

No. 08-472

In The
Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, et al.,
Petitioners,

v.

FRANK BUONO,
Respondent.

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

**BRIEF AMICI CURIAE OF CITIZENS UNITED,
CITIZENS UNITED FOUNDATION, AND
RENEWING AMERICAN LEADERSHIP
IN SUPPORT OF PETITIONERS**

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**IDENTITY AND INTEREST
OF AMICI CURIAE¹**

Citizens United (“CU”), a Virginia corporation, is a nonprofit educational and advocacy membership organization exempt from federal income taxation pursuant to section 501(c)(4) of the Internal Revenue code (“IRC”). CU is dedicated to certain important principles, including those of limited government, national sovereignty and rights secured under the United States Constitution, and it presents and communicates its views and the views of its members on legislative and public policy issues to federal, state and local government officials, as well as the general public. Citizens United Foundation (“CUF”), a Virginia corporation, is a nonprofit, nonpartisan, educational organization exempt from federal income taxation pursuant to IRC section 501(c)(3). CUF conducts research and informs and educates the public on a variety of issues of national importance, including issues related to belief in God, the role of traditional families and religious traditions in American society, the original intent of the Framers, and the correct interpretation of the United States Constitution. This case is of particular importance to CU and CUF because it involves the very survival of any veterans’

¹ Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief. These *amici curiae* requested and received the written consent of the parties to the filing of this *amicus curiae* brief, in the form of letters and/or emails from counsel of record for the respective parties. Such written consent has been submitted for filing to the Clerk of Court.

memorial on government land which can be linked to any kind of religious symbolism, however remote.

Renewing American Leadership (“ReAL”) is a 501(c)(3) organization that promotes and preserves America’s history and Godly heritage. ReAL was founded by Newt Gingrich, a long-time member of the U.S. House of Representatives, who served as Speaker of the House from 1995-1999. ReAL seeks to protect symbols of faith. Filing the amicus brief in this case fulfils ReAL’s mission of defending religious freedom. Additionally, ReAL hopes to help protect the veterans’ memorial in question in the Mojave Dessert for future generations.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals did not apply the appropriate standard in determining that the land exchange authorized by Congress to remedy the alleged Establishment Clause violation would nonetheless still violate the injunction issued by the district court. While the court of appeals did not explicitly state that the Act authorizing the land exchange is unconstitutional under the Establishment Clause, such a holding is inherent in the court of appeals decision. The decision rendered by the court of appeals did not follow clear precedent for determining whether an Establishment Clause violation exists as set forth recently in *Van Orden, infra.*, or earlier in *Lemon, infra.* Under either standard, it is clear that the Act authorizing the land exchange did not violate the injunction in this case and satisfies the Establishment Clause. The court of appeals, instead, purported to apply a standard established by the Seventh Circuit to evaluate the land

exchange in question. In so doing, it not only misapplied the standard set forth by the Seventh Circuit, but also ignored key considerations in determining whether an Establishment Clause violation exists.

ARGUMENT

I. The Court of Appeals Should Have Applied The Analysis Used In *Van Orden* to Evaluate The Act Authorizing The Land Exchange.

This case initially began as an Establishment Clause challenge to the Mojave Desert Veterans Memorial (“the Memorial”). The Establishment Clause as contained in the First Amendment of the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion.” U.S. Constitution Amend. I. The Memorial is in the shape of a cross and is located in the Mojave National Preserve (the “Preserve”), which is owned by the federal government. During the pendency of this case, Congress, recognizing the importance of having a government which is not too entangled in religion as required by the Establishment Clause, but also recognizing the need to preserve veterans’ memorials, devised what seemed to be a simple solution to the problem: convey the land on which the Memorial sits to the Veterans of Foreign Wars (“VFW”), a private entity, in exchange for land of equal value. Congress did so by enacting Department of Defense Appropriation Act, 2004, Pub. L. No. 108-87, § 8121(a) and (b), 117 Stat. 1100 (the “Act”). The Act authorized a land exchange between the government and the VFW so that the land on which the Memorial is located could be exchanged for other land of equal value in the

Preserve owned by private individuals. The district court held that the land exchange would not remedy the Establishment Clause violation, and enjoined the government from carrying out the land exchange.

