

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
AMERICAN HUMANIST ASSOCIATION,
THE AMERICAN ETHICAL UNION,
ATHEIST ALLIANCE INTERNATIONAL,
MILITARY ASSOCIATION OF ATHEISTS
AND FREETHINKERS,
SECULAR STUDENT ALLIANCE AND
SOCIETY FOR HUMANISTIC JUDAISM
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICI CURIAE¹

This *amici curiae* brief in support of the Respondent is being filed on behalf of the American Humanist Association, The American Ethical Union, Atheist Alliance International, Military Association of Atheists and Freethinkers, Secular Student Alliance and Society for Humanistic Judaism, comprising a diverse array of secular and religious organizations that advocate religious liberty and offer a unique viewpoint concerning the history of religious freedom in the United States of America.

Amici feel that this case addresses core Humanist concerns about the use of inherently religious symbols as memorials on public lands. Many of *amici's* members who visit city, state and federal parks are especially concerned about the outcome of this case. *Amici* wish to bolster the principle of separation of government from religion in order to prevent their own disenfranchisement as well as to best preserve religious liberty in America.

¹ *Amici*, identified in Appendix I, file this brief with the consent of all parties. Copies of the consent letters are being filed herewith. No counsel for any party in this case authored in whole or in part this brief. No person or entity, other than *amici*, their members or their counsel made a monetary contribution for the preparation or submission of this brief. The *amici* have no parent corporations, and no publicly held companies own 10% or more of their stock.

SUMMARY OF ARGUMENT

The Establishment Clause² prohibits the federal government from advancing religion, either by preferring one religion over another or by preferring religion over nonreligion.³ The presence of the Sunrise Rock cross on public property in the Mojave National Preserve (the “Preserve”) violates both prohibited preferences.

Congress intentionally violated these constitutional commands when it passed legislation authorizing the transfer of ownership of the land beneath the cross to a private party with full knowledge that there was an existing court order requiring removal of the cross. The sole purpose of Congress’s act was to maintain the religious symbol

² U.S. Const., amend I (“Congress shall make no law respecting an establishment of religion . . .”).

³ See *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.”); *Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (“The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no religious favoritism among sects or between religion and nonreligion.”); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.”); *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (“The touchstone for our analysis is the principle that the ‘First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion.’” (quoting *Epperson*, 393 U.S. at 104)).

of the dominant religion in the United States and thereby cast as outsiders persons of other religions and of no religion.

The People of the United States are entitled to strict adherence by their branches of government to the letter and spirit of the Establishment Clause, which prohibits government endorsements of religion. Accordingly, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

ARGUMENT

I. THE COURT HAS LONG RECOGNIZED THAT A PARTY WHO HAD UNWELCOME CONTACT WITH AN INHERENTLY RELIGIOUS SYMBOL ON PUBLIC PROPERTY (OR UNDER GOVERNMENT CONTROL) HAS STANDING TO CHALLENGE THE DISPLAY AS A VIOLATION OF THE ESTABLISHMENT CLAUSE.

“[T]he Court disregards its constitutional responsibility when, by failing to acknowledge the protections afforded by the Constitution, it uses ‘standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits.’” *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 490 (1982) (Brennan, J., dissenting) (quoting *Barlow v. Collins*, 397 U.S. 159, 178 (1970) (Brennan, J., concurring in result and dissenting)).

In a brazen effort to save the preeminent symbol of Christianity—the Latin (Christian) cross—from removal on land owned or substantially controlled by the government, Petitioners mischaracterize Respondent Frank Buono’s basis for standing, as well as the Court’s holding in *Valley Forge*. In so doing, they ask the Court turn a blind eye to its Article III powers to decide cases and controversies involving the prohibitions of the First Amendment.

A. At its core, standing requires the complainant to have a “personal stake in the outcome of the controversy.”

“The essence of the standing inquiry is whether the parties seeking to invoke the court’s jurisdiction have ‘alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’” *Duke Power Co. v. Carolina Evtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

In this case, the Respondent unequivocally has that “personal stake,” inasmuch as he is seeking to uphold his personal right to pass through the Preserve without having to encounter governmental endorsement of Christianity.

The standing question is distinct from merits considerations, and “[i]n considering standing, we must assume the merits in favor of the party invoking our jurisdiction.” *Emergency Coalition to Defend Educ. Travel v. United States Dep’t of the Treasury*, 545 F.3d 4, 10 (D.C. Cir. 2008); see also *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (“For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.”). Thus, in making the standing determination, the Court must assume that

the Petitioners' actions do, in fact, violate the Establishment Clause.

Religious liberty includes the right of individuals to determine for themselves the harmfulness of a governmental religious symbol. As the Court stated in another context, “the speaker and the audience, not the government, assess the value of the information presented.” *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). Moreover, even if Respondent himself considered the injury to be trivial, “an identifiable trifle is enough for standing to fight out a question of principle.” *United States v. SCRAP*, 412 U.S. 669, 690 n.14 (1973) (citation omitted).

B. The unwelcome witnessing of a government endorsement of religion is a “particularized” injury sufficient for standing purposes; Petitioners misstate the Court’s holding in *Valley Forge*.

