No. 08-472

IN THE
Supreme Court of the United States

KEN SALAZAR, Secretary of the Interior, in his official capacity, ET AL.,
Petitioners,
v.
FRANK BUONO,
Respondent.

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

BRIEF OF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether respondent has standing to maintain this action given that he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.

2. Whether, assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments, legislative prayer, and other public acknowledgments of God, including *American Atheists, Inc. v. Duncan,* No. 08-4061 (10th Cir.) (public highway memorial crosses).

The Foundation has an interest in this case because, contrary to Respondent's contentions, it believes that religious symbolism in the public sphere does not violate the Constitution. Moreover, the Foundation is concerned that government officials may be forced to disavow or renounce any "religious purpose" merely to justify the display of religious symbols, leaving the use of religious symbols only to

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[1] *Amicus curiae* Foundation for Moral Law files this brief with consent from both Petitioners and Respondent. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

those government officials who have demonstrated indifference, ignorance, or disdain toward them. Symbols can have multiple meanings. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, whether the cross erected in 1934 atop Sunrise Rock in the Mojave National Preserve violates the Establishment Clause of the First Amendment, and whether, considering the transfer of property from the National Park Service to the Veterans of Foreign Wars, the lower courts showed the proper deference to the intent of the legislative branch of government that the separation of powers inherent in the United States Constitution requires.

SUMMARY OF ARGUMENT

The placement of a cross atop Sunrise Rock in the Mojave National Forest did not constitute an establishment of religion in violation of the First Amendment.

The National Park Service's sale of the acre of land in the Mojave National Preserve does not constitute an establishment of religion in violation of the First Amendment, any more than the inscription "In God We Trust" on our coins and currency is a First Amendment violation. Rather, the cross is a time-honored universal symbol of respect for veterans who have died in the service of their country.

Even if the placement of the cross was a First Amendment violation, the sale of the acre of land on which the cross was located does not constitute an evasion of the First Amendment or the orders of the lower courts, any more than payment for groceries is an attempt to evade theft laws or driving 55 mph is an attempt to evade speeding laws. Rather, the sale was

a good faith attempt to comply with the First Amendment and with the orders of the lower courts.

The separation of powers inherent in the United States Constitution requires each branch of government to respect the other branches. For this reason, when Congress transferred the property on which this cross stood to the Veterans of Foreign Wars in order to comply with the Establishment Clause, the Ninth Circuit erred by refusing to give at least presumptive deference to that transfer. The Ninth Circuit not only impugned the motives of Congress in transferring the property; it also encumbered the VFW's use of the property by holding that the VFW could not display a cross on its property because the National Parks Authority had unconstitutionally displayed the cross on that property in the past. The VFW's freedom of expression is guaranteed by the First Amendment and should not be infringed because of the alleged past constitutional violations by the NPA.

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon case *tests* rather than the Constitution's *text*. The result of these judicial tests is a modern Establishment Clause jurisprudence that is consistently inconsistent and confusing, and often hostile to religion and its adherents. *Amicus* urges this Court to return to first principles by embracing the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI.

The text of the Establishment Clause states that "Congress shall make no law respecting an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). As applied to this case, the placement of this cross does not dictate religion, and it does not represent a form of an establishment. Thus, the decision of the court below should be affirmed, but the rationale should rest on an explication of the text of the First Amendment rather than the weak foundation of discordant Establishment Clause precedents.

ARGUMENT

> *This case would be easy if the [courts] were willing to abandon the inconsistent guideposts [they have] adopted for addressing Establishment Clause challenges and return to the original meaning of the Clause.*

Van Orden v. Perry, 545 U.S. 677, 692-93 (2005) (Thomas, J., concurring).

I. THE CONSTITUTIONALITY OF THE MOJAVE DESERT CROSS SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT BY JUDICIALLY-FABRICATED TESTS.

The courts' analysis of this case should be governed by the text of the "supreme Law of the Land" instead of by judicial tests created by the courts.

