2012 WL 1228254 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

UNITED STATES, et al., Petitioner,
v.
Steve TRUCK, et al., Respondents.

No. 11-1115.
April 11, 2012.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Amicus Curiae Center for Constitutional Jurisprudence in Support of Petitioner

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***i** QUESTIONS PRESENTED

1. Whether the Mount Soledad Veterans Memorial - recognized by Congress as a national veterans memorial that has stood for over 50 years "as a tribute to the members of the United States Armed Forces who sacrificed their lives in the defense of the United States" - violates the Establishment Clause because it contains a cross among numerous other secular symbols of patriotism and sacrifice.

2. Whether, given the lingering confusion in the lower courts over its applicability, the *Lemon* test should finally be interred, or at least clarified and narrowed, to prevent an interpretation of the Establishment Clause that would render unconstitutional much of our Nation's rich religious heritage?

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*1 INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Center for Constitutional Jurisprudence was established in 1999 as the public interest law firm of the Claremont Institute, the stated mission of which is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life." This includes the principle at issue in this case that the use of a religious symbol in a war memorial cannot offend the Establishment Clause in a nation established to protect the unalienable rights with which all human beings "are endowed by their Creator." The Center has participated as *amicus curiae* before this Court in several cases addressing similar issues, including *Van Orden v. Perry,* 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1 (2004); *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), and *Boy Scouts of Am. v. Dale,* 530 U.S. 640 (2000).

*2 REASONS FOR GRANTING THE WRIT

This *amicus* shares the view of the United States here, as well as of Petitioner in the parallel case, No. 11-998, that the existence of a Latin cross as part of a larger war memorial, even as a prominent part, does not manifest a purpose by Congress, and does not have the effect, of advancing and therefore under current jurisprudence unconstitutionally establishing religion. The Ninth Circuit's panel decision below to the contrary on that important issue therefore alone warrants review by this Court. But as this case demonstrates, the "purpose" and "effect" inquiries mandated by this Court's decision in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), threaten to undermine the rich religious tradition that is inextricably intertwined with this Nation's history. The broader consequences at stake make the petition for writ of certiorari even more compelling.

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I. America has a Rich History and Tradition of Acknowledging a Creator and Using Religious Symbolism.

Since the very beginning of the Republic, religion's role in American life has been acknowledged in official pronouncements. The claim of the justness of the cause of independence was grounded in an appeal to "the Laws of Nature and of Nature's God," for example. Decl. of Indep. ¶ 1. The foundational idea that human rights are not bestowed by government but rather pre-exist government, was grounded in the asserted self-evident truth that such rights are bestowed on all human beings "by their Creator." *Id.* ¶ 2. The men in Philadelphia who signed that historic Declaration appealed to the "Supreme Judge of the world for the rectitude of [their] intentions," ***3** and pledged to each other their lives, fortunes and sacred honor "with a firm reliance on the Protection of Divine Providence." *Id.*

The Constitution itself recognizes that a higher authority was to have a fundamental role in our national life. All legislative, executive and judicial officials, both of the United States and of the several States, "shall be bound *by Oath* or affirmation" to support the Constitution. U.S. Const, art. VI, cl. 3 (emphasis added).[2] Moreover, recognizing that the overwhelming majority of Americans at the time belonged to one or another sect of Christianity, the Constitution accommodates the majority's exercise of religion by exempting "Sundays" from the ten-day window afforded the President to veto bills sent to him from Congress. U.S. Const, art. I, § 7, cl. 2. It even marks time by explicit reference to the Christian calendar, "the Year of our Lord one thousand seven hundred and Eighty seven." U.S. Const, art. VII, cl. 2. These sectarian references coexist with the Constitution's prohibition of any "religious test" as a qualification for office. *Id.*

The State constitutions, too, are full of references to the "Almighty God," and most express gratitude for the blessings of liberty which He has bestowed. *See, e.g.*, Mass. Const, of 1780, Pmbl. ("acknowledging, with grateful hearts, the goodness of the great ***4** Legislator of the universe"); Pa. Const, of 1776 (noting that government ought to be instituted to "natural rights, and the other blessings which the Author of existence has bestowed upon man"); Cal. Const, of 1879 ("We, the people of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution").