The Respondent has brought this action to vindicate his First Amendment right to be free from a government endorsement of religion – the direct and unwelcome contact with the preeminent religious symbol of Christianity in a government location.

Perhaps the most cited standing case in terms of a “personal injury” notion is *Valley Forge*. There, an organization “firmly committed to the constitutional principle of separation of church and State,” 454 U.S. at 486, sought to invalidate the transfer of government property to a Christian college. Noting

that the property was “located in Chester County, Pa. The named plaintiffs reside[d] in Maryland and Virginia; their organizational headquarters [we]re located in Washington, D. C. They learned of the transfer through a news release,” *id.* at 487, the Court held that the plaintiffs lacked standing because no plaintiff “suffered, or [wa]s threatened with, an injury other than their belief that the transfer violated the Constitution.” *Id.* at 487 n.23. Article III, said the justices, does not give litigants “a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court.” *Id.* at 487.

In other words, *Valley Forge* stands for the “particularized” notion reiterated ten years later in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 n.1 (1992): “By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.” In this case, that criterion has definitely been met. The Respondent has been personally and individually injured because he came into direct and unwelcome contact with a religious display on government property and will either continue to have that contact when he passes by Sunrise Rock cross or will be forced to alter his behavior in order to avoid contact with the cross.⁴

A careful reading of *Valley Forge* in its entirety finds this idea to be expressed with the utmost

⁴ As a Catholic, Respondent does not view the cross itself as offensive, but in the context here finds the government’s display offensive as an endorsement of religion.

clarity. Nonetheless, confusion has arisen, largely from the following passage:

Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees.

454 U.S. at 485 (emphasis in original). Justice Rehnquist's choice of the word, "observation," was unfortunate, inasmuch as, out of context, it appears to refer to personal "observation" of specific governmental acts. Yet that is precisely what Valley Forge does *not* reference. Rather, "observation" in this passage equates to "learning by way of secondary sources" (as occurred in Valley Forge, where the plaintiffs did not personally observe the property transfer, but "learned of the transfer through a news release"). *Id.* at 487.

This understanding is corroborated by numerous cases, including the D.C. Circuit's *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 428 (D.C. Cir. 1998) (en banc) (animal welfare advocates had standing "when they *observed* primates living under [inhumane] conditions") (emphasis added) and *Chaplaincy of Full Gospel Churches v. United States Navy (In re Navy Chaplaincy)*, 534 F.3d 756, 764 (D.C. Cir. 2008) (standing exists when "religious speech [is] *observed* . . . by the plaintiffs") (emphasis

added). In fact, even the *desire* to personally observe suffices for standing, as stated in *Lujan*: “Of course, *the desire to . . . observe* an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.” 504 U.S. at 562-63 (emphasis added).

C. The practice of labeling injuries as “psychological” or “psychic” by persons of the dominant religion is seen by *amici curiae* as prejudicial and pejorative.

Amici feel compelled to inform the Court that our members view as condescending the use of the terms “psychological” and “psychic” to describe Respondent’s injury.⁵ These usages seem to infer

⁵ See *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007) (Scalia, J., concurring) (quoting *Valley Forge*, 454 U.S. at 485-86:

While *Valley Forge’s* application of the first prong to distinguish *Flast* was unpersuasive, the Court was at least not trying to hide the ball. Its holding was forthrightly based on a resounding rejection of the very concept of Psychic Injury: “[Plaintiffs] fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the

that Establishment Clause rights of the nonreligious and other persons, including the religious, who believe that separation of church and state is the true meaning of the clause, and who suffer harm wrought by government's endorsement of religion, are not worthy of equal protection under the law.

Moreover, our members detect that meeting the “spiritual” needs of the religious is often considered by some members of the Court to be superior to meeting the “psychological” needs of the nonreligious. Yet this preference for placing one sort of mental need or interest over another doesn’t find clear justification in logic, law or biology. Rather, this preference exhibits the hallmark of privilege: that deference enjoyed by those holding the dominant viewpoint. But when social privilege is set aside, offense taken at government establishment of religion, on the one hand, and offense taken at violations of religious liberty, on the other, equally constitute “mere” psychological harms.

D. *Amici* ask the Court to follow precedent.

Is direct exposure to and unwelcome contact with an inherently religious symbol on public property, as is the situation here, sufficient for Article III standing?

“In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing

intensity of the litigant's interest or the fervor of his advocacy.”

cases.” *Allen v. Wright*, 468 U.S. 737, 751-52 (1984) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102-05 (1983)). In each of the Court’s four religious symbols cases—*Van Orden v. Perry*, 545 U.S. 677 (2005) (Ten Commandments monolith); *McCreary County v. ACLU*, 545 U.S. 844 (2005) (Ten Commandments framed document); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (crèche and menorah); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (crèche)—the plaintiffs had standing. Although the context is different in each case, the critical component of standing, direct and unwelcome contact with a religious symbol, is the same. Clearly, precedent favors the Respondent.