A. The Constitution is the "supreme Law of the Land."

Our Constitution dictates that *the Constitution itself* is the "supreme Law of the Land." U.S. Const. Art. VI. All judges take their oath of office to support *the Constitution itself*—not a person, office,

government body, or judicial opinion. *Id.* *Amicus* respectfully submits that this Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

Chief Justice John Marshall observed that the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison, a leading architect of the Constitution, insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840). That same year, the United States Supreme Court confirmed that the constitutional words deserve deference and precise definition: "In expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

On June 26, 2008, this Court reaffirmed the premise that the meaning of the Constitution was not solely the province of federal judges and lawyers:

> In interpreting this text,[2] we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases

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[2] By "this text" the *Heller* Court evidently meant the Second Amendment to the United States Constitution, although the principle articulated here is hardly limited to that Amendment: *e.g.*, the *United States v. Sprague* case quoted dealt with Article V of the Constitution.

were used in their normal and ordinary as distinguished from technical meaning."

District of Columbia v. Heller, 554 U.S. ___, 128 S. Ct. 2783, No. 07-290, Slip op. at 3 (June 26, 2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

B. The *Lemon* test, the endorsement test, and the *Van Orden/McCreary* compare-and-contrast test, or all of them together, are constitutional counterfeits that contradict and obscure the text of the "supreme Law of the Land."

The *"Lemon* test" of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), is widely used as an analytical framework for analyzing Establishment Clause cases, but the test "has been criticized heavily by many, and not all members have adopted the test."[3] *American Atheists, Inc. v. Duncan,* 528 F. Supp. 2d 1245, 1252 (2007).

The lower courts' difficulty in trying to cobble together an interpretative rule for Establishment Clause cases is caused by reliance upon hopelessly

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[3] The district court in *American Atheists* noted that the *Lemon* test has been refined by the Court, and "under the revised version, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that 'religion or a particular religious belief is favored or preferred.' *[County of] Alle*gheny *[v. ACLU*, 492 U.S. 573] at 592-93 [1986] (quoting *[Wallace v.] Jaffree,* [472 U.S. 38] at 70 (O'Connor, J. concurring in judgment)." *Amicus* would observe that the *Lemon* test was further revised in *Agostini v. Felton*, 521 U.S. 203 (1997), in which J. O'Connor, writing for the majority, eliminated the third prong ("excessive entanglement") of the *Lemon* test and held that excessive entanglement was simply one of many factors to be considered in determining whether the government action has the principle or primary effect of advancing or inhibiting religion.

inconsistent Supreme Court decisions and tests instead of using the plain language of the Constitution. It is the courts' jurisprudential rejection of the First Amendment's text—indeed, its rejection of *any* one firm standard—and lower court cases based upon that rejection that continues the grand legal march away from the Constitution and into ever-increasing jurisprudential disarray.[4]

Justice Scalia well described the courts' confusion about the Establishment Clause in his concurring opinion in *Lamb's Chapel v. Center Moriches Union*

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[4] Several courts of appeal have expressed frustration with the difficulty in applying the *Lemon* test in particular and Establishment Clause jurisprudence in general. The Third Circuit has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence," *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999), and "marked by befuddlement and lack of agreement," *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005). The Fifth Circuit has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev'd sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000). The Sixth Circuit has labeled it "purgatory." *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005). The Seventh Circuit has acknowledged the "persistent criticism" that *Lemon* has received since its inception. *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005). This Court has opined that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997). *See also Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (Thomas J., concurring in judgment) (collecting cases).

Free School District, 508 U.S. 384, 398-99 (1993). Eight Justices used the *Lemon* test to uphold a church's right to rent a public school auditorium. Scalia concurred but wrote separately:

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, to be sure, was not fully six feet under; our decision in *Lee v. Weisman* conspicuously avoided using the supposed 'test' but also declined the opportunity to overrule it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart. ...
>
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to its tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes we take a middle course, calling its three prongs 'no more than helpful signposts.' Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him. (Citations omitted.)[5]

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[5] In a footnote to the majority opinion, Justice White commented on Justice Scalia's concurrence: "While we are somewhat diverted by Justice Scalia's evening at the cinema, we

The more opinions the Supreme Court and lower courts generate under modern Establishment Clause jurisprudence, the more "murky" the waters become, and the courts' repetitious claim of "no clear standard" becomes a self-fulfilling prophecy.

