

**In The
Supreme Court of the United States**

DIRK KEMPTHORNE,
Secretary of the Interior, et al.,

Petitioners,

v.

FRANK BUONO

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF AMICI CURIAE OF VETERANS OF
FOREIGN WARS OF THE UNITED STATES;
THE AMERICAN LEGION; MILITARY ORDER
OF THE PURPLE HEART; VETERANS
OF FOREIGN WARS DEPARTMENT OF
CALIFORNIA; AMERICAN EX-PRISONERS
OF WAR IN SUPPORT OF PETITIONERS**

PHILIP B. ONDERDONK, JR.
THE AMERICAN LEGION
700 N. Pennsylvania Street
Indianapolis, IN 46204-1172
(317) 630-1224

DANIEL J. MURPHY
National Judge Advocate
MILITARY ORDER OF THE

PURPLE HEART, INC.
National Headquarters
5413-B Backlick Road
Springfield, VA 22151-3960

JAMES A. CLARK
AMERICAN EX-PRISONERS OF WAR
National Headquarters
3201 East Pioneer Pkwy, #40
Arlington, TX 76010

KELLY J SHACKELFORD
Counsel of Record
HIRAM S. SASSER, III.
ROGER L. BYRON
LIBERTY LEGAL INSTITUTE
903 18th Street, Suite 230
Plano, TX 75074
(972) 423-3131

JOHN J. McNEILL, JR.
VETERANS OF FOREIGN WARS
OF THE UNITED STATES
34th & Broadway
Kansas City, MO 64111

NICK GUEST
VETERANS OF FOREIGN WARS
OF THE UNITED STATES
DEPARTMENT OF CALIFORNIA
1510 J Street, Suite 110
Sacramento, CA 95814

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INTEREST OF AMICI CURIAE¹

Veterans of Foreign Wars of the United States (“VFW”) – The VFW is a Congressionally chartered veterans service organization established in 1899 and representing over 2.3 million members. The VFW was instrumental in establishing the Veterans Administration, creating the World War II GI Bill and very recently the GI Bill for the 21st Century and developing the national cemetery system. The VFW also is instrumental in achieving disability compensation of Vietnam veterans exposed to Agent Orange, veterans diagnosed with “Gulf War Undiagnosed Illnesses,” as well as many other entitlements. The VFW helped fund the creation of the Vietnam Veterans Memorial, the Korean War Memorial, the World War II Memorial, the Women in Military Service Memorial and numerous other memorials in the region of the nation’s capital. This case is of great concern to the VFW as, upon lifting of the injunction, it will have final management and ownership responsibility of the Mojave Desert Veterans Memorial. This case also threatens many of the other veterans memorials, reaching into the hundreds,

¹ All counsel of record received notice of Amici’s intent to file this brief at least ten days before this brief was due and consented to the filing of this brief. Amici state that no portion of this brief was authored by counsel for a party and that no person or entity other than Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

the VFW helped create and directly threatens the erection of like veterans memorials in the future.

The American Legion – The American Legion is a veterans and community service organization representing approximately 2.6 million members plus an Auxiliary of almost 1 million members. The American Legion helps veterans survive economic hardship and secure government benefits. It drafted and obtained passage of the first G.I. Bill and its members were among the primary contributors to the Vietnam Veterans Memorial. It works to promote social stability and well-being for those that have honorably served our nation's common defense. And it strives to ensure that those veterans who have sacrificed their lives for our country are properly remembered in local, state and national veterans memorials. The proper resolution of this case is a matter of great concern to The American Legion because the ruling of the Ninth Circuit has a detrimental impact on its ability to honor those who have and do serve our nation's armed forces.

Military Order of the Purple Heart, Inc. – The Military Order of the Purple Heart is a non-profit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Purple Heart is a combat decoration awarded only those members of the armed forces of the United States wounded by a weapon of war in the hands of the enemy. It is, as well, awarded posthumously to the next of kin in the name of those who are killed in action or die of

wounds received in action. Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization composed strictly of combat veterans. As its work, the Order conducts welfare, rehabilitation and service work for hospitalized and needy veterans and their families. It has also erected at least one memorial to the recipients of the Purple Heart in every state in the nation. The Order is greatly concerned with the outcome of this case as it directly affects the future of veterans memorials that honor those who, like themselves, literally shed their blood in this nation's service.