The court of appeals upheld the decision rendered by the district court. The court of appeals held that even if the land was transferred in accordance with the Act, such a transfer would not cure the Establishment Clause violation and the government would continue to violate the injunction issued by the district court. Thus, in essence, the court of appeals determined that the Act violated the Establishment Clause.² In making such a determination, the court of appeals failed to follow law established by this Court in *Van Orden, infra.* and *Lemon, infra.* to determine if the statute violates the Establishment Clause. Rather, the court of appeals evaluated the Act authorizing the land exchange under a standard established in the Seventh Circuit, without taking into account all of the proper considerations necessary to determine whether an Establishment Clause violation exists.

² Although the court of appeals framed the issue on appeal as whether the Act violated the district court's injunction, the court of appeals' analysis focused on whether the Act violated the Establishment Clause. *Buono v. Kempthorne*, 527 F.3d 758, 778-79 (9th Cir. 2008) (stating that "[i]n *Buono II*, we noted that 'the presence of a religious symbol on once-public land that has been transferred into private hands may still violate the Establishment Clause.' But we left for another day the question of 'whether a transfer completed under section 8121 would pass constitutional muster.' In considering that question, we examine both the form and substance of the transaction to determine whether the government action endorsing religion has actually ceased." (citations omitted)).

This case is similar to *Van Orden* as both involve Establishment Clause challenges to monuments. *Van Orden v. Perry*, 545 U.S. 677 (2005). The monument in *Van Orden* was on display on the grounds of the Texas State Capitol and consisted of a monolith with several symbols of religious significance, the most prominent being the text of the Ten Commandments. The monument was given to the State by the Fraternal Order of Eagles, a private civic organization, in order to “highlight the Commandments’ role in shaping civic morality as part of the organization’s efforts to combat juvenile delinquency.” *Van Orden*, 545 U.S. at 701. In *Van Orden*, just as in this case, the monument had stood for decades without challenge until a citizen who encountered the monument brought suit seeking a declaration that the monument violated the Establishment Clause and an injunction for its removal.

The primary test utilized by this Court prior to *Van Orden* to evaluate possible Establishment Clause violations is the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). However, as noted by Chief Justice Rehnquist in *Van Orden*, the Court has not applied the *Lemon* test in every instance when an Establishment Clause challenge has been raised. *Van Orden*, 545 U.S. at 686. This Court declined to use the *Lemon* test in evaluating whether the monument at issue in *Van Orden* violated the Establishment Clause and stated: “[W]e think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s history.” *Id.*

In determining the standard to use to evaluate whether a monument violates the Establishment Clause, this Court wisely acknowledged the need to recognize the “strong role played by religion and religious traditions throughout our Nation’s history” while also being cognizant of the fact that “governmental intervention in religious matters can itself endanger religious freedom.” *Id.* at 683, *citing, School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963). The Court stated that “our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens.” *Id.* at 683. Additionally, this Court has acknowledged the role of religion in our history and government. *Id.* at 212; *Engel v. Vitale*, 370 U.S. 421, 434 (1962).

In *Van Orden*, this Court recognized that the monument clearly had religious significance as it contained the text of the Ten Commandments. *Van Orden*, 545 U.S. at 690. However, this Court stated that “simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.” *Id.*, *citing, Lynch v. Donnelly*, 465 U.S. 668, 680, 687 (1984); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *McGowan v. Maryland*, 366 U.S. 420, 437-440 (1961); *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 676-678 (1970). Justice Scalia stated in his concurring opinion in *Van Orden* “that there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgement, or, in a nonproselytizing manner, venerating the Ten Commandments.” *Van Orden*, 545 U.S. at 692. This Court in *Van Orden* focused moreso on the use of the text of the Ten Commandments

rather than any religious symbolism that might be associated with the text. In so doing, the Court recognized that even though the Ten Commandments undoubtedly have religious significance, the text used in the monument at issue had a more passive use as it relates to religion rather than a more primary use of supporting a particular religion. *Van Orden*, 545 U.S. 677.