Unfortunately, the Supreme Court views the lack of a bright line test to be laudatory. In *Lemon* the Court observed that "[t]he language of the Religion Clauses of the First Amendment is at best opaque" and that, therefore, "[i]n the absence of precisely stated constitutional prohibitions, [the Court] must draw lines" delineating what is constitutionally permissible or impermissible. 403 U.S. at 612. The Court reiterated this idea in *Lynch v. Donnelly,* 465 U.S. 668, 678-79 (1984), intoning that "an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . . In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed."

This jurisprudential attitude confuses complexity with intelligence and sensitivity with difficulty. Just because an area of the law deals with a sensitive subject like religion does not mean that the answer to the conflict must be difficult to achieve, and interweaving various factors and levels of analysis into an area of the law does not automatically make the law more intelligent. Yet this is exactly what the Supreme Court has done with its proliferation of tests: the *Lemon* test, the *Agostini*-modified *Lemon* test, the

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return to the reality that there is a proper way to inter an established decision, and *Lemon,* however frightening it may be to some, has not been overruled." 508 U.S. at 395 n.7.

endorsement test, the coercion test, the neutrality test, and so on. These tests have created more problems than they have solved, producing a continuum of disparate results. As Justice Thomas recently observed, "the very 'flexibility' of [the Supreme] Court's Establishment Clause precedent leaves it incapable of consistent application." *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring). Such impracticability is hardly surprising because attempting to draw a clear legal line without the "straight-edge" of the Constitution is simply impossible.

The courts' abandonment of fixed, *per se* rules results in the application of judges' complicated substitutes for the law. James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62, at 323-24 (James Madison) (George W. Carey & James McClellan eds., 2001). The "law" in Establishment Clause cases is so voluminous, incoherent, and incessantly changing that it "leaves courts, governments, and believers and nonbelievers alike confused . . . ."[6] *Van Orden*, 545 U.S. at 694

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[6] Recent district court opinions have aimed scathing critiques at the unsettled nature of the law in this area, noting that the Supreme Court's Establishment Clause jurisprudence is: "hardly Paradise" but "more akin to Limbo" than Purgatory,

(Thomas, J., concurring). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky., v. ACLU of Ky.*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting). By adhering to judicial tests rather than the legal text in cases involving the Establishment Clause, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead decide cases agreeably to judicial precedent which has no basis in law or reason. *See Marbury*, 5 U.S. at 180; U.S. Const. art. VI. In addition to jurisprudential confusion, the practical result of these judicial tests is to foster *hostility* toward religion.

C. The primary effect, if not the purpose, of *Lemon* and other judicial tests is often hostility to the historically important role religion has played in our country.

"There 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." *Lynch*, 465 U.S. at 674; *see also Van Orden*, 545 U.S. at 686-90 (listing numerous examples of the

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Green v. Haskell County Bd. of Comm'rs, 450 F. Supp. 2d 1273, 1285 (E.D. Okla. 2006); "convoluted, obscure, and incapable of succinct and compelling direct analysis," *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D. N.D. 2005); "mystif[ying] . . . inconsistent, if not incompatible," *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 (W.D. Wash. 2005), and "utterly standardless" jurisprudence in which "ultimate resolution depends on the shifting subjective sensibilities of any five members of the High Court." *Newdow v. Congress*, 383 F. Supp. 2d 1229, 1244 n.22 (E.D. Cal. 2005).

"rich American tradition" of the federal government acknowledging God and religion). The primary author of the Declaration of Independence, Thomas Jefferson, observed that, "No nation has ever existed or been governed without religion. Nor can be." T. Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). George Washington similarly declared that, "While just government protects all in their religious rights, true religion affords to government its surest support." *The Writings of George Washington* 432, vol. XXX (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered, like the Declaration of Independence, to be part of this nation's organic law, declared that, "Religion, morality, and knowledge [are] necessary to good government." Northwest Ordinance, Article III, July 13, 1787, *reprinted in* 1 *The Founders' Constitution*, 28 (Phillip B. Kurland & Ralph Lerner eds. 1987). The United States Congress affirmed these sentiments in an 1853 Senate Judiciary Committee report concerning the constitutionality of the congressional and military chaplaincies:

> [The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.

Senate Rep. No. 32-376 (1853). The Supreme Court has noted that "religion has been closely identified with our history and government." *School Dist. of*

Abington Tp., Pa. v. Schempp, 374 U.S. 203, 213 (1963).

