

Case Nos. 08-56415 & 08-56436

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IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Jewish War Veterans of the United States  
of America, Inc., *et al.*,

*Plaintiffs-Appellants,*

v.

City of San Diego, *et al.*,

*Defendants-Appellees.*

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On Appeal From the United States District Court for the Southern District of California  
Nos. 06-cv-01597-LAB, 06-cv-01728-LAB (Burns, J.)

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*Amici Curiae* Brief of the American Center for Law and Justice, Advocates for Faith and Freedom, and United States Representatives Randy Forbes, Robert Aderholt, Todd Akin, Roscoe Bartlett, Mike Conaway, Jeff Duncan, Renee Ellmers, Virginia Foxx, Scott Garrett, Walter Jones, Jim Jordan, Steve King, John Kline, James Lankford, Jeff Miller, Joe Pitts, and Joe Wilson in Support of the Petition for Rehearing En Banc

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, *amici* American Center for Law and Justice and Advocates for Faith and Freedom state that they have no parent corporation and issue no stock.

Dated March 23, 2011

/s/ Jay Alan Sekulow  
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## INTEREST OF AMICI

Pursuant to 9th Cir. R. 29-2(a), the parties have consented to the filing of this *amici curiae* brief.<sup>1</sup>

*Amicus*, the American Center for Law and Justice (“ACLJ”), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued in numerous cases involving the First Amendment before the Supreme Court of the United States and other federal and state courts. *See, e.g., Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987).

The resolution of this case is a matter of substantial concern to the ACLJ because it will significantly affect memorials honoring veterans across the nation. In addition, the ACLJ’s interests are directly harmed by the panel’s unprecedented conclusion that the ACLJ’s involvement in defending the Mount Soledad Veterans Memorial is evidence that the federal government’s maintenance of the Memorial is unconstitutional. Recognizing the national importance of this case, thousands of

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<sup>1</sup> The parties and their counsel did not author this brief in whole or in part. No person, other than *amici*, their members, or their counsel, contributed money to support the preparation or filing of this brief.



Americans recently signed an ACLJ petition to preserve the Mt. Soledad Veterans Memorial as it is.

*Amicus*, Advocates for Faith and Freedom (“Advocates”), is a California-based law firm dedicated to protecting religious liberty and family values. Advocates seeks to ensure that the rich religious tradition that was so integral to the formation of Anglo-American law is not unduly excluded from the public arena in the United States, and especially in California. Advocates is involved in many First Amendment cases, and the resolution of this case is of great importance to Advocates due to the impact it will have upon future cases in California and across the country.

*Amici*, United States Representatives Randy Forbes, Robert Aderholt, Todd Akin, Roscoe Bartlett, Mike Conaway, Jeff Duncan, Renee Ellmers, Virginia Foxx, Scott Garrett, Walter Jones, Jim Jordan, Steve King, John Kline, James Lankford, Jeff Miller, Joe Pitts, and Joe Wilson, are currently serving members of the 112th Congress. These *amici* strongly support the federal government’s acquisition of the Memorial through Public Law 109-272 so that it may be enjoyed by all Americans as a national memorial to honor veterans.

In light of the *amici*’s interests, many of them have previously filed *amici curiae* briefs with this Court and other courts in litigation involving the Memorial.

## SUMMARY OF ARGUMENT

The panel erred in holding that Public Law 109-272 violates the Establishment Clause of the First Amendment. In 1954, after returning from war, members of an American Legion Post founded the Mount Soledad Memorial Association (“Association”) to honor the sacrifice of the men who died next to them. With the permission of the City of San Diego, they constructed a cross to honor their fallen brothers. In the span of the previous few years, over 36,000 American servicemen died or remained missing along with over 220,000 of their allies.<sup>2</sup> The Korean War came less than a decade after the conclusion of the largest war in history, World War II, which claimed millions of lives, including approximately 400,000 Americans.<sup>3</sup>

As Congress noted, “[t]he Mt. Soledad Veterans Memorial was dedicated on April 18, 1954, as ‘a lasting memorial to the dead of the First and Second World Wars and the Korean conflict’ and now serves as a memorial to American veterans of all wars, including the War on Terrorism.” P.L. 109-272. The Memorial evoked thoughts of the hundreds of thousands of individual crosses throughout the country and worldwide representing the lives and service of American veterans; it was a

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<sup>2</sup> *Korean War: Battle Casualties*, Encyclopedia Britannica Online, <http://www.britannica.com/eb/art-67418?articleTypeId=1>.