The real concern of the Petitioners and supporting *amici* is that this case—like *American Atheists, Inc. v. Duncan*, No. 08-4061 (10th Cir. pending) (Latin crosses on Utah highway rights-of-way) or *Jewish War Veterans v. Gates*, Nos. 08-56415 and 08-56436 (9th Cir. pending) (Latin cross on Mt. Soledad)—is a threat to Christian hegemony in the United States. However, as members of the Court are sworn to uphold equal justice under law, Petitioners’ fears that an adverse outcome in this case will potentially have a negative outcome on these other cases should be irrelevant to the Court.

As *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007), left *Flast v. Cohen*, 392 U.S. 83 (1968), where it found it for taxpayer standing,⁶ *Valley Forge* and *Van Orden* left standing based on

⁶ “We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.” Alito, J., Slip Opinion at 28 in *Hein v. Freedom From Religion Foundation*

direct and unwelcome contact intact. *Amici* urge the Court to affirm “unwelcome contact” standing.

II. THE NINTH CIRCUIT DID NOT ERR IN REFUSING TO GIVE EFFECT TO THE ACT OF CONGRESS PROVIDING FOR THE TRANSFER OF THE LAND TO A PRIVATE PARTY.

The court below properly identified the land exchange mandated by Congress “leav[ing] a little donut hole of land with a cross in the midst of a vast federal preserve,” *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1071 (9th Cir. 2007), as merely a clever attempt by the government to evade the district court’s permanent injunction enjoining the government from displaying the Latin cross on Sunrise Rock. *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002), *aff’d*, *Buono v. Norton (Buono II)*, 371 F.3d 543 (9th Cir. 2004). Thus, the government’s argument, that the congressional act cures the violation of the Establishment Clause, is without merit because the government retains substantial—if not nearly complete—control over the cross and property notwithstanding the land transfer.

In order for § 8121 to comply with the Establishment Clause, the government must have had “a secular . . . purpose” in conveying the land to the VFW. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). While it is true that “the Court is normally deferential to [the government’s] articulation of a

secular purpose,” *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987), such justifications “ha[ve] to be genuine, not a sham, and not merely secondary to a religious objective.” *McCreary County v. ACLU*, 545 U.S. 844, 864 (2005). See also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (“When a governmental entity professes a secular purpose for an arguably religious policy, the government’s characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one.” (quotation omitted)); *Edwards*, 482 U.S. at 586-87 (“While the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.”). Recognizing such precedent, this is the sensible approach the Ninth Circuit took in rejecting the presumption that the land transfer effectively cured the inappropriate endorsement of religion. Instead, the court respected that “[t]he Supreme Court’s Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry [into the sale].” *Buono IV*, 502 F.3d at 1082 n.13.

Although the Seventh Circuit has stated that “[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion,” *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000), that court admits that “we look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased,” *id.*, and “look to a number of factors and determine whether the

sale effectively ended [government] action, based on the totality of the facts in the record.” *Id.* at 492. Thus, it is not relevant whether this Court chooses to adopt a presumption that a land transfer to a private party is an effective way for the government to cure its violation of the Establishment Clause. In either circumstance, it is the facts of the particular case that dictate whether the land transfer actually cures the inappropriate government endorsement of religion.

An examination of the facts of this case unmistakably demonstrates that the government has a long history of control over the religious display, does not relinquish control of the cross nor the real property by virtue of the land transfer, and thus does not cure the violation of the Establishment Clause merely by transferring a relatively small portion of its land to a private party. The overwhelming evidence of the government’s ongoing control over the cross, coupled with the government’s religious purpose as manifested by Congress’s multiple efforts at intervening to prevent the cross’s removal, compel a finding that the government has violated the Establishment Clause and continues its violation by ignoring the injunction.

As the Ninth Circuit correctly identifies, the evidence is clear that the government maintains significant control over the property. The specific incidents of control include: (1) The National Park Service (NPS) is granted statutory powers under 16 U.S.C. §§ 2, 431 of “supervision, management, and control” of national memorials; (2) § 8121(a) expressly reserves NPS management responsibilities

under § 8137; (3) § 8137(a)-(c) effectively gives the government an easement or license over the property to install replicas of the original plaque and cross located at the site; and (4) the government retains a reversionary interest in the property under § 8121(e). *Buono IV*, 502 F.3d at 1083. Taken together, these facts demonstrate that despite the land transfer, the government maintains significant ongoing control over the property “requiring compliance with constitutional requirements on [the] land.” *Id.* The fact that the government retains an *automatic* reversionary interest in the property if it is no longer being used as a war memorial clearly shows that, unlike a fee simple land transfer, the transfer in question impermissibly allows the government to maintain control over a religious display.

Even more damning is the evidence that the government transferred the land to the VFW specifically *because* it knew that they would maintain the cross as a religious war memorial. The decision to transfer the land was buried in an appropriations bill, did not open bidding to the general public and directs the land to be transferred to the VFW, which is the very organization that originally installed the cross on Sunrise Rock and obviously desires to maintain it. *Id.* at 1084. The unusual structuring of the transaction, “coupled with the government’s selection of beneficiaries . . . [with] significant interest and personal investment in preserving the cross that has been ordered removed, provide additional evidence that the government is seeking to circumvent the injunction.” *Id.* at 1085.