Veterans of Foreign Wars Department of California – The VFW Department of California is the California arm of the VFW responsible for administering VFW programs and initiatives within the state. Accordingly, it works with the VFW membership of California to advance the mission and programs of the VFW within the state and throughout the country, such as veterans benefits and aid for the wounded. This case is of great concern to the VFW Department of California. In accordance with VFW by-laws and procedure, following the May 2007 charter revocation of Post 358 the VFW Department of California will assume ownership of and responsibility for the memorial at issue in this case upon the lifting of the injunction. This case is of great importance to the VFW Department of California as it directly affects its statewide efforts to promote the mission and ideals of the VFW in particular and service to country in general.

American Ex-Prisoners of War (“AXPOW”) – AXPOW is a national service organization composed of and open to all former prisoners of war from any war involving the United States, including all former civil internees, and their families. It provides aid to American citizens who were captured by an enemy in time of war. It exists to help those captured in time of war deal with the trauma of their capture and confinement. AXPOW is greatly concerned with the proper resolution of this case as any ruling adverse to the nation’s veterans memorials would dishonor its members who literally have been imprisoned in service to this nation and only add to their trauma.



SUMMARY OF ARGUMENT

The Ninth Circuit not only struck down as unconstitutional a veterans memorial that has stood for almost seventy-five years due solely to its use of religious imagery, it now refuses to allow the federal government to convey the memorial and the land surrounding it to the local VFW post who erected it in the first place. There is no Establishment Clause violation here. Military culture is replete with such imagery, symbols with religious origins that have taken on widely accepted meanings independent of the religions from which they were derived. But even if the memorial must be discarded because of such symbolism, certainly conveying the memorial and the surrounding land in exchange for a fair market value trade in land is a reasonable alternative. Such a

harsh and draconian measure of requiring the removal or destruction of the memorial is unnecessary and creates the perception of government hostility towards a time-honored means of honoring the nation's military veterans. Failure on the part of this Court to reverse the Ninth Circuit will cause great harm as the message of hostility to veterans will be heard and countless veterans memorials will be affected. The Court should grant Petitioner's writ of certiorari and reverse the Ninth Circuit.

◆

ARGUMENT

I. The Mojave Desert Veterans Memorial deserves protection.

Veterans have been fighting and dying for this Country for more than two centuries. We have called upon them to make extraordinary sacrifices in the face of great danger. They have saved this nation in times of great peril, they have freed millions from the bondage of slavery and oppression and saved countless lives around the world. Yet, as a nation, we often fail to honor their service in appropriate ways. For example, after saving the world from the darkness of fascist oppression during World War II, we failed to honor their service with a national veterans memorial for more than 50 years.

As has been the case from ancient times, the tool of remembrance most often employed to honor military veterans and their service has been physical

monuments of one form or another prominently displayed in public areas.² These monuments have often included or been almost entirely composed of symbols that have religious significance. In that regard this nation is certainly no exception. *See, e.g.*, Pet. App. at 47a n.6. As Justice O'Connor cogently observed, "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottos and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35-36 (2004) (O'Connor, J., concurring).

Because governments, from the federal government down to the local township, often neglect to honor the service of veterans and the sacrifice of those lost in war with memorials, it is often left to the veterans themselves to raise the money and donate memorials that are worthy of display. Most of these efforts are led by Amici and others like them. And like many other veterans memorials, the memorial at issue in this case was donated by a local VFW post.

If these memorials were, shockingly, to be determined now to violate the Establishment Clause, how are these governments to cure the defect? Must they tear them down and wound the spirit of veterans and

² Occasionally, as is the case with the Mojave Desert Veterans Memorial, veterans have erected memorials in obscure and remote places.

the families of fallen soldiers? Such an extreme response to the lawsuit of a passing heckler seems, at the very least, inappropriate.

A. A cross is a common symbol honoring the courage and sacrifice of veterans of the First World War.

The mechanized nature of the First World War changed forever the face of modern warfare. None were prepared for the massive loss of life inflicted in that war by the large scale implementation of the machine gun and a mechanized cavalry. Horrors such as England's "Million Dead," many of whom had been volunteers, took the nation's embroiled in that war wholly by surprise. Along with the sacrifice of almost an entire generation of Western Europe with so little discernable justification came the need to commemorate that sacrifice in a visible, corporeal manner. Memorials to the fallen were erected across the continent. In short order, one of the premier symbols of remembrance used for these memorials became Sir Reginald Blomfield's Cross of Sacrifice, a lone cross emblazoned with a sword. Accordingly, through the years, with its roots in Blomfield's much heralded design, the symbol most associated with remembrance of World War I became a lone cross.