Indeed, as this Court acknowledged in *Lynch v. Donnelly,* "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." 465 U.S. 668, 674 (1984); *see also Van Orden,* 545 U.S. at 685-86 (quoting *Lynch*). To assure that this role would always be protected, the generation of citizens who wrote and ratified our Constitution immediately added to it the religion clauses of the First Amendment, providing two guarantees for religious liberty - a ban on laws prohibiting the free exercise of religion and a ban on the coercion that flows from having a nationally-established church. President Madison made clear that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *McGowan v. State of Md.,* 366 U.S. 420, 441 (1961) (quoting 1 Annals of Cong. 730 (1789)).

Recognizing that preventing "coercion," rather than mere acknowledgement of or even collaboration with religion, was the principal purpose of the Establishment Clause, this Nation has long embraced acknowledgements of religion through the use of religious symbols on federal land without doubt (until ***5** recently) as to their constitutionality. Significantly, many of these century-old monuments are not dissimilar to the Mount Soledad Monument at issue in this case. For example, the Arlington National Cemetery includes a prominent cross in the Argonne Memorial and a twenty-four foot Canadian Cross of Sacrifice. Gettysburg National Military Park features a Celtic cross in the Irish Brigade Monument, and Taos Plaza contains a cross memorializing soldiers of the Bataan Death March of World War II. Furthermore, thousands of crosses mark the gravesites of fallen United States soldiers at places such as Flanders Field in the Netherlands and Normandy, France. The government not only initiates religious messages, but it protects them as well. Currently, the National Park Service preserves the San Antonio missions in Texas, the Old North Church in Massachusetts, and the Touro Synagogue in Rhode Island.

In light of the unambiguous and unbroken history, there can be no doubt that the government's use of religious symbols in historical commemorations or memorials was never thought to amount to an establishment of national religion. Indeed, the Congress that proposed the Establishment Clause participated in religion much more directly without any hint of constitutional offense, urging President Washington to proclaim a national "day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God." George Washington, Proclamation: A National Thanksgiving (Oct. 3, 1789). Congress even paid for a chaplain to open each legislative session with a prayer, a long-standing practice that this Court has ***6** upheld as constitutional. *Marsh v. Chambers,* 463 U.S. 783, 788 (1983).

More recently, however, the notion has taken root that the Establishment Clause requires such an absolute separation of church and state as to require, in the eyes of some, a complete removal from the public square of all things even hinting of religion. To be sure, some of this Court's recent jurisprudence arguably lends itself to such an absolutist interpretation. *See, e.g., Newdow,* 542 U.S. at 46 (Thomas, J., concurring) (noting that adherence to *Lee v. Weisman,* 505 U.S. 577 (1992), would require the Court to strike down the Pledge of Allegiance, with its reference to "one Nation, under God"). Such a trajectory, however, would yield much more than the panel decision below; it would call into question the Declaration of Independence itself; the Constitution; the Northwest Ordinance; indeed, much of the rich tradition of our nation.

Some might think this progress. But the richness of America's religious tradition is much more than an historical relic worth protecting merely for history's sake. Our Nation's Founders quite rightly recognized the important role that religion could play in fostering the kind of moral citizenry necessary for success in the experiment of self-government. The Massachusetts Constitution of 1780, for example, noted that "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality." Mass. Const, of 1780, pt. 1, art. 3. And the Northwest Ordinance, adopted by Congress in 1787 for the government of the territories and readopted while the Congress was drafting what would become the Establishment ***7** Clause, provided: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio,* art. 3, 1 Stat. 51, 53 n. a (July 13, 1787, re-enacted Aug. 7, 1789)

In short, if we sanitize the public square of all things religious, a trend bolstered by decisions such as that below, we lose not only the richness but the benefits of this tradition. That would not be progress. As C. S. Lewis famously noted,

> progress means getting nearer to the place you want to be. And if you have taken a wrong turn, then to go forward does not get you any nearer. If you are on the wrong road, progress means doing an about turn and walking back to the right road; and in that case, the man who turns back soonest is the most progressive man.