The standard as espoused in *Van Orden*, is the most appropriate standard to evaluate whether a monument violates the Establishment Clause and should have been used by the court of appeals to evaluate the Act authorizing the land exchange and the continued display of the Monument at issue in this case. The sole purpose of the Act authorizing the land exchange was to preserve the Memorial and to remedy the alleged violation of the Establishment Clause. The purpose of the Memorial is to honor all veterans of World War I irrespective of religion. The purposes of the Act and the Memorial are far more passive than the purpose associated with the memorial in the *Van Orden* case, which was “to highlight the Ten Commandments’ role in shaping civic morality, as part of the organization’s efforts to combat juvenile delinquency.” *Id.* at 701. Thus, in applying the reasoning set forth in *Van Orden*, the purpose of the Act in authorizing the land exchange to preserve the veteran’s memorial and the continued presence of the cross on the transferred land is clearly passive as it relates to religion.

Further, this country has a rich history for honoring its veterans. There are numerous veterans memorials located in various places throughout this country. Many of them are located on government

land and contain religious text or symbolism (e.g. various monuments in Arlington Cemetery, Chaplain's Hill Monument, the Confederate War Memorial, the Spanish-American War Monument, the Space Shuttle Challenger Memorial, and the Peace Monument located in our Nation's capitol). The history of the Act, the Memorial, and veterans' memorials in general, are strong evidence of the passive nature of the Act. The purpose of the Act authorizing the land exchange clearly satisfies the "passive monument" standard.

Justice Breyer in his concurring opinion in *Van Orden*, referred to the memorial in that case as a borderline case. *Van Orden*, 545 U.S. at 700. In issuing his concurrence, Justice Breyer noted that "the circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter [referring to a secular message], nonreligious aspects of the tablets message to predominate. And the monument's 40-year history on the Texas state grounds indicates that that has been its effect." *Van Orden* 545 U.S. at 701.

The message associated with the Act authorizing the land exchange and the continued presence of the cross on the land is far more subdued than the message associated with the memorial in *Van Orden*. First, neither the Act authorizing the land exchange nor the Memorial at issue in this case contain any text which would indicate that there is any religious purpose associated with the transfer of the land or the Memorial itself. The language of the Act clearly indicates that its purpose is a secular one, which is to preserve the Memorial. Likewise, the Memorial itself contains no text which has any religious significance whatsoever. Earlier in its existence, the Memorial had

two signs along side it which read: “The Cross, Erected In memory of the Dead of All Wars,” and “Erected 1934 by Members of Veterans of Foreign [sic] Wars, Death Valley post 2884.” Pet. App. 56a. Although those signs are no longer present, their presence in the past and the text inscribed on them is a clear indication of the Memorial’s secular purpose and the secular purpose of the Act authorizing the land exchange.

In determining that the monument in *Van Orden* did not violate the Establishment Clause, Justice Breyer noted that the monument had been in existence for 40 years prior to any challenge. *Van Orden*, 545 U.S. at 703. According to Justice Breyer, this was strong evidence of the fact that the nonreligious aspects of the monument predominated. *Id.* The Memorial at issue in this case was in existence for approximately 70 years before it was ever challenged. Under Justice Breyer’s analysis, this is even a stronger indicator of the secular nature of the Memorial than that which was associated with the memorial in *Van Orden*.