The land exchange itself is merely the latest step in a litany of long-standing efforts on the part of the government to maintain and preserve the cross in violation of the Establishment Clause. When a suit against the government was first brought, Congress passed § 133, banning the use of government funds to remove the cross. *Buono IV*, 502 F.3d at 1085. It was only after litigation commenced that the government tried to take a different tack in preserving the cross by designating it as a national war memorial under § 8137. *Buono IV*, 502 F.3d at 1085. When the court in *Buono I* enjoined display of the cross, Congress *again* prohibited the use of federal funds to remove any World War I memorials under § 8065(b), which conveniently included the cross as previously designated under § 8137. *Buono IV*, 502 F.3d at 1085. The government does not deny nor contest these legislative responses, *id.*, which taken together demonstrate that, not only is the most recent land transfer an attempt to circumvent the latest injunction, but that these actions are consistent with the long-standing and deliberate efforts of the government to preserve the cross atop Sunrise Rock.

III. THE LATIN CROSS ON GOVERNMENT PROPERTY IS GOVERNMENT-SPONSORED SPEECH AND VIOLATES THE ESTABLISHMENT CLAUSE.

Given that the Petitioners have failed to challenge the lower court's correct ruling that the display of the cross violates the Establishment

Clause, *res judicata* dictates that the issue not be relitigated here. However, given that the government is attempting to maintain control of the property on which the cross stands, despite the land transfer, the narrow remedy ordered is insufficient to cure the underlying violation. Thus, the real issue before the Court is the Establishment Clause itself, and how its proper interpretation undeniably exposes the government's continuing violation of it.

A. The speech of a donated permanent monument on public property is that of the government.

This term, in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009), the Court held that “the placement of a permanent monument in a public park is . . . a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.” Once a form of expression is concluded to be government speech, it is no longer governed by the Free Speech Clause, because “[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.” *Id.* at 1131. However, “[t]his does not mean that there are no restraints on government speech. For example, government speech *must comport with the Establishment Clause.*” *Id.* at 1131-32 (emphasis added). This Court in *Summum* unequivocally rejected the argument that the government can hide behind the protections of the Free Speech Clause afforded to a private party just because it commissioned the monument. The court rejected such a line of reasoning several times, stating that

“[p]ermanent monuments displayed on public property typically represent government speech,” *id.* at 1132; “[a] monument, by definition, is a structure that is designed as a means of expression,” *id.* at 1133; “[j]ust as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land,” *id.*; “throughout our Nation’s history, the general government practice with respect to donated monuments has been one of selective receptivity,” “[t]he monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.” *Id.* at 1133, 1134.

Thus, at the latest—when government acquiesced to the presence of the cross atop Sunrise Rock (by its refusal to remove the cross at Respondent’s request)—the message inherent to the monument became *government* speech that is subject to the restrictions of the Establishment Clause.

It is true that the Court goes on to state that what constitutes the “message” of a monument is by no means always clear, *id.* at 1135, and may in fact change over time. *Id.* at 1136. However, the message of the Latin cross is unequivocally religious and has been so throughout history. Therefore, the government must accept that, by displaying the cross on public land and continuing to control the monument notwithstanding the land transfer, it is unconstitutionally endorsing a symbol with an *inherently* religious message.

B. The meaning and use of the Latin cross is an inherently religious symbol of Christianity.

Webster's New American Dictionary defines a cross as “a device composed of an upright bar traversed by a horizontal one, specifically, one used as a Christian symbol.” Michael E. Agnes, *Webster's New American Dictionary* (John Wiley & Sons 2004). Numerous court decisions also reference the cross as being the principal symbol of the Christian religion. See *Capitol Square v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring) (describing cross as the “principal symbol of Christianity”); *Lynch v. Donnelly*, 465 U.S. 668, 695 (1984) (Brennan, J., dissenting) (describing cross as a “distinctively religious symbol[]”); *Webb v. City of Philadelphia*, 562 F.3d 256, 262 (3d Cir. 2009) (referencing “religious symbols, such as cross pins”); *Barnes-Wallace v. City of San Diego*, 551 F.3d 891, 897 (9th Cir. 2008) (describing cross as “the central symbol of [the Christian] religion”); *ACLU v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1982) (referring to the cross as a “religious symbol[]”); *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 930 (3d Cir. 1980) (holding that city’s purchase of a 36-foot high cross to commemorate the papal visit lacked “[a]t least some minimal secular purpose”); *Fox v. City of Los Angeles*, 587 P.2d 663, 670 (Cal. 1978) (en banc) (“[T]he single-barred cross is a symbol particularly pertinent to the Christian religion.”); *Lowe v. City of Eugene*, 463 P.2d 360, 363 (Or. 1969) (en banc) (referring to cross as an “essentially religious symbol”).

The cross has always been very significant in Christian theology and was especially important to the authors of the New Testament. The cross reminds both Christians and non-Christians of the death of Jesus Christ.

The Christian religion emphasizes the death of Christ much more than his life, activities and teachings. The Nicene Creed⁷ refers to his death on behalf of humanity but makes no mention of his miracles and teaching. A person may doubt the miracles of Jesus (such as casting out demons and healing the sick) and still call himself a Christian. Similarly, a person may call himself a Christian even though he believes that some of the sayings attributed to Jesus are not genuine. But a person cannot be a true Christian if he fails to understand and be thankful for Christ's death on the cross and his subsequent resurrection from the dead. His sacrificial death on the cross and subsequent resurrection constitute the defining doctrine and primary message of Christianity.