Thus, in 1934 the Veterans of Foreign Wars Post 2884 determined that the symbol most representative of the service of those Americans who died in the killing fields that were World War I was a lone cross.

They were not alone in this determination. The Canadian Cross of Sacrifice, dedicated on Armistice Day, 1927 in Arlington, Virginia, is a twenty-four foot granite cross that stands in honor of those Americans who with great internal conviction joined the Canadian Armed Forces to fight in World War I before the United States entered the War. The Argonne Cross, also in Arlington, sits among nineteen pine trees that represent the Argonne Forest where countless American servicemen gave their lives in the same war. The same is true for the Memorial Peace Cross in Bladensburg, Maryland, as well as countless other like memorials in countless other localities.

In Western military heritage, the image of a lone cross has become synonymous with honoring those who fell in the First World War. The meaning and appropriateness of this symbolism is widely understood and accepted. *See, e.g., Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338 (Or. 1976), *cert. denied*, 434 U.S. 876 (1977) (expressly recognizing testimony that “a monument with a cross is an appropriate symbol for sacrifice by men who gave their lives for their country in time of war”); *Newdow*, 542 U.S. 1 at 36 (O’Connor, J., concurring) (“[f]acially religious references can serve other valuable purposes in public life”). These memorials make no partisan or sectarian statement about religion or a government’s endorsement of it. Rather, they serve, “in the only ways reasonably possible in our culture, the legitimate secular purpose of . . . encouraging the recognition of what is worthy of appreciation in

society.” *Newdow*, 124 S.Ct. at 36 (O’Connor, J., concurring).

B. Far from an Establishment Clause violation, religious imagery such as a cross is deeply entrenched in American military culture.

American military culture is replete with religious imagery. The Congressional Medal of Honor, for example, the nation’s highest military decoration, has as its centerpiece an etching of Minerva, Roman goddess of war, fending off Discord. The Navy and Marine Corps’ second highest military honor is the Navy Cross. The Army’s second highest military honor is the Distinguished Service Cross. The Air Force’s second highest military honor is the Air Force Cross. Each of the services also recognize the highly distinguished Distinguished Flying Cross as an honored military decoration. In the American military, the cross is universally recognized as an emblem of honor and memorial for those to whom it is awarded and those for whom it is erected.

The military’s incorporation of religious imagery evinces no more endorsement or establishment of religion than the Shriners, known for their philanthropic efforts to provide hospitals for children, use of the Islamic Star and Crescent symbol indicates their adherence to Islam. The cross has been incorporated by the Red Cross and the medical community at large – military medicine, in particular – as a symbol of

healing and service. Predictably, a pluralistic culture's exposure to various religions has resulted in a secular incorporation of the more admirable, universal ideals the religions represent, to include the use of that religion's symbols.

Military culture is no different. The armed forces' use of religious imagery is no more than the recognition that the highest ideals of military service, namely valor, selflessness and sacrifice, have been best exemplified by religious imagery. There could be few if any symbols in Western military heritage more appropriate to honor exemplary service and the giving of one's life to save another than a cross, a universal symbol of beneficent sacrifice. Among the nation's military veterans there are none more deserving of such honor than the fallen, those who braved the horrors of the battlefield and died there so that others might live and breathe free. In the same way, there are none more qualified to determine what symbols best memorialize sacrifice of the fallen than their comrades in arms, those who know firsthand the conditions of their deaths and how they may best be honored and remembered.

Without appropriate action by this Court, the destruction of this and an untold number of like veterans memorials is sealed, and the rest fall deeper under the threatening shadow of a judiciary already proven hostile toward them. *See, e.g., Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (en banc); *see also Sumnum v. Pleasant Grove City*, 499 F.3d 1170 (10th Cir. 2007) (McConnell, J., dissenting). The

veterans who fight and die for this Nation and then erect memorials honoring the sacrifice of their brethren should, at the very least, receive the opportunity to preserve this small token of remembrance in the Mojave Desert. Most who traverse that barren landscape will never see the memorial that has stood as a witness of the honor and sacrifice of World War I veterans for almost seventy-five years.