<sup>3</sup> *World War II*, Encyclopedia Britannica Online, <http://www.britannica.com/eb/article-9110199/World-War-II>; *National WWII Memorial*, <http://www.wiimemorial.com/>.

logical choice given the widespread use of crosses in other war memorials that had been recently constructed around the world.<sup>4</sup>

In light of the secular purpose and effect of the federal government's maintenance of the Memorial, the panel erred in holding P.L. 109-272 unconstitutional. The panel correctly recognized that the law's key purpose—preserving a historic war memorial to honor veterans—is secular. However, the panel placed little importance upon Justice Kennedy's plurality opinion in *Salazar v. Buono*, 130 S. Ct. 1803 (2010), which noted that “a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people.” *Id.* at 1820.

In addition, the panel erred in concluding that the Argonne Cross and the Canadian Cross of Sacrifice at Arlington National Cemetery are distinguishable from the Memorial. The panel also relied upon the erroneous conclusion that the alleged religious motives of individuals who donate memorials to the government or support legislation are relevant in determining a law's primary purpose and effect. The federal government's operation of the Memorial is constitutionally sound and the panel's decision should be vacated.

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<sup>4</sup> See, e.g., <http://www.normandy1944.info/> (various D-Day memorials); <http://www.normandie44lamemoire.com/versionanglaise/indexus.html> (same).

## ARGUMENT

### **I. The Panel Correctly Held that Public Law 109-272 Has a Secular Purpose.**

The panel recognized that Public Law 109-272's primary purpose is secular: "to preserve a historically significant war memorial . . . as a national memorial honoring veterans of the United States Armed Forces." *Trunk v. City of San Diego*, Nos. 08-56415 & 08-56436, slip op. at 193 (9th Cir. 2011) (quoting P.L. 109-272, § 2(a)). A disconnect between this holding and the panel's conclusions concerning the statute's primary effect, however, led to the erroneous determination that the statute is unconstitutional.

The Supreme Court has observed that, under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), "[t]he plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose." *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (citations omitted). The Mount Soledad statute acknowledges that the Memorial "has been recognized by Congress as a National Veterans Memorial and is considered a historically significant national memorial." P.L. 109-272, at § 1(5).

Plaintiffs ("JWV") invite this Court to discard the multiple secular purposes set forth in the statute in favor of snippets of legislative history and extraneous statements that allegedly indicate a religious purpose and effect. The Supreme Court has noted, however, that "what is relevant is the legislative purpose of the

statute, not the possibly religious motives of the legislators who enacted the law.” *Mergens*, 496 U.S. at 249. In the proper analysis of both purpose and effect, the statutory text and the Memorial’s actual content is paramount, not extraneous statements made by government officials or private individuals.

## **II. The Panel Improperly Disregarded the Plurality Opinion in *Salazar v. Buono*.**

The panel gave little weight to Justice Kennedy’s plurality opinion in *Salazar v. Buono*, 130 S. Ct. 1803 (2010). In *Buono*, the Supreme Court considered whether a federal law that authorized the transfer of federal land which included a memorial cross to a private party violated the Establishment Clause. Justice Kennedy wrote a plurality opinion, joined by Chief Justice Roberts and Justice Alito, rejecting the claim that a Latin cross is an exclusively religious symbol in all settings.<sup>5</sup>

The plurality observed that

a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

*Id.* at 1820 (Kennedy, J., plurality).