In the Christian story Jesus died by crucifixion. This is an extremely painful form of death. It was considered remarkable that Jesus died in the same cruel way that criminals died at the hands of the Roman government. Some of those who witnessed his crucifixion mocked Jesus, arguing that if Jesus were really God's chosen son and the King of the

⁷ Joseph Willhelm, *The Nicene Creed*, in *The Catholic Encyclopedia*, Vol. 11 (Robert Appleton Company 1911), available at <http://www.newadvent.org/cathen/11049a.htm>.

Jews, he would come down from the cross and save himself from death. See *Luke 23:35-37*;⁸ *Matthew 27:38-42* (King James).⁹ Christianity teaches that a man who did not save himself is able to save us. But this paradox is easily explained. As noted above, Jesus had to die in order to provide atonement for human sins. Another meaning related to his death is that Christians will experience pain, suffering, struggle and persecution, as symbolized by the cross. Jesus said, “[i]f any man will come after me, let him deny himself, and *take up his cross*, and follow me.” *Matthew 16:24*¹⁰ (emphasis added); see also *Mark 8:34* (King James).¹¹

Petitioners and others may try to create an *additional* and non-Christian meaning for the cross by arguing that it symbolizes the sacrifice of

⁸ “And the people stood beholding. And the rulers also with them derided him, saying, He saved others; let him save himself, if he be Christ, the chosen of God. And the soldiers also mocked him, coming to him, and offering him vinegar, And saying, If thou be the king of the Jews, save thyself.”

⁹ “Then were there two thieves crucified with him, one on the right hand, and another on the left. And they that passed by reviled him, wagging their heads. And saying, Thou that destroyest the temple, and buildest it in three days, save thyself. If thou be the Son of God, come down from the cross. Likewise also the chief priests mocking him, with the scribes and elders, said, He saved others; himself he cannot save. If he be the King of Israel, let him now come down from the cross, and we will believe him.”

¹⁰ “Then said Jesus unto his disciples, If any man will come after me, let him deny himself, and take up his cross, and follow me.”

¹¹ “And when he had called the people unto him with his disciples also, he said unto them, Whosoever will come after me, let him deny himself, and take up his cross, and follow me.”

veterans who have died in service to their country. But that additional meaning is subordinate to and derived from the primary Christian meaning of the cross. The Bible and twenty centuries of Christian history emphasize the religious significance of the cross, which is in no way negated by 21st century feigned ignorance of the Bible and Christian history.

If we assume that the cross at issue symbolizes the noble sacrifice of war veterans, that meaning is made possible only because of the much greater sacrifice of Jesus Christ for the benefit of mankind. The “Battle Hymn of the Republic” includes the following verse: “As He died to make men holy, let us die to make men free.” The verse links the sacrificial death of a soldier on the battlefield to Jesus Christ’s much greater sacrifice on the cross. Similarly, the reasonable observer in this case inevitably thinks of the death of Christ when he or she views the cross at issue, even if we assume that the cross was intended to honor war veterans.

Christianity has always been the dominant religion in the United States and the cross has always been the primary symbol of Christianity. Given these facts, it would be absurd to conclude that the cross at issue in this case has lost its Christian meaning simply because the cross might also symbolize the sacrifice of veterans.¹² The

¹² The Veterans Administration itself does not recognize the Latin cross as a universal symbol of death and remembrance. Instead, it recognizes 39 distinct religious emblems of belief to be used on government headstones and markers at the option of the next of kin or authorized representative. See United States Department of Veterans Affairs, Mar. 12, 2009,

Christian meaning of the cross is its primary meaning and any other meaning is secondary, derivative and of minimal significance.

C. The Latin cross may be a symbol of death and burial, but it is an inherently Christian symbol of death and burial rather than a secular symbol.

The Latin cross is the “principal symbol of Christianity.” *Capitol Square v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring); see also *Friedman v. Board of County Comm’rs*, 781 F.2d 777, 788 (10th Cir. 1985). The cross expresses with clarity and simplicity the Christian message that the crucifixion and resurrection of Jesus is the source of human salvation. See Holly Everett, *Roadside Crosses in Contemporary Memorial Culture* 22 (2002). Nothing inherent in the shape of a Latin cross communicates a message of death and remembrance. This symbolism is a product of the historical use of the cross in Christianity:

The cross as an indication of death is connected with the biblical account of Jesus Christ’s death and resurrection as told in the gospels of Matthew, Mark, Luke and John. Prior to the infamous execution, crosses were understood as

<http://www.cem.va.gov/hm/hmemb.asp>. Of course, there is no requirement that any emblem of belief be put on a headstone or marker as would be appropriate where the decedent was nonreligious or of a religion different than the 39 approved emblems.

threatening symbols of Roman power
and punishment.

Id. at 23. It is only because the cross has been used by Christians since the Fourth Century to identify themselves and mark their place of death and/or burial that the cross conveys a message of death and remembrance for Christians today. See *New Catholic Encyclopedia*, Vol. IV, 370 (Thomas Carson et al. eds., Thomson Gale 2002).