Religious symbolism in government buildings and property abounds across the country, including in the Supreme Court building and courtroom's multiple representations of the Ten Commandments. *See Van Orden*, 545 U.S. at 688. Our nation's capitol is replete with monuments and buildings acknowledging God and religion, including "a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross" that stands outside a District of Columbia courthouse. *Id.* at 689 & n.9. Cities across the land, and particularly in the West, have names and symbols that reflect the faith of the Spanish and American setters.

The Ninth Circuit contends that the cross is "exclusively a Christian symbol." *Buono v. Kempthorne*, 527 F.3d 758, 768 (9th Cir. 2008) (denying reh'g and en banc review). While the cross is certainly a symbol at the heart of the Christian religion, the court below presumed to discern undisclosed motives behind the placement of the cross on Sunrise Rock. The findings of fact of the United States District Court for the District of Utah, in *American Atheists, Inc. v. Duncan, supra*, concerning the placement of memorial crosses beside state highways to honor highway patrolmen who had been killed in the line of duty, are highly relevant and instructive:

> 20. A highly motivating factor in the selection of the memorial cross was [the Utah Highway Patrol Association's] belief that only a cross could effectively convey the simultaneous messages of

> death, honor, remembrance, gratitude, sacrifice, and safety.
>
> 21. The UPHA also chose the white cross because it is commonly used as a memorial symbol in cemeteries, particularly government owned/sponsored military cemeteries in this country and elsewhere in the world.
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> 22. The UPHA chose the white cross because such crosses are a time-honored medium for memorializing soldiers, and the fallen troopers it represents are entitled to the same high honor because each of them died in the line of duty for their fellow citizens.[7]

528 F. Supp. at 1249.

In United States military cemeteries throughout the world, one finds row upon row of white crosses to honor and remember with gratitude those who served with honor and made the ultimate sacrifice for their country. In military cemeteries within the United States, graves are commonly marked by a white slab, and the overwhelming majority of these are inscribed at the top with a prominent cross. Likewise, crosses are prominent symbols in all kinds of publicly-owned and privately-owned cemeteries throughout this land. And although the Ninth Circuit refers to the Mojave cross as the "Latin cross," there is no evidence whatsoever that the VFW or others involved with the placement and maintenance of the Mojave cross chose the cross or any particular form of the cross because of religious considerations. In *Van Orden*, the plurality opinion recognized that even classic religious symbols

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[7] This case is on appeal to the United States Court of Appeals for the Tenth Circuit.

may have various meanings and purposes depending on their context. *Id.* at 690-91. Likewise, in *American Atheists* at 1253, the court found that "the memorial crosses at issue communicate a secular message, a message that a [Utah Highway Patrol] trooper died or was mortally wounded at a particular location." Likewise in this case, anyone informed as to the various meanings of the cross and the history of this particular cross and the persons and organizations involved with its placement and maintenance would not understand the Mojave cross to be a governmental endorsement or establishment of religion.[8]

Acknowledgments of religion and God should not be removed simply because they have a religious meaning or because they originate from those with religious purposes. Judicial tests that have departed from the text of the First Amendment, when not merely adding to the confusion that reigns in Establishment Clause jurisprudence, will continue the modern trend of expunging from the public square anything that is remotely religious. It is time for the federal courts to return to the plain and original text of the First Amendment, which, when applied to this case, supports the position of the U.S. Department of Justice and the National Park Service that the Mojave cross does not violate the First Amendment.

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[8] However, that same observer, perceiving the cross covered with a plywood box as it is at present, pursuant to the trial court's order, would very likely perceive this crude act of censorship as government hostility toward religion.

II. THE MOJAVE CROSS DOES NOT CONSTITUTE A "LAW RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides, in relevant part, "Congress shall make no *law* respecting an *establishment* of *religion*, or prohibiting the free exercise thereof." U.S. Const. amend I (emphasis added). Even if the cross is a symbol that is considered religious, its placement could not be considered a "law respecting an establishment of religion."

A. The definition of "religion"

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance* in 1785, was referenced in the North Carolina, Rhode Island, and Virginia ratifying conventions' proposed amendments to the Constitution, and was echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[9] In all these instances, "religion" was defined as follows:

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[9] Later in *Torcaso v. Watkins*, the U.S. Supreme Court reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent. *See Torcaso*, 367 U.S. 488, 492 n.7 (1961).

