message "to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

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[7] 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

Id. at 688. In Town of Greece, however, the Court flatly rejected that such a finding could give rise to an Establishment Clause claim:

> In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. [Town of Greece at 854.]

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

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

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

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

Even more specifically, Justice Alito explained:

> In the case before us, the Court of Appeals appeared to base its decision on one of the Establishment Clause "tests" set out in the

> opinions of this Court ..., but if there is any inconsistency between any of those tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice. [Town of Greece at 862 (Alito, J., concurring).]

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

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

On that original foundation, Justice Alito launched a review of the "'morning in Philadelphia' [in] September 1774 [when] [t]he First Continental Congress convened in Philadelphia, and [when] the need for the 13 colonies to unite was imperative." *Id.* at 861. Putting aside their denominational differences, the members of Congress called on an Anglican minister to pray, leading Justice Alito to comment:

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

Indeed, in both purpose and effect, the prayer united the members of Congress — not on any confession of faith or doctrinal statement, such matters belonging exclusively to the Church — but on a Declaration and Resolves concerning taxes, writs of assistance, standing armies, and quartering of soldiers and other such matters belonging to the State.[8] *See* Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), reprinted in Sources of Our Liberties, pp. 286-289 (R. Perry & J. Cooper, eds., rev. ed., ABA Foundation: 1978).

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

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

jurisdictional line between the affairs of the church and the affairs of State.[9] *Id.* In short, the Court concluded that the Establishment Clause "may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy." *See id.* at 849.

C. Town of Greece Discarded the Allegheny Endorsement Test.

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

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

In Allegheny, Justice Kennedy recounted, "the Court held that a creche placed on the steps of a county courthouse to celebrate the Christmas season violated the Establishment Clause because it had 'the effect of **endorsing** a patently Christian message.'" *Id.* (emphasis added). Recalling the dissenting opinion's critique that "disputed that endorsement could be the proper test," Justice Kennedy repeated the contention of the Allegheny dissenters that such a test would "condemn a host of traditional practices that recognize

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

the role religion plays in our society, among them legislative prayer [including] 'forthrightly religious' Thanksgiving proclamations issued by nearly every President since Washington." *Id.*

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

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

Capping this rehearsal of Allegheny, Justice Kennedy came to this most remarkable conclusion:

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

Without specifically overruling Allegheny, Justice Kennedy's majority opinion in Town of Greece conformed to Justice Kennedy's dissenting opinion in Allegheny — that an Establishment Clause claim

cannot be based upon a finding of government endorsement, but instead only upon a finding of government coercion. *See id.* at 852.

To be sure, the Town of Greece dissenters did not agree. In her vigorous dissenting opinion, Justice Kagan attempted to salvage the Allegheny "endorsement" test, but neither by refuting Justice Kennedy's characterization of it as *dictum*, nor by refuting Justice Kennedy's claim that the test rests upon a false factual or legal premise. Rather startlingly, Justice Kagan proffered in support of the endorsement test a lengthy quote from Justice Scalia's dissenting opinion in Lee v. Weisman,[10] implying strongly that even Justice Scalia has admitted that "Our constitutional tradition ... ruled out of order government-sponsored endorsement of religion ... where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example the divinity of Christ)." *See* Town of Greece at 872-73 (Kagan, J., dissenting). In context, however, Justice Scalia's statement was clearly a concession to provide a predicate for his argument that even a "sectarian endorsement" does not, in his view, meet the Establishment Clause requirement of legal coercion. *See* Lee, 505 U.S. at 641-42.

After this foray into the endorsement legacy of Allegheny, Justice Kagan never incorporates

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[10] 505 U.S. 577, 641 (1992) (Scalia, J., dissenting).

"endorsement" in any way into her analysis, using other phrases — such as "religious equality,"[11] "neutrality,"[12] "religious diversity,"[13] and no "preference"[14] — to explain her understanding of Establishment Clause principles. Even then, Justice Kagan fails to land on any governing principles, apparently because she is convinced (as is Justice Breyer) that whether a particular act or practice violates the Establishment Clause depends ultimately upon the collective "judgment" of a majority of the justices — after review of all the facts. *See generally id.* at 867-70 (Breyer, J., dissenting) and 876-81 (Kagan, J., dissenting).

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

Not only did the Town of Greece majority discard the "no endorsement test," but the entire Court also completely abandoned the three-part test adopted by the Court in 1971 in Lemon v. Kurtzman, 403 U.S. 602 (1971). According to Lemon, a statute or other governmental act or practice violated the Establishment Clause if it failed one or more of three tests. First, the statute or practice must have a secular purpose. Second, its principal or primary

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[11] Town of Greece at 870.

[12] *Id.*

[13] *Id.* at 871.

[14] *Id.* at 873.

effect must neither advance not inhibit religion. Third, the statute or practice must not foster an excessive government entanglement with religion. *See, e.g.,* Trunk, 629 F.3d at 1106.

The Lemon test, and the case which spawned it, are entirely unmentioned in either Justice Kennedy's majority opinion or either of the concurring opinions. They are simply abandoned. Even Justice Kagan deserts the Lemon case and test in their entirety,[15] stating instead that she and her fellow dissenters "agree with the Court's decision in *Marsh* ... upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer." Town of Greece at 870 (Kagan, J., dissenting). By concurring with Marsh, every member of the dissenting team has abandoned Lemon and the Lemon test, having unanimously disagreed with Justice Brennan that the practice of legislative prayer violated all three prongs of the Lemon test. *See* Marsh, 463 U.S. at 795-96.[16]

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

[16] First, faithfully applying the three-part Lemon test, Justice Brennan found that "the 'purpose' of legislative prayer is pre-eminently religious rather than secular.... 'To invoke Divine guidance on a public body entrusted with making the laws' ... is nothing but a religious act." *Id.* at 797. Second, Justice Brennan

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

E. The Ninth Circuit Panel Opinion Rests Upon the Thoroughly Discredited Three-Part Lemon Test, including the Repudiated Endorsement and Divisiveness Tests.

