Nos. 08-56415, 08-56436

In the
United States Court of Appeals
for the Ninth Circuit

JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA, INC., STEVE TRUNK, *et al.*,

Plaintiffs-Appellants,

v.

CITY OF SAN DIEGO, *et al.*,

Defendants-Appellees.

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.)

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF APPELLEES, SEEKING AFFIRMANCE OF THE DISTRICT COURT BELOW

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CORPORATE DISCLOSURE STATEMENT OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 26.1, *Amicus Curiae* American Civil Rights Union states that it is a non-profit, non-stock corporation with no parent corporation, and no publicly held corporation owns 10% or more of its stock.

AUTHORITY OF AMERICAN CIVIL RIGHTS UNION TO FILE *AMICUS CURIAE* BRIEF

All parties have consented to the filing of this brief.

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INTEREST OF AMICUS CURIAE AMERICAN CIVIL RIGHTS UNION

The American Civil Rights Union (ACRU) is a nonpartisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University Walter Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn Laforce.

The ACRU's interest in this case is to ensure full protection for freedom of religion under the First Amendment, and that the Establishment Clause is not interpreted beyond its proper bounds to restrict religious freedom and speech. All parties have consented to the filing of this brief.

ARGUMENT

The text of the Constitution itself, and the historical context informing the meaning of the words used, are the primary governing sources for interpreting the rights of the American people recognized in our founding document. A recent example of such fundamental Constitutional analysis is provided in *District of Columbia v. Heller*, 554 U.S. __ (2008), and in the opinion of the lower court affirmed in *Heller*, *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).

We submit that this Court should return to the fundamentals in regard to the text and history of the Establishment Clause as well. Judge Burns did as good a job as possible in his opinion below with the reigning analysis from *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Van Orden v. Perry*, 545 U.S. 677 (2005), and we endorse his reasoning in full. But we submit that these old standards involve more subjective labeling than analysis in deciding what the principal and primary purpose and effect of a challenged policy or action is, or what entanglement is "excessive", or what involves an "endorsement" of religion rather than an accommodation, or the message sent by a long standing monument that contains no words and does not talk. Several members of the Supreme Court itself have expressed similar

complaints about these old standards over the years.[1]

What is needed are clear, distinguishing, legal principles by which alleged Establishment Clause violations can be measured. We submit that the text and history of the Establishment Clause provides precisely such principles. As Justice Brennan said in *Abington School District v. Schempp*, 374 U.S. 203, 294 (1963)(concurring), "The line we must draw between the permissible and the impermissible is one which accords with history and

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[1] *Wallace v Jaffree*, 472 U.S. 38, 110-11 (1985)(Rehnquist, J., dissenting)(providing examples of the difficulty the Court has had in "making the *Lemon* test yield principled results," adding that the *Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results."); *Committee for Public Educ. v. Regan*, 444 U.S. 646, 662 (1980)(Under *Lemon* the Court has "sacrifice[d] clarity and predictability for flexibility"); *County of Alleghany v. American Civil Liberties Union*, 492 U.S. 573,656 (1989) (Kennedy, J. concurring in the judgment and dissenting in part)("Substantial revision of our Establishment Clause doctrine may be in order"); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985)(Justice O'Connor dissenting)(expressing "doubts about the entanglement test"); *Roemer v. Board of Public Works*, 426 U.S. 736, 738 (1976)(White, J., concurring in the judgement)("I am no more reconciled now to *Lemon I* than I was when it was decided….The threefold test of *Lemon I* imposes unnecessary, and…superfluous tests for establishing [an Establishment Clause violation]; *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987)(Scalia, J. dissenting)("pessimistic evaluation…of the totality of *Lemon* is particularly applicable to the 'purpose' prong."); *See also* Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 316-317 (1986); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pit. L. Rev. 673, 681 (1980)(noting "the absence of any principled rationale" in the Court's Religion Clause jurisprudence); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 20 (1978).

faithfully reflects the understanding of the Founding Fathers."

III. The Establishment Clause Only Prohibits Government Policies or Actions Involving Coercion.

A. The Text and Associated History of the Establishment Clause Show That Coercion Is a Necessary Element of An Establishment Clause Violation.

The text of the First Amendment states, "Congress shall make no law…respecting an Establishment of Religion…." That phrase "Establishment of Religion" had a particular meaning at the time of the Constitution.