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<sup>5</sup> Justices Scalia and Thomas concluded that the plaintiff lacked standing to obtain the injunction he sought. *Id.* at 1824 (Scalia, J., concurring).

Justice Kennedy distinguished the case from one in which a Latin cross is displayed for the purpose of promoting a Christian message:

Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message. . . . Placement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation’s fallen soldiers.

*Id.* at 1816-17.

In addition,

[t]he cross had stood on Sunrise Rock for nearly seven decades before the statute was enacted. By then, the cross and the cause it commemorated had become entwined in the public consciousness. . . . Congress ultimately designated the cross as a national memorial, ranking it among those monuments honoring the noble sacrifices that constitute our national heritage. . . . It is reasonable to interpret the congressional designation as giving recognition to the historical meaning that the cross had attained.

*Id.* at 1817.

The panel downplayed the *Buono* plurality opinion in a footnote, stating

the record before us does not establish that Latin crosses have a well-established secular meaning as universal symbols of memorialization and remembrance. On the record in this appeal, the “thousands of small crosses” in foreign battlefields serve as individual memorials to the lives of the Christian soldiers whose graves they mark, not as generic symbols of death and sacrifice.

Slip op. at 208, n.18. The panel also stated that the size of the Mount Soledad cross in comparison to the Memorial’s numerous other items was significant. *Id.*

The *Buono* plurality opinion, along with the previously expressed understanding of the Establishment Clause of Justices Scalia and Thomas,<sup>6</sup> strongly suggest that a majority of the current Supreme Court would consider memorial crosses included in a public veterans memorial for a secular purpose to be constitutionally permissible. As the *Buono* plurality explained, one commemorative cross is intended to represent the thousands of individual crosses or other grave markers belonging to fallen service members of all faiths. In this context, the symbolism is secular gratitude, not religious devotion.

The panel based its analysis upon expert testimony suggesting that most veterans memorials do not include crosses. *See id.* at 200-04. The panel downplayed evidence that at least 114 Civil War monuments include some kind of cross, concluding that any religious overtones were overshadowed by secular elements. *See id.* at 202-03. The panel declared that “the universal symbol emanating from [the World Wars] is the poppy, not the cross.” *Id.* at 202. The longstanding existence of the Mount Soledad cross, the Argonne Cross, and the Canadian Cross of Sacrifice at prominent locations suggests otherwise. The secular endeavor of honoring veterans at Mount Soledad is not rendered constitutionally

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<sup>6</sup> *See, e.g., McCreary County v. ACLU*, 545 U.S. 844 (2005) (Scalia, J., dissenting, joined by Justice Thomas) (noting the lack of historical support for the *Lemon test* and the use of a reasonable observer to gauge the constitutionality of public displays with alleged religious elements).

suspect simply because others who memorialized the fallen elsewhere chose other means of doing so.

### **III. The Panel’s Attempt to Distinguish the Memorial from the Argonne Cross and the Canadian Cross of Sacrifice at Arlington National Cemetery is Flawed.**

The panel properly recognized that the Establishment Clause does not mandate the removal of commemorative Latin crosses from all public memorials in all circumstances. The panel observed that “[s]imply because there is a cross or a religious symbol on public land does not mean that there is a constitutional violation,” *id.* at 182, and also noted that “many monuments that include sectarian symbols do not have the primary effect of advancing religion.” *Id.* at 205. Both the panel and JWV concluded that the government’s maintenance of the Argonne Cross and the Canadian Cross of Sacrifice at Arlington National Cemetery are consistent with the Establishment Clause. *Id.* at 183, 204-05, 222; JWV Brief at 25, n.15.

The panel erred in concluding that there is a principled basis for distinguishing the Argonne Cross and the Canadian Cross of Sacrifice from the Mount Soledad Veterans Memorial. The panel characterized the Arlington crosses as “non-dominant features of a much larger landscape providing a ‘context of history’ and memory that overwhelms the sectarian nature of the crosses themselves.” *Slip op.* at 205. The panel stated that the Arlington crosses stand



among headstones and other monuments and are not predominant features of the Cemetery. *Id.* at 204, 222.