A majority of individuals in the United States belong to Christian denominations that revere the Latin cross as a symbol of Jesus' death and resurrection.¹³ Presumably this majority would view the Latin cross as a general symbol of death, as they may view the cross as a general symbol for morality, sacrifice or salvation. See *The Zondervan Pictorial Encyclopedia of the Bible*, 1038-39 (Merrill C. Tenney ed., Zondervan Publishing House 1975). As many Christians argue in the debate over separation of church and state, religious adherents often find it impossible to separate the religious aspect of their lives from the civic aspect of their lives. See, e.g., Candyce T. Beneke, *The Separation of Personal Religious Faith and Professional Identity—Is This Really Possible? Is It Truly Desirable?*, 41 S. Tex. L. Rev. 1423 (2000). Therefore, it would not be surprising to find that a majority of Americans may perceive the Latin cross to have secular importance as well as religious importance. But the fact that a

¹³ See The Pew Forum on Religion & Public Life, *The US Religious Landscape Survey* (Feb. 25, 2008), available at <http://religions.pewforum.org/affiliations>.

majority of Americans have no problem with the government's purported "secular" use of a religious symbol does not mean that that symbol is no longer religious; i.e., that it has been transmuted into a secular symbol.

Religious symbols do not become secular by virtue of the fact that they are so pervasive that even nonadherents know what the symbols signify:

Symbolically, the cross represents physical death followed by spiritual rebirth into an eternal state of existence to *all those even vaguely familiar* with the tenets of Christianity. Thus, each marker affords the viewer a powerfully iconic moment, with spatial, temporal, and magico-religious implications.

Everett, *Roadside Crosses, in Contemporary Memorial Culture, supra*, at 22 (emphasis added). Therefore, even if it was proven that one hundred percent of the United States population associated the Latin cross with death, this would not turn the cross into a secular symbol. At most, this would simply prove that the cross is a well-recognized religious symbol. It is only because of Jesus' death on a cross that the cross is able to symbolize the deaths of his followers.

D. It is the unambiguously religious message of the Latin cross that makes it an effective symbol.

The determination of whether a display has the effect of conveying a message of government endorsement of religion is heavily dependent on the unique facts surrounding the display. Applying the recent Supreme Court cases of *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005), the Tenth Circuit stated that “[t]he ‘effect’ prong of the endorsement test asks whether a reasonable observer aware of the history and context of the forum would find the display had the effect of favoring or disfavoring a certain religion.” *O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1227-28 (10th Cir. 2005). The Tenth Circuit explained that analysis of a display’s effect “depends in large part on the display’s particular physical setting.” *Id.* at 1228.

The Supreme Court has crafted a *flexible* test that is “sensitiv[e] to the unique circumstances and context of a particular challenged practice,” *Pinette*, 515 U.S. at 782 (O’Connor, J., concurring), in an effort to maintain a high degree of objectivity in a test that is subjective by definition. The flexibility of the effect-prong analysis was designed to promote decisions that are both logical and practical: “this flexibility is a virtue and not a vice.” *Pinette*, 515 U.S. at 783.

In this case, the reasonable observer should be aware of the existence of two types of Latin crosses erected along local roads and highways across America: 1) small crosses, often with flowers, marking the location where an individual has died in an automobile accident and 2) large crosses intended to spread the religious message of Jesus’ death and

resurrection. However, even though it may be appropriate to ascribe knowledge of the uses of Latin crosses to the reasonable observer for purposes of effect-prong analysis, this knowledge is far from “universal.” In *Roadside Crosses in Contemporary Memorial Culture*, *supra*, at 117, Holly Everett wrote that several people that she interviewed “had never seen or heard of objects by the side of the road marking the site of a fatal accident.” Roadside crosses are not universally recognized, and their relative obscurity can give them an air of illegality:

The fact that roadside crosses do not register on the cognitive maps of all area residents, or civic and county site maps, further highlights their informality and liminal status. Adding to the *outlaw quality* of the markers has been the absence of concrete guidelines for governmental entities in many areas.

Id. (emphasis added).

Small, white, roadside crosses are certainly not the only crosses motorists see while driving on interstate highways. Large Latin crosses exist all across the United States *on private property* visible from the interstate. Crosses are placed in locations chosen for maximum visibility in order to capture the attention of passing motorists. Although the number of large Latin crosses bordering the highways of the United States is unknown, the number of crosses erected by one remarkable individual is known. Bernard Coffindaffer “led a

one-man crusade that erected 1,864 sets of three crosses in at least 27 states, the District of Columbia, Zambia and the Philippines.”¹⁴ The tallest crosses were twenty-two feet tall, and the smaller crosses were seventeen feet tall. These crosses were not memorials. Coffindaffer wanted to spread the religious message of Jesus’ death and resurrection.¹⁵ Even if Coffindaffer was the only person to erect

¹⁴ See, Christian Crosses, Inc., <http://www.christiancrosses.org> (last visited July 25, 2008).