The countries of Europe all had "religious establishments", which meant official government religions enforced by laws requiring attendance at the official church, regular contributions to it, and other preferences in law for members of that church. These establishment policies all involved government *coercion* to force citizens to support the one favored church, whether Catholic, or Baptist, or Puritan, or whatever.

Almost all of the American colonies had such establishments as well, with legal compulsion or coercion as their hallmark. 6 W. & A. Durant, *The Story of Civilization* 208-220, 501-506, 523-601, 631-641 (1957); L. Pfeffer, *Church, State and Freedom* 20-30 (rev. 1st ed. 1967). Professor Joseph Brady, in a seminal historical work on the Establishment Clause, quotes historian Marcus W. Jernegan regarding the typical laws involved in state

religions:

> "The general rule in those colonies having an established church was to require dissenters to support it by paying tithes or taxes, and also to attend the official church services under penalty. They were also frequently required to submit to various tests or oaths, and to subscribe to the creeds and catechisms of the established church. Sometimes the right to settle in a colony, or the privilege of naturalization, or citizenship, or the right to vote and hold office, depended on submission to religious tests."[2]

See also L. Levy, *The Establishment Clause: Religion and the First Amendment* 4 (1987).

In Virginia, the home of Jefferson, Madison, and Washington, the Anglican Church was adopted as the Established church in the Colony's original charter in 1606. That charter required all ministers in the Colony to preach Christianity according to Anglican doctrines. L. Levy, *supra*, n.13, at 3. In 1611, Virginia required all citizens to attend church and observe the Sabbath, and enacted severe punishments for blasphemy, sacrilege, and criticism of the doctrine of the Trinity. *Id.* The law also required all citizens to embrace Anglican doctrine, and to pay for the maintenance of Anglican churches and ministers. *Id.*, at 3-4. Every clergyman was required to accept the Anglican Thirty-Nine Articles of Faith, and every church was required to follow the liturgy of the Church of England according to the Anglican Book

[2] J. Brady, *Confusion Twice Confounded: The First Amendment and the Supreme Court* 6-7 (1954).

of Common Prayer. *Id.* at 4.

These practices, and anything like them involving coercion in regard to religion, are what the framers meant to prohibit in adopting the Establishment Clause, for this is what an Establishment of Religion meant at the time. They did not mean, however, to prohibit any voluntary, public, religious speech, or religious expression or symbolism, which does not involve any such coercion, as we will see further below.

The philosophy of the framers of our constitution was drawn heavily from highly influential British philosopher John Locke, who recognized this distinction, writing,

> "The care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind….Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgment that they have framed of things.
>
> "It may indeed be alleged that the magistrate may make use of arguments…and procure their salvation. I grant it; but this is common to him with other men. Every man has commission to admonish, exhort, convince another of error, and, by reasoning, to draw him into truth; but to give laws, receive obedience, and compel with the sword, belongs to none but the magistrate. And upon this ground, I affirm that the magistrate's power extends not to the establishing of any articles of faith, or forms of worship, by the force of his laws. For the laws are of no force at all without penalties, and penalties in this case are absolutely impertinent, because they are not proper to convince the mind.

Locke, *A Letter Concerning Toleration* (1684), in 5 *The Founder's Constitution* 52, 53 (P. Kurland and R. Lerner, eds. 1987)(hereinafter "Kurland").

St. George Tucker in *Blackstone's Commentaries* (1803) later recognized the same distinction between unjustifiable religious coercion and unobjectionable persuasion or expression or recognition of religion, saying that "religion, or the duty we owe to our creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence." Kurland, *supra*, p. 14, at 96. He continued,

> "In vain, therefore, may the civil magistrate interpose the authority of human laws, to prescribe that belief, or produce that conviction, which human reason rejects….The martyr at the stake, glories in his tortures, and proves that human law may punish, but cannot convince…."

Id. at 96. Tucker made a careful distinction, however, saying,

> "Statesmen should countenance [genuine religion] only by exhibiting, in their own example, a conscientious regard to it in those forms which are most agreeable to their own judgments, and by encouraging their fellow citizens to do the same.

Id. at 97.

This same distinction is found as well throughout the writings of Jefferson and Madison. In 1776, Jefferson led the adoption of Virginia's Declaration of Rights. The religious freedom clause in that Declaration stated,

> "That religion, or the duty we owe to our creator, and the manner of discharging it can be directed only by reason or conviction, *not by force or violence;* and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience…." (emphasis added).