The panel's analysis mirrors testimony from Dr. G. Kurt Piehler "describ[ing] the Argonne Cross as part of a larger display dedicated to servicemen who died in the campaign for the Argonne Forest." *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1215 (S.D. Cal. 2008). The District Court observed, "[a]pparently, [Dr. Piehler] is referring to the grove of trees in which the cross is located" since there is no other "larger display" surrounding the Argonne Cross. *Id.* The front of the Argonne Cross faces a walkway that divides two fields of individual grave markers, while a row of trees are positioned alongside and behind the cross.<sup>7</sup>

A grove of 19 pine trees are on 3 sides of the Cross (North, West and South). These trees are symbolic of the Argonne Forest where many of the men fought. At the juncture of the arm and stem of the cross is carved, in low relief, an eagle and wreath.<sup>8</sup>

Similarly, the Canadian Cross of Sacrifice has a bronze sword on its face and sits alongside a field of individual gravestones; it is not part of a larger display.<sup>9</sup>

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<sup>7</sup> Michael Patterson, *Argonne Cross Memorial*, <http://www.arlingtoncemetery.net/argonne-cross.htm> (providing photos).

<sup>8</sup> Arlington National Cemetery, *Monuments and Memorials: Argonne Cross*, [http://www.arlingtoncemetery.org/visitor\\_information/Argonne\\_Cross.html](http://www.arlingtoncemetery.org/visitor_information/Argonne_Cross.html).

<sup>9</sup> Michael Patterson, *The Canadian Cross of Sacrifice at Arlington National Cemetery*, <http://www.arlingtoncemetery.net/canadian-cross.htm> (providing photos); Arlington National Cemetery, *Monuments and Memorials: Canadian*

It is difficult to explain why the presence of a few trees nearby, symbols or items on the crosses, or the presence of secular commemorative items located a substantial distance away on the same property would distinguish the Arlington crosses from the Memorial. As the District Court explained,

Mt. Soledad's memorial display consists of an assortment of elements and symbols, all but one of which are indisputably secular. The cross, having both religious and secular meaning, is ensconced within and immediately surrounded by the array of non-religious, military, and patriotic elements.

*Trunk*, 568 F. Supp. 2d at 1219.

The panel emphasized that the Memorial's cross stands taller than the many surrounding commemorative items, perhaps implying that the outcome would have been different if the cross had been half of its current size. *See slip op.* at 182, 208, n.18, 219-21. The idea that a constitutional issue of such importance would be decided based upon a subjective feeling of whether a commemorative cross is "too tall" is deeply troubling and lacks any connection to the original meaning of the Establishment Clause. Nevertheless, an expressive item's size merely serves to *amplify its existing message*; it does not transform a secular message into a religious message. The Mount Soledad cross conveys a secular message, one that would be the same whether it stood five feet tall or ninety-five feet tall.

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*Cross of Sacrifice (WWI/ WWII/ Korea)*,  
[http://www.arlingtoncemetery.org/visitor\\_information/Canadian\\_Cross.html](http://www.arlingtoncemetery.org/visitor_information/Canadian_Cross.html).

**IV. The Alleged Religious (or Anti-Religious) Motives of Private Individuals Who Donate Monuments and Memorials to Government Actors, or Support Legislation or Litigation, are Irrelevant to a Determination of Primary Purpose and Effect.**

It would be odd indeed if the Establishment Clause effectively prevented religious citizens from participating in the government decision-making process while, at the same time, Article VI of the Constitution ensures that “no religious test shall ever be required as a qualification to any office or public trust under the United States.” *See* U.S. CONST. ART. VI, cl. 3. This, however, is exactly the import of JWV’s argument that “court decisions enjoining the government display of the Cross have been resisted at every turn by religiously motivated individuals and groups. This resistance is probative of religious effect.” JWV Brief at 34.