C. S. Lewis, Mere Christianity 36-37 (1952).

If the mere display of the Latin cross as part of a memorial to our fallen soldiers is now to be viewed as unconstitutional, if the reference to "under God" in our Pledge of Allegiance cannot be permitted, if the simple, time-honored tradition of invocations at school graduations cannot be tolerated, then appealing to "Nature's God" in the Declaration and abiding by the foundational idea that some rights presuppose a Supreme Being, is likewise unconstitutional cannot be far behind. It is hard to imagine a road more wrong from the perspective of our Nation's founding. ***8** This case presents an opportunity for an about-face so that we can get back on the right road before it fades into obscurity.

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II. *Lemon* is Being Inconsistently Applied, or Eschewed Altogether; It Should Be Clarified and Narrowed.

The Circuit Courts' failure, in this case and elsewhere, to give due credence to this rich historical tradition is driven in part by an overly broad application of *Lemon* and uncertainty about whether it even applies in some circumstances. Although this Court has at times maintained that *Lemon* remains the dominant Establishment Clause test, for example, it also "repeatedly emphasize[s] [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch,* 465 U.S. at 679. Indeed, in *Van Orden,* 545 U.S. at 677, Chief Justice Rehnquist pronounced that *Lemon* "is not useful" in analyzing certain borderline cases, and this Court refused to apply the long-standing test in that case. Circuit Court decisions subsequent to *Van Orden* have therefore struggled with whether even to apply *Lemon* when dealing with passive religious displays, reaching contrary conclusions.

Three circuits, the Sixth, Tenth, and Second Circuit, continue to apply *Lemon* even while acknowledging the "hopeless disarray" that has resulted. *See Am. Civil Liberties Union of Ohio Found., Inc. v. DeWeese,* 633 F.3d 424, 434 (6th Cir. 2011) *cert. denied,* 132 S. Ct. 368 (U.S. 2011) (applying *Lemon* to hold that a poster display of the Ten Commandments in a courtroom is unconstitutional); *Am. Atheists, Inc. v. Davenport,* 637 F.3d 1095, 1112 (10th Cir. 2010) *cert. denied,* 132 S. Ct. 12 (U.S. 2011) (applying ***9** *Lemon* to hold that a roadside memorial is unconstitutional); *Skoros v. City of N.Y.,* 437 F.3d 1, 17 (2d Cir. 2006), cert, denied, 549 U.S. 1205 (2007) (applying *Lemon* to uphold a public school policy permitting the display of a Menorah (from the Jewish faith) and a Star and Crescent (from the Islamic faith) but prohibiting the display of a creche (from the Christian faith)).

Conversely, the Ninth and Eighth Circuits have eschewed the *Lemon* test in some passive religious display cases. *See Card v. City of Everett,* 520 F.3d 1009, 1019 (9th Cir. 2008) (holding that a monument displaying the Ten Commandments was constitutional); *ACLU Neb. Found, v. City of Plattsmouth, Neb.,* 419 F.3d 772, 777-78, 778 n.8 (8th Cir. 2005) (en banc) (same). Finally, another panel of the Ninth Circuit in the case *sub judice* and the Fifth Circuit have taken another approach, one that combines aspects of *Lemon* with other tests that incorporate its elements as "guideposts." *See Trunk v. City of San Diego,* 629 F.3d 1099, 1106-07 (9th Cir. 2011) (applying the "factors" from Justice Breyer's concurring opinion *Van Orden* and the "purpose and effect prongs" from *Lemon* to hold that a cross included in a war memorial is unconstitutional); *Staley v. Harris Cnty., Tex.,* 461 F.3d 504, 513-15 (5th Cir. 2006) (discussing both *Lemon* and *Van Orden* in holding that a monument containing a Bible is unconstitutional), *dismissed as moot on reh'g en banc,* 485 F.3d 305 (5th Cir. 2007).