II. Removing the Mojave Desert Veterans Memorial after seventy-five years is an unreasonably hostile decision contrary to the requirements of the Establishment Clause.

This is not the first time a court has tarnished the service of veterans by demanding the removal of a memorial of remembrance. Other courts have likewise misapplied the Establishment Clause to eradicate veterans memorials designed to recognize “what is worthy of appreciation in society,” namely the military service and personal sacrifice of veterans for something greater than themselves. *See, e.g., Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988) (a cross cannot serve as a veterans memorial without violating the endorsement test); *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993).

In fact, *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996), is the epitome of Establishment Clause catastrophe and a

perfect example of why Establishment Clause jurisprudence must be constantly revisited by this Court. Acknowledgement is not the same as endorsement. The veterans memorial at issue, a cross, was “first condemned, then twice approved, and now once again condemned, all by well-intentioned judges seeking to apply the Establishment Clause of the United States Constitution.” *Id.* at 620 (O’Scannlain, J., concurring). In fact, the veterans memorial in *Eugene* was originally vindicated for the very reason that it was a veterans memorial, and thus held a secular purpose, despite that fact that it bore a cross. *See id.* at 625 n.9 (“an appropriate ceremony was conducted by the American Legion to dedicate the cross as the ‘Veteran’s War Memorial Monument’”) (quoting *Eugene Sand and Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 344 (Or. 1976), *cert. denied*, 434 U.S. 876 (1977)).

The memorial in this case was erected by the Veterans of Foreign Wars almost seventy-five years ago to honor the fallen of World War I. It eventually became a memorial to “the Dead of All Wars.” From the start it was composed primarily of a lone cross. Though remote and out of the way, it has become an enduring symbol of honor to the nation’s veterans, past and present, as is evident by the numerous times it has been replaced over its long life after falling into disrepair. Each time it has been replaced, the meaning and appropriateness of a lone cross as a memorial to the nation’s military veterans has been understood and preserved. It is unreasonable to conclude, as did the Ninth Circuit, that the memorial is a violation of

the Establishment Clause and that the only solution to the alleged violation is banishment, that the memorial is so repugnant to the Constitution it must be forever removed from any land, public or, as intended by Congress in this case, private land. The 2003 conveyance of the memorial to the Veterans of Foreign Wars is an appropriate and valid measure to cure any alleged violation of the Constitution and preserve the sanctity of a long-standing memorial to the nation's war dead. The validity of such a conveyance has been expressly and repeatedly recognized by the Seventh Circuit Court of Appeals. *See Freedom from Religion Found., Inc., v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000) (upholding the sale of a portion of a municipal park on which stood a statute of Jesus with arms extended); *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005) (upholding the sale of a portion of a municipal park with monument of Ten Commandments). The Ninth Circuit's approach, on the other hand, would seem to "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment).

While allegations that the memorial violates the Establishment Clause are unreasonable, conveying the memorial to a private party (particularly the private party that originally erected the memorial) ensures that no one, reasonable or otherwise, could possibly perceive the memorial as a government endorsement of religion. At the same time, it renders

unnecessary even consideration of the draconian measure of dismantling a time-honored veterans memorial, a measure any reasonable person would understand not only as hostility toward religion in general but also toward the honor due the nation's military veterans in particular.

- i. Without action by this Court, countless veterans memorials will perish, dishonoring the memory of those who gave their lives for a cause greater than themselves and disheartening the millions of veterans who find solace and understanding in such memorials.**

There are numerous veterans memorials throughout the country that invoke religious imagery. For example, the Argonne Cross in Arlington Cemetery, erected in part through the efforts of the Argonne Unit American Legion, sits among nineteen pine trees that represent the Argonne Forest where so many American servicemen gave their lives. A simple inscription on the base of the cross reads: "IN MEMORY OF OUR MEN IN FRANCE 1917 1918."

The Canadian Cross of Sacrifice, also among the graves in Arlington Cemetery, is a twenty-four foot gray granite cross that dominates its surroundings with a bronze sword affixed to the cross. The Cross of Sacrifice was dedicated on Armistice Day, 1927, honoring those Americans, with great internal conviction, who joined the Canadian Armed Forces to fight in World War I before the United States joined the

war. Subsequently, the monument was modified to honor those that served in World War II and the Korean War.