Additionally, Justice Breyer looked at the setting of the monument in *Van Orden* noting that the monument is located in a large park with 17 monuments and 21 historical markers. *Van Orden*, 545 U.S. at 626. Justice Breyer stated that “the physical setting of the monument, moreover, suggests little or nothing of the sacred.” *Id.* While the Monument in this case is not in close vicinity to other monuments and historical markers, the same reasoning used by Justice Breyer concerning the monument in *Van Orden* can be applied to the Monument in this case, because it is located in a

remote location in the desert and contains no indication that it has a religious purpose other than the fact that it is in the shape of a cross. Just as in *Van Orden*, the setting of the Monument does not readily lend itself to religious activity.

The standard used by this Court in *Van Orden* to evaluate whether a monument violates the Establishment Clause strikes the appropriate balance between the competing interests of recognizing the role of religion in our history and government while guarding against excessive government entanglement with religion. There are numerous monuments in this country located on government land. Each, obviously, has significant historical significance. Many of them also contain representations of religious significance. A test which does not consider the passive nature of such monuments puts a large portion of this country's historical monuments in jeopardy.

Based upon the foregoing, it is clear that the Act which allowed for the land exchange, and the continued display of the Memorial on the land meets the criteria established by the majority in *Van Orden* and does not violate the Establishment Clause.

II. The Act Authorizing The Land Exchange Even If Evaluated Under The *Lemon* Test Does Not Violate The Establishment Clause.

As mentioned previously, the standard which has been often utilized in the past to evaluate whether an Establishment Clause violation exists is the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* test consists of three prongs: (1) whether the government activity in question has a secular purpose,

(2) whether the activity's primary effect advances or inhibits religion, and (3) whether the government activity fosters an excessive entanglement with religion. *Id.* at 612-13. If the State action fails to satisfy any of these prongs, it violates the Establishment Clause. *Id.* The *Lemon* test is more formulaic than the test utilized by this Court in *Van Orden*, but even under the *Lemon* test, the Act authorizing the land exchange, and the continued presence of the cross on the land conveyed to the VFW still does not violate the Establishment Clause.

A. The Act Authorizing The Land Exchange Has A Secular Purpose.

The Act authorizing the land exchange served the secular purpose of preserving the Memorial which commemorates the service of all veterans. In determining whether government action affecting a religious symbol has a secular purpose, a government's characterization of its purpose is entitled to deference. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

There is no language in the Act, which suggests that it does not have a secular purpose. The Act provides that the Secretary of the Interior shall convey to the VFW "a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by Section 8137 of the Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, Div. A. § 8137(a), 115 Stat. 2278) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war," in exchange for a privately owned five-acre parcel of land elsewhere in

the Preserve. Department of Defense Appropriation Act, 2004, Pub. L. No. 108-87, § 8121(a) and (b), 117 Stat. 1100. It is clear by the language contained in the Act that its purpose is purely a secular one. The mere fact that the Memorial which sits on the land is in the shape of a cross does not make the purpose of the Act a religious one or establish the existence of a violation of the Establishment Clause. *Van Orden*, 545 U.S. at 743. The purpose of government action and therefore the existence of government neutrality is discerned from its text, structure, purpose and history as well as the body of evidence contained in the record. *Paulson v. Abdelnour*, 145 Cal. App. 4th 400 (2006), *citing*, *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 861, 868 (2005).

In order to preserve the Memorial, the government chose to authorize a land exchange and relinquish ownership of the Memorial rather than remove it. This scenario is similar to the scenario in the *Mercier* case in the Seventh Circuit involving a Ten Commandments monument in a public park. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005). The City defendant in that case chose to sell the monument back to the private party that donated it rather than remove it. *Id.* The court stated that “while removal was an option, so also was the sale. By selling the Monument site to end a perceived endorsement, the City exercised an option that served a secular purpose.” *Mercier*, 395 F.3d at 705. In this case, the government when faced with an Establishment Clause challenge, chose to arrange for a land exchange rather than remove the Memorial. Such a choice, and thus the Act, served a secular purpose, similar to *Mercier*.