A great deal of the doctrinal difficulty inheres in the ambiguity at the heart of the *Lemon* test. In order to meet constitutional muster, *Lemon* instructs that a law must have a secular as opposed to religious ***10** purpose, and must neither advance nor inhibit religion. Broadly interpreted, the "effects" prong of this test is particularly problematic. Any accommodation of religion can be said to "advance" religion in some way; any acknowledgment of religion can be seen as an endorsement that lends it credence; and any partnership with religion can be viewed as placing the government's imprimatur on the religious enterprise.

Lemon as so interpreted would thus outlaw much of the rich national religious heritage described above and prevent the important collaborations between religion and government that our founders thought so critically important to successful self-government. At the very least, concerns about the amorphous scope of *Lemon* would lead prudent local government officials to steer well clear of any religious symbol in order to avoid facing an unenviable "Hobson's choice: foregoing memorial crosses or facing litigation." *Am. Atheists, Inc.*, 637 F.3d at 1106 (Kelly, J., dissenting). Most economically depressed governments will ultimately be unwilling or unable to take such risks, and over time, public displays of religious symbols and the rich heritage they represent will disappear. Although "[t]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious," *Van Orden,* 545 U.S. at 699 (Breyer, J., concurring), the expansive view of *Lemon* being adopted by too many lower courts, including the court below, yields just that result.

In contrast, a narrow interpretation of *Lemon* would render it much more consistent with our Constitution's original design. Not *any* purpose or effect ***11** of advancing religion, but only those that advance religion by coercing adherence to religion (whether generally or to a particular religious sect) should be the hallmark of an Establishment Clause violation, largely the view espoused by the 4-Justice plurality in *Van Orden.* 545 U.S. at 683 ("Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens."); *see also Lee,* 505 U.S. at 640 (Scalia, J., dissenting) (noting that the "hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty"); *id.* (noting that "without some measure of more or less subtle coercion," establishing a religion "would be difficult indeed"); *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter,* 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[G]overnment may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.' " (quoting *Lynch,* 465 U.S. at 678)).

Such a reassessment of the reach of *Lemon* would provide much-needed clarity to the lower courts. It would prohibit the coercion that lay at the heart of the concerns exhibited by those who drafted and ratified the Establishment Clause. But, more importantly, it would preserve and permit to flourish the rich and important religious heritage that is our legacy.

*12 CONCLUSION

This case involves a Latin cross that sits atop the mountain of solitude as part of a reflective and powerful memorial to our Nation's war dead. The memorial overlooks the City of San Diego, named after the Catholic Saint, San Diego de Alcala, and the mission founded in his name by Father Junipera Serra in 1769. It is located in the State of California, the capital city of which is Sacramento, Spanish for "the Sacrament." It is governed by a state constitution, the preamble of which provides: "We, the People of the State of California, *grateful to Almighty God for our freedom*, in order to secure and perpetuate its blessings, do establish this Constitution." It forms part of a nation that declared independence by an appeal to "nature's God," in order to secure the inalienable rights that its people have from their " Creator." Under the expansive interpretation of *Lemon* and the guidepost test from *Van Orden* adopted by the court below, if consistently applied, not only the memorial, but the City name, the state capital, the state constitution, and the Declaration itself could all be found to be unconstitutional. That cannot be the correct interpretation of the Establishment Clause.

***13** The petition for writ of certiorari filed by the United States (and the parallel petition in 11-998 filed by the Mount Soledad Memorial Association) should be *granted* so that this Court can clarify and narrow *Lemon* and begin the much-needed course correction of its Establishment Clause jurisprudence.

Footnotes

1 Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file in support of certiorari. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

2 An "oath" was made to a Supreme Being; the "affirmation" alternative was designed not to accommodate those who did not acknowledge a Supreme Being, but to accommodate those, such as the Quakers, who were "conscientiously scrupulous of taking oaths," so as "to prevent any unjustifiable exclusion from office." Joseph Story, 3 Commentaries on the Constitution § 1338 (1833).

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