> **The duty which we owe to our Creator, and the manner of discharging it.**

Va. Const. of 1776, art. I, § 16 (emphasis added); *see also*, James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in* 5 *Founders' Constitution* at 82; *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

In *Reynolds*, the United States Supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. The *Reynolds* Court thereby found that the duty not to enter into a polygamous marriage was not religion—that is, a duty owed solely to the Creator—but was "an offense against [civil] society," and therefore, was "within the legitimate scope of the power of . . . civil government." *Id.* In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned

by the Supreme Court,[10] quoted from *Beason* in defining "the essence of religion." *See Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting).

Sixteen years later in *Everson*, the Supreme Court noted that it had

> previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson's 1785 *Act for Establishing Religious Freedom*].

330 U.S. at 13. The *Virginia Act for Establishing Religious Freedom* enacted the sentiments expressed in Madison's *Memorial and Remonstrance*. *See Virginia Act for Establishing Religious Freedom*, October 31, 1785, *reprinted in* 5 *Founders' Constitution*, 84-85 (Kurland and Lerner eds., U. Chi. Press: 1987). The *Everson* Court emphasized the importance of Madison's "great *Memorial and Remonstrance*," which "received strong support throughout Virginia," and played a pivotal role in garnering support for the passage of the Virginia statute. 330 U.S. at 12. Madison's *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution. For good measure, Justice Rutledge attached Madison's *Memorial* as an appendix to his *Everson* dissent which was joined by Justices Frankfurter, Jackson, and Burton. *See Everson*, 339

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[10] *Macintosh* was overturned by this Court in *Girouard v. United States*, 328 U.S. 61 (1946).

U.S. at 64. Thus, this Court has repeatedly recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16.

As the constitutional definition makes clear, not everything that may be termed "religious" meets the definition of "religion." "A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God." H.R. Rep. No. 83-1693 (1954). For example, from its inception in 1789 to the present, Congress has opened its sessions with prayer, a plainly religious exercise; yet those who drafted the First Amendment never considered such prayers to be a "religion" because the prayers do not mandate the duties that members of Congress owe to God or dictate how those duties should be carried out. *See Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983). To equate all that may be deemed "religious" with "religion" would eradicate every vestige of the sacred from the public square. The Supreme Court as recently as 2005 stated that such conflation is erroneous: "Simply having *religious* content or promoting a message consistent with *religious* doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 678 (emphasis added).

> [Even *Lemon*] does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to

> religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989).

The Mojave cross cannot be considered a law respecting "religion" because, even though the cross is a religious symbol sacred to Christians, the symbol of the cross does not address the *duties* owed to the Creator or the *manner* of discharging those duties. The cross is "religious" to some, but it is not a "religion," properly defined, to anyone. Moreover, that which constitutes a "religion" under the Establishment Clause must inform the follower not only *what* to do (or not do) but also *how* those commands and prohibitions are to be carried out, *i.e.*, "the dut[ies] which we owe to our Creator, **and** the manner of discharging [them]." A symbol of the cross does neither and thus cannot be considered a "religion."

B. The definition of "establishment"

Even assuming, *arguendo,* that the Mojave cross is a "religion" and its placement on Sunrise Rock is a "law," the placement of the Mojave cross by the VFW cannot be considered an "establishment."

At the time the First Amendment was adopted in 1791, "five of the nation's fourteen states (Vermont joined the Union in 1791) provided for tax support of ministers, and those five plus seven others maintained religious tests for state office." Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992). To avoid entanglements with the states' policies on religion and to prevent fighting

among the plethora of existing religious sects for dominance at the national level, the Founders, via the Establishment Clause of the First Amendment, sought to prohibit Congress from setting up a national church "establishment." *See, e.g.*, Story, *A Familiar Exposition*, *supra,* § 441 (Establishment Clause cannot be attributed to "an indifference to religion in general, especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution)").

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). For example, in Virginia, "where the Church of England had been established [until 1785], ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches." *Newdow*, 542 U.S. at 52 (Thomas, J., concurring in the judgment). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] 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." 1 *Annals of Cong.* 757 (1789) (Gales & Seaton's ed. 1834). Justice Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real

object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion"

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these.*

H.R. Rep. No. 33-124 (1854) (emphasis added). At the time of its adoption, therefore, "establishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'" *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (citations omitted).