Photo provided by Arlington National Cemetery <http://www.arlingtoncemetery.org/visitor_information/Canadian_Cross.html>

In fact, in Arlington Cemetery alone, there are numerous inscriptions of religious acknowledgement permanently displayed on public property. Chaplain's Hill Monument bears the inscription, "May God Grant Peace To Them And To The Nation They Served So Well." The Confederate War Memorial bears the inscription, "Victrix Causa Diis Placuit Sed Victa Caton," which means "The Victorious Cause was Pleasing to the Gods, But the Lost Cause to

Cato” and depicts a woman extending a laurel wreath from ancient Greek religion to her fallen son. The Spanish-American War Monument bears the inscription, “TO THE GLORY OF GOD AND IN GRATEFUL REMEMBRANCE OF THE MEN AND WOMEN OF THE ARMED FORCES WHO IN THIS CENTURY GAVE THEIR LIVES FOR OUR COUNTRY THAT FREEDOM MIGHT LIVE.” The Space Shuttle *Challenger* Memorial bears the inscription, “. . . put out my hand, and touched the face of God.” In Washington, D.C., the Peace Monument stands as a forty-four foot high monument in the circle to the west of the Capitol at Pennsylvania Avenue and First Street, N.W. This war memorial was erected in 1877-78 to commemorate the naval deaths at sea during the Civil War. Among the ancient Greek classical figures, Mars, the god of war and Neptune, the god of the sea are depicted, as well as the figure Victory, holding a laurel wreath. The Peace Memorial in Gettysburg bears the inscription, “With Firmness In The Right As God Gives Us To See The Right – Lincoln.” Countless small towns and communities across the country have erected veterans memorials that bear religious inscriptions or invoke religious imagery. The City of Chicago dedicated the City Hall Memorial Plaque, a World War I and II memorial that bears the image of an angel. Blooming Grove, Texas built a Korean and Vietnam War Memorial that bears an inscription from the Book of Ecclesiastes. Such is the nature of thousands of war memorials across the country.

For some courts, these war memorials must be torn down. It is disheartening and distressing to think that Arlington Cemetery must be gutted because there are those who are offended by the religious imagery. And, under the Ninth Circuit's approach, no memorial may be preserved by conveying it to a veterans organization, probably the very organization that paid for the memorial in the first place.

The veterans memorials of this country were not lightly constructed, nor do they advance a particular creed or religion. Instead, they represent this nation's best efforts to give meaning to a cause that cannot alone be sustained by empty rhetoric and talk of abstract freedom. Veterans gave their best to this nation so that it might not perish from the Earth, but rather long endure. At the very least, we request this Court to honor their sacrifice by preserving the remnants of their mark on us all, the veterans memorials.

In times past, the defense of this nation and the preservation of the freedom of all people has been equally born by most members of American society. However, in recent decades the transformation of the military into an all volunteer force has seen the arisal of a new breed of soldier, one who serves not for personal gain or ambition but to be a part of and contribute to something greater than himself. All these veterans ask is that their time-honored memorial, standing in the middle of the desert, receive one

more opportunity to survive. *Amici*, representing more than three million veterans, deserve as much.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. ONDERDONK, JR.
THE AMERICAN LEGION
700 N. Pennsylvania Street
Indianapolis, IN 46204-1172
(317) 630-1224

DANIEL J. MURPHY
National Judge Advocate
MILITARY ORDER OF THE
PURPLE HEART, INC.
National Headquarters
5413-B Backlick Road
Springfield, VA 22151-3960

JAMES A. CLARK
AMERICAN EX-PRISONERS
OF WAR
National Headquarters
3201 East Pioneer Pkwy, #40
Arlington, TX 76010

KELLY J SHACKELFORD
Counsel of Record
HIRAM S. SASSER, III.
ROGER L. BYRON
LIBERTY LEGAL INSTITUTE
903 18th Street, Suite 230
Plano, TX 75074
(972) 423-3131

JOHN J. MCNEILL, JR.
VETERANS OF FOREIGN WARS
OF THE UNITED STATES
34th & Broadway
Kansas City, MO 64111

NICK GUEST
VETERANS OF FOREIGN WARS
OF THE UNITED STATES
DEPARTMENT OF CALIFORNIA
1510 J Street, Suite 110
Sacramento, CA 95814