B. The Primary Purpose of The Act Authorizing The Land Exchange Does Not Advance Or Inhibit Religion.

The Act authorizing the land exchange and the continued presence of the cross on the land transferred to the VFW does not advance or inhibit religion. In order to make such a determination one must not focus on the intent of the government creating the Act authorizing the land transfer, but whether a reasonable person, apprised of the circumstances surrounding the sale, would conclude that the sale amounted to an endorsement of religion. *Mercier*, 395 F.3d at 705, *citing*, *Lynch*, 465 U.S. at 690; *Books v. City of Elkhart, Indiana*, 235 F.3d 292, 304 (7th Cir. 2000); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000). Just as in *Mercier*, if the history of the Memorial is considered along with the events leading up to the passage of the Act in order to save it, a reasonable person would understand the government's desire to preserve the Memorial rather than allow its removal. *Mercier*, 395 F.3d at 705. The government attempted to transfer ownership of the Memorial back to the VFW, the original donor, similar to *Mercier* where the monument was sold back to the original donor. The VFW was the logical purchaser, just as the original donor in *Mercier* was the logical purchaser. *Id.* Still further, the Memorial is located in the Preserve in a location which is not near any public schools, government buildings, or any public structure. Although the Preserve is on government land, there is also land owned by private individuals located in the Preserve. These facts would indicate that a reasonable person would understand that the Act authorizing the land exchange and the continued presence of the Memorial on the land does

not serve to advance or inhibit religion, but rather has the purpose of preserving the Memorial which honors all veterans.

C. The Act Authorizing The Land Transfer Does Not Foster An Excessive Entanglement With Religion.

In evaluating whether a government act constitutes excessive entanglement with religion, the Court looks to “the character and purposes of the institutions benefited, the nature of the aid provided by the government, and the resulting relationship between the government and the religious authority.” *Paulson*, 145 Cal. App. 4th at 431, *citing*, *Lemon*, 403 U.S. at 613.

One of the main points emphasized by the court of appeals was that even if the land exchange was effectuated, the government involvement with the Memorial would still be excessive. The court of appeals’ position is clearly not supported by the facts surrounding the land exchange. First, the Act transfers the land on which the Memorial sits to the VFW in exchange for land of comparable value. The exchange was a fair exchange. One of the focuses of the court of appeals was that the Act provided that the government would have a reversionary interest in the property exchanged. While the Act provides that the property would revert back to the government in the event that it is no longer used as a war memorial, this is not significant enough to suggest excessive involvement by the government. The government is certainly not prohibited by the Establishment Clause from encouraging the continued existence of veterans’ memorials. An important point to note here is that

language contained in the Act does not make reference to or require the VFW to maintain the cross as the Memorial. It only requires the VFW to maintain the property as a war memorial. Further, in examining the relationship between the government and the VFW as a result of the Act, there simply is no relationship between the parties other than parties engaging in a transaction concerning the land exchange. There is nothing in the Act which would suggest a continuing relationship once the land has been exchanged. Still further, the VFW is not a religious organization, but rather one that is committed to serving all veterans.

What is clear concerning the land exchange authorized by the Act is that once the land is transferred to the VFW, a private entity, it will own the land and be responsible for maintaining the Memorial in the manner it deems appropriate. The government will have little, if any involvement with the Memorial once the land exchange is consummated. Therefore, the Act which authorized the land exchange does not foster an excessive entanglement with religion.

Based upon the foregoing, it is clear that the Act which allowed for the land exchange, and the continued display of the Memorial on the land meets the criteria set forth in the *Lemon* test and does not violate the Establishment Clause.

CONCLUSION

For the foregoing reasons, *amici curiae* Citizens United, Citizens United Foundation, and Renewing American Leadership respectfully submit that the

judgment of the court below should be reversed and this case remanded with instructions to dismiss.

Respectfully submitted,

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