As was true of the court of appeals decision in the Town of Greece case,[17] the Ninth Circuit panel below rested its opinion entirely upon Lemon and its two variants — no endorsement and no political divisiveness. At the outset of its analysis, the panel announced that its review was governed by "the *Lemon* and *Van Orden* Frameworks." Trunk v. San Diego, 629 F.3d 1099, 1105 (9th Cir. 2011). Thus, the panel set the following opening parameter:

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observed that "[t]he 'primary effect' of legislative prayer is also clearly religious," because linking the power and prestige of the State to such an act "'provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.'" *Id.* at 798. Third, and finally, Justice Brennan contended that "there can be no doubt that the practice of legislative prayer leads to excessive 'entanglement' between the State and religion," in two ways. First, it invites the State to "monitor[] and oversee[] religious affairs," by making sure that the chaplain engages in "'suitable' prayers." *Id.* at 798-99. Second, it invites "'political division along religious lines,'" and thus, fosters "divisiveness," "'threat[ening] ... the normal political process.'" *Id.* at 799.

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

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

After noting that the Supreme Court recently applied the Lemon test to a Ten Commandments display, the panel opined that, unless the Mount Soledad Cross qualified as an historical exception under Van Orden v. Perry,[18] the Lemon test applied. Trunk at 1106-07.

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

> The question is, under the effects prong of *Lemon*, whether "it would be objectively reasonable for the government action to be

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[18] 545 U.S. 677 (2005).

> construed as sending primarily a message of either **endorsement** or disapproval of religion"... By **"endorsement,"** we are not concerned with all forms of government approval of religion ... but rather [with] those acts that send the **stigmatic message** to nonadherents "'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members'".... [*Id.* at 1109 (emphasis added).]

The Ninth Circuit panel then embarked on an extensive search for the real effect of the memorial. It found the Latin Cross to be "an iconic Christian symbol," and that placing such a cross in a cemetery or other memorial setting does not shed its "inherently religious message." *Id.* at 1110-16. Having made this general finding, the Ninth Circuit panel turned to the specific placement and history of the Cross in the Mount Soledad Memorial. *See id.* at 1117. In order to assess whether the primary effect of the Cross was religious or secular, the panel laid down its constitutional prism:

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

Enlisting Allegheny as its quintessential guide, the panel pronounced its conclusion that "the entirety of

the Mount Soledad Memorial, when understood against the background of its particular history and setting, projects a government **endorsement** of Christianity." *Id.* at 1118 (emphasis added). *See also id* at 1124.

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

> It suggests that the government is so connected to a particular religion that it treats that religion's symbolism as its own, as universal. To many non-Christian veterans, this claim of universality is alienating[,] send[ing] an implicit message "to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." [*Id.* at 1124-25.]

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

Significantly, in Town of Greece, the Second Circuit court of appeals panel applied the same analysis and came to the same conclusion as did the Mount Soledad panel. First, "[i]t held that some aspects of the prayer program, viewed in their totality by a reasonable

observer, conveyed the message that Greece was endorsing Christianity." *Id.* at 844. Second, the Second Circuit panel concluded that, overall, the prayers "'placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation.'" *Id.* at 845. Neither ground is valid under the rule announced and applied in Town of Greece.

F. The Establishment Clause Issue Presented Is of Imperative Public Importance and Requires the Immediate Attention of this Court.

In contrast to this Court's prior Establishment Clause jurisprudence, Town of Greece has cleared out the unconstitutional underbrush, rejecting outright the judicially contrived, fact-based endorsement test, and substituting a fixed jurisdictional line, separating matters that belong exclusively to the church and matters belonging to the State. This jurisdictional distinction permeates Justice Kennedy's opinion, as he sorts out the constitutionally "permissible" from the "impermissible." *Id.* at 846.

Permissible are prayers that address matters of State that are properly before the town council or other civil government body. *See id.* at 845, 846, and 850-51. Impermissible are prayers that address matters that belong to the church. *See id.* at 849, 850, and 851. Beyond that jurisdictional distinction, the courts are not permitted to go, except to determine

whether the people are being impermissibly coerced by the government to participate in a religious exercise. *See id.* at 852-55.

There is no doubt that the Ninth Circuit panel decision is in direct conflict with these Establishment Clause principles endorsed in Town of Greece. Yet there is no guarantee that the court of appeals or the district court on remand will get the message. It appears that nothing would be gained by further proceedings in either the court of appeals or the district court. The fact record developed below over decades appears to be fully sufficient to decide whether the cross as it now stands in the Memorial serves a legitimate civic purpose, such as the one identified by Justice Kennedy in Salazar v. Buono:[19]

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

The record also would be sufficient to assess whether the placement and maintenance of the cross in its war memorial setting impermissively "coerce[s] citizens 'to support or participate in any religion or its exercise.'"[20] *See* Trunk at 1124-25.

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[19] 559 U.S. 700 (2010).

[20] Town of Greece at 852.

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

CONCLUSION

For the reasons stated, the petition satisfies Rule 11 and should be granted.

Respectfully submitted,

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June 4, 2014