Virginia Declaration of Rights, Section 16 (June 12, 1776), Va. Const. art. I, Sect. 16, in Kurland, *supra*, p. 14, at 70.

After adopting this provision in the state constitution, the Virginia Assembly repealed the prior laws originally adopted by the English Parliament compelling observance of and support for the established English church. But Jefferson insisted as well that the Assembly also repeal its own prior Acts that coerced conformity to the Christian religion by disqualifying dissenters from holding public office and imposing criminal penalties on them. In a famous passage, Jefferson said,

> "The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws….The legitimate powers of government extend to such acts only as are injurious to others. *But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg....*Reason and free inquiry are the only effectual agents against error….It is error alone which needs the support of government. Truth can stand by itself. Subject opinion to coercion: Whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion?...What has been the effect of coercion? To make one half the world fools, and the other half hypocrites….[W]e cannot effect [truth] by force. Reason and persuasion are the only practicable instruments." (emphasis added).

Notes, in Kurland, *supra,* p. 14, at 79-80.

In 1779, Jefferson drafted his "Act for Establishing Religious Freedom," which again focused on coercion as the problem, distinguishing speech and expression. The Act stated,

> "[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or beliefs; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."

Virginia Act for Establishing Religious Freedom, in Kurland, *supra*, p. 14 at 85. Indeed, the Preamble to the Act suggests that its principles are divinely inspired, saying,

> "Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy or meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do….

Id., at 84. The Supreme Court has stated that this bill and the history of its ultimate enactment in 1786 by the Virginia General Assembly is "particularly relevant in the search for the First Amendment's meaning." *McGowan v. Maryland*, 366 U.S. 420, 437 (1961).

And from its earliest beginnings to this very day, our nation in practice has continued to recognize this distinction between religious

coercion and mere expression. The Declaration of Independence appeals "to the Supreme Judge of the world" and to "the laws of nature and of nature's God," and proclaims that all men "are endowed by their creator with certain inalienable rights." In his first inaugural address, George Washington sought the blessings of God, "that Almighty Being" and "the Great Author of every private and public good."[3] Washington, in fact, said "it would be peculiarly improper to omit in [his] first official act [his] fervent supplications to that Almighty Being who rules over the universe…"[4] Almost without exception, Washington's successors in office have included in their addresses statements of religious sentiment and supplications for God's assistance in discharging their official obligations.

The very next day after the House of Representatives of the First Congress voted to adopt the Establishment Clause, the House adopted a resolution requesting President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging the many and signal favors of Almighty God." *Lynch v. Donnelly*, 465 U.S. 668, 675, n.2 (1984). Washington responded by proclaiming November 26, 1789, as a day of thanksgiving in which to offer "our prayers and applications to the

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[3] George Washington, First Inaugural Address, April 30, 1979, in *Inaugural Addresses of the Presidents of the United States from George Washington, 1789 to George Bush, 1989* at 1,2 (Bicentennial ed. 1989).
[4] *Id.*

Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions." *Id.* This tradition, too, has been continued throughout our history by virtually every President. *Id.*

It was the First Congress also that adopted the practice of opening daily sessions of the House and Senate with prayers by an official chaplain. *Marsh v. Chambers,* 463 U.S. 783, 787-788 (1983). Madison was a member of the House Committee that proposed the practice, and he voted in favor of it. *Id.* at 788 n.8. This practice has also continued to this very day.

Congress's early chaplains even conducted Sunday worship services in the hall of the House of Representatives, and both Jefferson and Madison attended these services while serving as President. 1 Stokes, *Church and State in the United States* 499-507.

Moreover, at least since Chief Justice John Marshall, the very sessions of the U.S. Supreme Court have been opened with a crier respectfully requesting "God Save the United States and this Honorable Court." *Engel v. Vitale,* 370 U.S. 421, 446 (1962)(Stewart, J., dissenting).

Our nation's leaders from the framers to this day engaged in these practices without any concern that they somehow violated the Establishment Clause because they did not involve any coercion, only expression. Those attending the inaugural ceremonies of our Presidents were not required to

accept or support the religious sentiments those Presidents expressed. No one was required to give thanks and say prayers on days designated for that purpose by our Presidents, from Washington to Roosevelt to Reagan. No one was every required to attend the chaplain's invocations opening sessions of Congress, nor to accept or support the religious beliefs expressed by the chaplain.