JWV has repeatedly cited *amicus* ACLJ’s involvement in defending the Memorial as evidence of a primarily religious effect. *Id.* at 36, 44, n.23. The panel accepted JWV’s argument, stating that “Christian advocacy groups like [*amicus* ACLJ] . . . launched national petition campaigns for the Cross . . . . The starkly religious message of the Cross’s supporters would not escape the notice of the reasonable observer.” Slip op. at 213-14. The panel’s acceptance of JWV’s argument is unsupported by the Establishment Clause and, if applied consistently, would exclude many organizations from participation in the legislative and judicial processes while jeopardizing a host of civil rights, public accommodation, and other statutes. It is based upon the faulty premise that a faith-based group’s support

for a legislative or legal position is based primarily upon *religious doctrine*, but this case centers upon *a purely legal question*: whether the Establishment Clause requires the exclusion of an item with alleged religious meaning from public property. Simply put, JWV’s interpretation of the Establishment Clause has “been resisted at every turn” because it is wrong. *See* JWV Brief at 34.

**A. Religiously motivated statements made by individuals in the 1950s are irrelevant to the primary effect of the federal government’s maintenance of the Memorial today.**

A few religiously-themed quotes from individuals who were involved in the process of dedicating the Memorial in 1954 do not translate into a religious purpose or effect conveyed by the federal government’s maintenance of the Memorial in 2011. While the panel implied that such statements drown out the Memorial’s intended secular message of remembrance and solemn appreciation, the Supreme Court recently rejected the argument that a monument displayed by the government necessarily conveys the donors’ intended meaning(s).

In *Pleasant Grove*, the Court noted that “a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument.” 129 S. Ct. at 867. The Court observed that “[b]y accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument’s donor or creator.” *Id.* at 866.

Similarly, the federal government’s maintenance of the Memorial in its present form—including its numerous memorial walls, bollards, plaques, inscriptions, and photographs—does not perpetuate any religious message asserted by an individual in 1954.

**B. The panel’s decision conflicts with settled Establishment Clause principles.**

The District Court correctly rejected JWV’s argument, noting that there is no authority supporting JWV’s position that “a reasonable observer would take into account the views of various citizens or advocacy groups with no power to control the land or what was done with it.” *Trunk v. City of San Diego*, 2007 U.S. Dist. LEXIS 75787, at 5, 7 (S.D. Cal. Oct. 10, 2007). The court stated “that much of the support for the statute was religiously motivated . . . . is unremarkable; lobbying and public advocacy by religious and charitable organizations is altogether common, and in any event cannot be regarded as ‘causing’ Congress to take the memorial.” *Trunk*, 568 F. Supp. 2d at 1208 (citations omitted). In addition, the California Court of Appeals stated in previous litigation involving the Memorial, “we are troubled by the proposition that a government entity or any individual appearing as an attorney before a court, on any issue, may first be screened for their sectarian or nonsectarian background or motives before being allowed to appear as an advocate.” *Paulson v. Abdelnour*, 51 Cal. Rptr. 3d 575, 600 (Ct. App. 2006).

JWV's theory is based upon a misapplication of *Epperson v. Arkansas*, 393 U.S. 97 (1968). A review of legislative history (where appropriate) is necessarily different when a *voter initiative* is involved—as was the case in *Epperson, id.* at 109, n.17—than when a legislature directly enacts a statute, as is the case here. The *Epperson* Court's citation to faith-based advertising campaigns supporting the voter initiative came *after* its conclusion that “[n]o suggestion has been made that Arkansas' law may be justified by considerations of state policy *other than the religious views of some of its citizens.*” *Id.* at 107 (emphasis added). Here, the government has relied upon the statute's text and the Memorial's context, not the religious views of individuals, to demonstrate a secular purpose and effect.