¹⁵ A brief history of the Bernard Coffindaffer and the erection of the crosses is available at <http://www.christiancrosses.org/history>. The following is a selection from that website:

After two heart by-pass operations, [Coffindaffer] liquidated his business and two years later had a vision. “A genuine, marvelous, glorious vision,” he said, “The Holy Spirit instructed, blessed, dealt with me and told me how to go about installing these crosses. It was an experience you have once in a lifetime.” He was told what to do: Get manpower, materials, and plant crosses. “I worked like a dog for the money, eighteen hours a day for thirty-five years,” he said. “The Holy Spirit knew I had the money and was willing to spend it, and I’m not going to back down.” For the nine final years of his life, he obediently spent approximately \$3,000,000 planting the clusters of three crosses in 29 states, District of Columbia, Zambia and The Philippines. Site owners donated the lands used for the crosses and Coffindaffer paid all the bills.

Coffindaffer started the project on September 28, 1984, stating, “Not for saints or sinners. For everybody. They’re up for only one sole reason, and that’s this—to remind people that Jesus was crucified on a cross at Calvary for our sins, and that He Is soon coming again.”

large Latin crosses near the highway, one could honestly say that large crosses are a common sight on America's highways. But many have followed in Coffindaffer's footsteps.

In her book, Everett described a man named Steve Thomas who "erected a 190-foot cross next to Interstate 40 as an 'advertisement for Jesus.'" *Roadside Crosses, supra*, at 19. A website devoted to this cross states that, "[t]en million people pass by every year."¹⁶ Everett further noted that "Thomas planned to help others build giant crosses in Illinois and Florida." *Roadside Crosses, supra*, at 19. Furthermore, at the intersection of Interstates 57 and 70, there is a white, Latin cross standing 198-foot tall, which was erected by the Cross Foundation.¹⁷ According to their website, the Cross Foundation is "dedicated to building both faith and family on an ecumenical basis," and the cross "is intended to serve as a beacon of hope to the 50,000 travelers estimated to pass the site each day." *Id.*

The existence of these larger roadside crosses across the United States is significant because of their similarity to the cross in this case. The Latin cross in this case is not comparable to the small memorial crosses that are routinely removed by highway maintenance personnel; the Sunrise Rock cross is an eight-foot tall permanent cross. If we assume that the reasonable observer is aware of the

¹⁶ See Cross of Our Lord Jesus Christ Ministries, <http://www.crossministries.net> (last visited July 25, 2008).

¹⁷ See The Cross Foundation, <http://www.crossusa.org> (last visited July 25, 2008).

existence of both the small, memorial crosses as well as the larger, “advertisement for Jesus”-type crosses, Everett, *Roadside Crosses*, *supra*, at 117, it is clear that the cross in this case is of the type used to send a Christian message to motorists and visitors.

Individuals and organizations that expend time and money erecting large Latin crosses by the side of the highway do so precisely because the crosses send a religious message. *See, e.g., id.* at 19. Just as it is reasonable for a motorist to assume that a permanent cross near an interstate highway is intended to convey the religious message of the owner of the property, it is reasonable to assume that this permanent cross on government property reflects the religious message of the government. *See Pinette*, 515 U.S. at 786 (Souter, J., dissenting) (“an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands.”).

E. Religious symbols, and the controversy that surrounds their display on government property, impair the effectiveness of memorials to veterans.

Unfortunately, the message of remembrance and gratitude for the service of military veterans is often lost in the controversy that ensues when the government sanctions a pervasively religious symbol to serve as a memorial. The lives of the veterans commemorated by the Latin cross at issue here have been overshadowed by a debate over the proper place of religion in government. Furthermore, this Court

has been placed in the unenviable position where, in order to avoid offending those Christians who want the government to display the Latin Cross as a sincere expression of faith, the Court must deny the religious significance of the cross—a symbol with profound religious significance for a majority of Americans.

Litigation is divisive, distracting and costly, even in cases where a challenged governmental practice is ultimately upheld. One particularly telling case involves the forty-three-foot tall Latin cross on Mt. Soledad in San Diego, California. This cross has been the subject of continuous litigation since 1989 between the government and citizens who view the cross as an endorsement of religion. See *Paulson v. City of San Diego*, 262 F.3d 885 (9th Cir. 2001); *Paulson v. City of San Diego*, 475 F.3d 1047 (9th Cir. 2007); *Trunk v. City of San Diego*, 547 F. Supp. 2d 1144 (S.D. Cal. 2007); *Jewish War Veterans v. Gates*, Nos. 08-56415 and 08-56436 (9th Cir. pending).

Even if it is assumed *arguendo* that the cross on Mt. Soledad is constitutionally permissible, it is still undeniable that the religious nature of the cross has been enormously divisive. See Kimberly Edds, *In California, Cross Site Stirs Discord: Church-State Separation Is Issue at Mount Soledad Memorial*, Washington Post, Dec. 6, 2004, at A19. The government's attempt to characterize the Mt. Soledad cross as a veterans' memorial does not relieve tension; indeed it injects more emotion into the debate. *Id.* Now opponents of the Mt. Soledad cross are accused of lack of respect for, or even contempt for, Christianity *and* of veterans. *Id.* A

similar dynamic is present in this case, where opponents of the impermissible display of the Latin cross can be characterized as opponents of honoring fallen military veterans.