Like the inscription of the motto "With God All Things Are Possible" on the Ohio Statehouse, the Mojave cross

> involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church.

> It imposes no tax or other impost for the support of any church or group of churches.

ACLU of Ohio v. Capitol Sq. Review and Advisory Bd., 243 F.3d 289, 299 (6th Cir. 2001) (*en banc*).

The word "establishment" in the First Amendment was meant by the Founders to communicate the idea of a compulsory and state-sponsored religious orthodoxy on a comprehensive level. The Mojave cross does not come close to that level of state involvement with religion.

III. THE PUBLIC ARENA MUST NOT DISCRIMINATE AGAINST RELIGIOUS EXPRESSION.

America's commitment to freedom of expression is based in large part upon the belief that truth is most likely to win out in competition in the marketplace of ideas. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissent); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). *Keyishian* further recognized that "The classroom is peculiarly the 'marketplace of ideas.'" *Id.* at 605-06.

Widmar v. Vincent, 454 U.S. 263 (1981), held that a state university may not discriminate against religious expression by making its meeting rooms available to nonreligious organizations but not to religious organizations. A similar principle applies to other forms of government property except closed forums such as jails or military reservations.

In the 208 years since the ratification of the First Amendment, the public arena has expanded exponentially. At that time schools were mostly private or parochial; now public schools and universities are the norm. At that time, except in

cities and towns, roads were relatively few and often privately owned; today public streets, roads and highways interlace the nation. Add to this public parks, theaters, coliseums, museums, office buildings, national forests, public radio and television, and a host of other publicly-owned entities, and we find that the public arena has become the primary arena for the exchange of ideas.

The marketplace of ideas involves competition among many ideas -- some religious, some secular, some a combination of both. Sometimes religious ideas compete with other religious ideas; sometimes they compete with secular ideas. Sometimes they involve alternative explanations, approaches, or solutions to the same underlying problems.

If government gives secular expression full access to the public arena, but restricts or prohibits religious expression in the public arena, then government has placed religious ideas at a distinct disadvantage. This has always been true, but the more the public arena expands, the more severe this disadvantage becomes.

A policy that allows display of purely secular symbols but prohibits display of a cross, constitutes the hostility to religion Justice Clark warned of in *Abington Township v. Schempp*, 374 U.S. 203, 294 (1963), when he said, "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion."

The Mojave cross is a form of expression. The lower courts' prohibition of the Mojave cross, while other forms of expression are permitted, is blatant subject-matter discrimination and viewpoint discrimination against this form of expression. The Foundation respectfully urges the Court not to

interpret the First Amendment in a way that places certain forms of expression at a disadvantage simply because that expression employs symbols that have a religious origin or meaning for someone.

IV. THE COURT SHOULD BALANCE THE INTERESTS OF THE MAJORITY AND THE INTERESTS OF THE MINORITY.

As James Madison made clear in *Federalist No. 10,* constitutional government is concerned about balancing the interests of the majority and the interests of the minority. Nowhere is that more important and more difficult than in First Amendment jurisprudence.

In matters concerning public exercises such as prayer, the majority must be especially careful to respect and protect the interests of the minority. That respect and protection might take the form of abstaining from such exercises or allowing the minority to leave the room or remain silent.

But in matters concerning the public display of symbols, the balance shifts somewhat toward the interests of the majority and the minority should respect the majority's right to display symbols that reflect its beliefs and values. In *American Atheists* at 1258-59 the court observed that "An informed observer in this case would be more reasonable, neutral, and tolerant than the *Friedman* [*v. Board of County Commissioners,* 781 F.2d 777 (10th Cir. 1985)] observer." True tolerance does not consist of shutting down any public display with which someone disagrees, but rather of learning to respect the rights of those who want to display it.

This is a case involving public display of a memorial which, some believe, has a religious origin and meaning. Those who do not agree with the meaning some attach to the cross, should nevertheless respect the right of the Veterans of Foreign Wars to honor fallen soldiers and the right of those soldiers' loved ones to honor and remember them in the way that is most meaningful to them.[11] The First Amendment should be a shield to protect freedom of expression, not a sword to censor and silence expressions with which one does not agree.