**C. The panel's decision would have wide-ranging implications for numerous federal, state, and local laws.**

Under JWV's unprecedented theory, an Act of Congress could be invalidated simply because religious leaders spoke out in favor of its passage. Throughout American history, however, prominent religious leaders like the Reverend Dr. Martin Luther King, Jr. have galvanized like-minded Americans to support or oppose government policies, often in overtly religious terms. For example, in Dr. King's famous *Letter from Birmingham Jail*, he said,

I am in Birmingham because injustice is here. Just as the prophets of the eighth century B.C. left their villages and carried their “thus saith the Lord” far beyond the boundaries of their home towns, and just as the Apostle Paul left his village of Tarsus and carried the gospel of Jesus Christ to the far corners of the Greco-Roman world, so am I

compelled to carry the gospel of freedom beyond my own home town. Like Paul, I must constantly respond to the Macedonian call for aid.<sup>10</sup>

Just as the Establishment Clause does not disqualify priests, rabbis, and other members of the clergy from holding public office, *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion), it does not give religious citizens an unwanted “King Midas touch” rendering the laws that they actively support unconstitutional.

The absurdity of JWV’s theory is magnified when applied to other contexts. For example, the ADA Amendments Act of 2008, P.L. 110-325, Sept. 25, 2008—which expanded the protections of the Americans with Disabilities Act of 1990—would violate the Establishment Clause under JWV’s theory. Among the legislation’s active supporters were Jewish War Veterans of the USA and dozens of other religiously-affiliated organizations. *Supporters of H.R. 3195 – ADA Amendments Act of 2008*, 154 Cong. Rec. E1447 (July 14, 2008). Many of these organizations expressed their support for the legislation in what JWV would call “stark religious terms.” *See* JWV Brief at 35. For example, a coalition of Jewish organizations sent Members of Congress a letter urging passage of the Act based upon passages from the Torah.<sup>11</sup> Other prominent religious organizations that

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<sup>10</sup> Rev. Dr. Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), <http://www.mlkonline.net/jail.html>.

<sup>11</sup> Religious Action Center of Reform Judaism, *Jewish Coalition Mobilizes for Restoration of Rights for Americans with Disabilities*, Feb. 6, 2008, at <http://rac.org/PrintItem/index.cfm?id=2674&type=Articles>.

supported the Act have explained the duty to help the disabled in expressly religious terms.<sup>12</sup>

Under JWV’s theory, “[t]he nature of [the religious groups that supported the ADA Amendments Act of 2008] and the fact that they lobbied for federal action in religious terms suggest that the purpose of [the Act] was religious.” *See* JWV Brief at 44. Contrary to the panel’s holding, however, the Mount Soledad statute—like the ADA Amendments Act of 2008—is constitutionally sound because its primary purpose and effect are secular. The statutes’ secular goals are not transformed into religious goals simply because religiously affiliated groups were among those who advocated for their enactment. “Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (plurality opinion).

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<sup>12</sup> *See, e.g.*, United Methodist Church, *United Methodist Implementation of Americans with Disabilities Act*, 2004, available at <http://archives.umc.org/interior.asp?ptid=4&mid=6558>; National Council of Churches USA, *Disabilities, the Body of Christ and the Wholeness of Society*, Nov. 11, 1998, at <http://www.nccusa.org/nmu/mce/dis/>.



**CONCLUSION**

For the foregoing reasons, *amici* respectfully request this Court to vacate the panel’s decision and uphold P.L. 109-272.

Dated March 23, 2011

/s/ Jay Alan Sekulow

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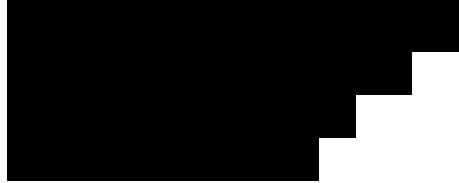
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## CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32 and 9th Cir. R. 29-2, the attached *amici curiae* brief is proportionally spaced, has a typeface of 14 points or more, and contains 4,200 words or less (4,006 words in total).

Dated March 23, 2011

/s/ Jay Alan Sekulow  
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## CERTIFICATE OF SERVICE

I certify that on March 23, 2011, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated March 23, 2011

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