On this basis, we urge this Court to adopt a new standard evaluating alleged Establishment Clause violations based on whether the challenged policy, practice, or action involves coercion in regard to religion.

B. The Coercion Standard Is Practical and Workable

The coercion standard for Establishment Clause violations would not be a wooden, inflexible, mechanistic rule of law. Whether coercion exists in a particular circumstance would depend on the facts of each case as well. For example, the coercion standard would not require any change in decisions regarding school prayer in elementary school or secondary schools. They youth of the students and the social pressures involved easily satisfy a flexible and realistic vision of coercion. Or a prayer at an elementary or secondary school graduation ceremony can easily leave a student feeling compelled to participate in an effective religious ceremony contrary to their will. *Lee v. Weisman*, 505 U.S. 577 (1992).

But in a case involving whether a student religious club can be recognized as an official school club on the same terms and conditions as all other school clubs, the coercion standard quickly makes clear that there is no coercion involved in allowing the club to be so recognized. To the contrary, coercion is more likely present in excluding the club on the basis of religion, recalling the old Establishment of Religion practices of excluding people from public offices and government benefits based on their religious views.

Moreover, outside of school prayer, the coercion standard would likely result in a finding of no establishment in almost all other cases involving mere expression rather than coercion. For example, a newly elected President saying a prayer in his Inaugural address would not involve coercion, nor would a Presidential Proclamation of a Day of Thanksgiving and Prayer, nor would the chaplains praying at the start of each Congressional day, where adults obviously from many backgrounds are free to accept or reject what they hear, or forego attendance at any prayer altogether. Mere speech or expression by itself does not involve coercion, precisely for these reasons. In Jefferson's terms, the practice in these cases "neither picks my pocket nor breaks my leg."

The same would be true in cases involving mere symbolism, recognition of traditions, or expression, such as Christmas holiday displays,

or monuments or paintings referencing religious subjects such as the Ten Commandments, or Moses receiving the law from God. Of course, the facts of a particular case can still raise the issue of coercion.

Moreover, taxation forcing contribution for a program targeted specifically to aid religion would be unconstitutional, just as the framers strongly objected to taxation specifically to aid religion in their time. Such programs are too similar to the mandatory financial support to established churches under the establishment of religion practices the framers intended to ban.

But allowing churches to participate in general secular programs on the same terms as everyone else would not be prohibited. For example, a voucher program aiding all schools, public and private, religious or non-religious, that allowed religious schools to participate on the same terms and conditions as everyone else, would not involve an unconstitutional establishment of religion. Such a program would involve compelling aid to education, not religion. Indeed, excluding some schools because of their religion would raise a coercion issue, analogous to the historical establishment practice of denying access to government benefits based on religious views.

IV. The Cross at the Veterans Memorial on Mt. Soledad Is Not Unconstitutional Because It Does Not Involve Coercion.

With a clear, simple standard rooted in the text of the Constitution and its surrounding history, this case is easily resolved. The cross at the federal Veterans' Memorial atop Mt. Soledad does not involve an unconstitutional establishment of religion because it does not involve coercion of any sort. It just sits there, without any specified message. In Jefferson's illuminating words, again, "It neither picks my pocket nor breaks my leg."

Each visitor to the memorial is free to decide what the cross, and the memorial overall, means to them. They can take the cross as an expression of reverence for the nation's veterans, including those who suffered the supreme sacrifice. They can take it as an expression of hope that these lost loved ones will be seen again in some unknown future. They can take it as an expression of some religious message. However each visitor interprets the cross, they are also free to then accept or reject the message that they each discern. In context, however, no reasonable visitor would believe that the cross means the federal government is endorsing the Christian religion, or a particular variant of it, such as Catholicism.

In our daily lives, we often see or hear the expression of messages with which we disagree, sometimes strongly, or otherwise find objectionable or inappropriate. The national political conventions of the two major parties

are broadcast on the networks, with something surely to offend everyone. But without coercion, the Establishment Clause does not provide a foundation for the courts to prohibit any speech, expression, or symbolism. The public still has democratic control over the nation's leaders, and can exercise its will over the messages, expression, or symbolism included in the nation's veterans memorials through that means.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully requests this Court to affirm the decision of the court below.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2009, I electronically filed the foregoing BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF APPELLEES, SEEKING AFFIRMANCE OF THE DISTRICT COURT BELOW with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Certificate of Compliance Pursuant to Fed. R. Civ. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Numbers 08-56415 & 08-56436

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

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