V. ACCOMMODATION OF RELIGION

In *Zorach v. Clauson,* 343 U.S. 306 (1952), this Court upheld a released-time program whereby public schools released students from classes for a set period of time to enable them to attend religious instruction at their respective churches. Justice Douglas wrote for the Court:

> We are a religious people whose institutions presuppose a Supreme Being. ...When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

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[11] *See* Richard J. Neuhaus, *The Naked Public Square* 2 ed. (Eerdmans 1984, 1988).

Although *Amicus* has shown that the display of the cross is not unconstitutional under the words of the First Amendment, to the extent that this Court concludes that the Mojave cross display is religious, the Court should consider it a justifiable accommodation of religion. Those who want to honor their veterans by observing this display of a cross have a right to do so. Congress's method of solving a possible conflict with the lower courts' interpretation of the Establishment Clause by transferring the land to the VFW while restricting its use and reserving a reversionary right if the land ever ceases to be used to honor veterans, is a justifiable accommodation and, as Justice Douglas said in *Zorach*, "follows the best of our traditions," because it then "respects the religious nature of our people and accommodates the public service to their spiritual needs." *Id.*

VI. THE OPINION OF THE NINTH CIRCUIT VIOLATES THE CONSTITUTIONAL CONCEPT OF SEPARATION OF POWERS BY NOT GIVING PROPER DEFERENCE TO THE PURPOSES, MOTIVES, AND ACTIONS OF THE LEGISLATIVE BRANCH.

Although the exact words "separation of powers" do not appear in the Constitution, the concept is readily apparent in the language of Article I vesting legislative power in Congress, Article II vesting executive power in the President, and Article III vesting judicial power in the courts. In *United States v. Brown,* 381 U.S. 437, 443 (1965), this Court described the separation of powers as "a bulwark against tyranny" and stated that "if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive

implementation, no man or group of men will be able to impose its unchecked will." The power of judicial review may be a judicial check upon legislative power, but it should be exercised with due respect and deference to Congress.

That respect includes deference to the stated purposes of Congress in enacting legislation. For example, in *Champion v. Ames,* 188 U.S. 321, 356-57, 362 (1903), this Court upheld the power of Congress to prohibit the interstate sale of lottery tickets. Congress, the Court said, has the authority to regulate interstate commerce; lottery tickets are articles of commerce; therefore, Congress has the authority to regulate their interstate sale. The possibility that Congress's real motive was to suppress lotteries rather than regulate commerce was beyond the power of the Court to inquire. Likewise, in *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 257 (1964), this Court held that the Heart of Atlanta Motel was engaged in interstate commerce and therefore Congress could prohibit the Motel from refusing to rent rooms on the basis of race. The possibility that Congress's real purpose was to eliminate racial discrimination rather than regulate interstate commerce was not a proper subject for the Court to consider. And in *Hammer v. Dagenhart,* 247 U.S. 251, 276 (1918), the Court concluded that it could consider the effects of child labor legislation but could not consider Congress's motive:

> We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the states. This court has no more important

> function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority federal and state to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

In the case before us, the Ninth Circuit expressly refused to entertain a presumption that the transfer of property from the Department of the Interior to the VFW ended any Establishment Clause violation. In so doing it disregarded the clear purpose of § 8121 and cited the restrictions and reversionary rights set forth in the statute to ensure that the cross continues to be a veterans' memorial, and twisted those restrictions and reversionary rights into a basis for characterizing the statute as an attempt to evade the lower court order and the Establishment Clause. Congress's purpose was to comply with the court's interpretation of the Establishment Clause. Compliance is not evasion.

A due respect for a coordinate branch of government requires, at the very least, a higher degree of deference than this. When one branch of government unduly elevates itself into the position of judging and second-guessing the motives and purposes of coordinate branches, it loses sight of its proper place in our constitutional system of government.

CONCLUSION

"When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, [the courts] should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. City of New London, Conn.*, 545

U.S. 469, 523 (2005) (Thomas, J., dissenting). Such a clash exists in this case between the never-amended words of the Establishment Clause on the one hand and the ever-changing Establishment Clause jurisprudence on the other. The proper solution is to fall back to the foundation, the text of the Constitution.

For the foregoing reasons, *Amicus* respectfully submits that the court's decision below should be reversed.

Respectfully submitted,

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