Religious symbols as memorials invariably alienate a segment of the community that was served by the fallen veteran. To those members of the community that do not share the beliefs expressed by a religious symbol, religious symbols often send divisive messages, i.e., 1) the veteran only served the members of the community that shared his or her beliefs, 2) only those members of the community who revere the religious symbol are honoring the veteran or 3) only Christian veterans are honored. The first message is unfortunate because military personnel pledge to serve the entire community regardless of religious belief. The second message is unfortunate because every member of the community should be able to feel as though he or she is honoring the fallen veteran. And the third message is unfortunate because a significant minority of all fallen veterans are Jews and other religious non-Christians or are non-religious. This message is particularly offensive to non-Christians and violates the Establishment Clause.

F. Secular memorials do not offend religious beliefs.

Although memorials with religious symbols may alienate the segment of the population that does not share those religious beliefs, the reverse proposition—that secular memorials alienate the

segment of the population with religious beliefs—is not true. It is indisputable that attempts to remedy Establishment Clause violations are often interpreted by some religious adherents as “hostility” toward their beliefs, *Van Orden v. Perry*, 545 U.S. 677, 684 (2005), but these same adherents would not argue that every memorial which is not laden with religious imagery is offensive.

The most poignant and effective memorials in the United States contain no religious symbols. Americans are not offended that, for example, the National World War II Memorial, the Vietnam Veterans Memorial and the Korean War Veterans Memorial do not contain Christian or other religious symbols. These memorials are not considered hostile toward religion because they do not have religious symbols. These secular monuments allow Americans of all belief systems to participate equally in the act of honoring and remembering veterans.

G. Those who advocate the display of the Latin cross on public property do so for religious, not secular, purposes and, to advance their legal theory, must deny the cross’s historic and current religious significance.

Most Americans who support the display of the Latin cross on public property admit unapologetically that they support using the cross because of its profound religious significance.¹⁸

¹⁸ See, for example, Dave Tabish, the organizer of a rally protesting the filing *American Atheists v. Duncan*, No. 08-4061

However, government officials and their attorneys know that in order for the display of a Latin cross to satisfy the secular purpose requirement of *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), and its progeny, the government must deny the religious significance of the cross. One legal commentator, William P. Marshall, has described as a “shell game” the government’s attempt to deny the religious nature of a practice in order to uphold it.

[There are] a number of approaches in which the prohibition on state-sponsored religion may be maintained in theory while allowing significant state sponsorship of religion to remain in practice.

...

Virtually all of [these] approaches have one element in common. They minimize, if not completely deny, the religious significance of the governmental practice in question. As such, they are little more than shell games. There are elements of religiosity in all of the practices that these approaches seek to justify.”

(10th Cir. pending), was quoted as saying: “We’ve taken god out of the school, out our council meetings and taken the Ten Commandments out of government It’s time we stand up and put God back in our country.” Jason Davis, *Atheists Seek to Remove Cross Memorials for Fallen Patrol Officers*, The Christian Post, Dec. 5, 2005.

The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy, 78 Notre Dame L. Rev. 11, 20, 27 (2002).

CONCLUSION

For the reasons that the Respondent has standing, the case is not moot and the display by government of the Christian cross on public land is a violation of the Establishment Clause, the Amici Curiae respectfully request that the judgment of the Ninth Circuit be affirmed.

Respectfully submitted,

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APPENDIX

IDENTIFICATION OF *AMICI CURIAE*

The American Humanist Association advocates for the rights and viewpoints of Humanists. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than 100 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The Mission of the American Humanist Association is to promote the spread of Humanism, raise public awareness and acceptance of Humanism and encourage the continued refinement of the Humanist philosophy.

The American Ethical Union is a federation of Ethical Culture/Ethical Humanist Societies and circles throughout the United States. Ethical Culture is a Humanistic religious and educational movement inspired by ideal that the supreme aim of human life is working to create a more humane society. The American Ethical Union has participated in a number of amicus curiae briefs in defense of religious freedom and church-state separation.

Atheist Alliance International is an organization of independent religion-free groups and individuals in the United States and around the world. Its primary goals are to help democratic, atheistic societies become established and work in coalition with like-minded groups to advance rational

thinking through educational processes. Through the Alliance, members share information and cooperate in activities with a national or international scope.

The Military Association of Atheists and Freethinkers is an independent 501(c)(3) project of Social and Environmental Entrepreneurs. MAAF is a community support network that connects military members from around the world with each other and with local organizations. In addition to our community services, MAAF takes action to educate and train both the military and civilian community about atheism in the military and the issues that face us. Where necessary, MAAF identifies, examines and responds to insensitive practices that illegally promote religion over nonreligion within the military or unethically discriminate against minority religions or differing beliefs. MAAF supports separation of church and state and First Amendment rights for all service members.

The Secular Student Alliance is a network of over 130 atheist, agnostic, Humanist and skeptic groups on high school and college campuses. Although it has a handful of international affiliates, the organization is based in the United States. The vast majority of the affiliates are at high schools and colleges in the U.S. The mission of the Secular Student Alliance is to organize, unite, educate and serve students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics.

The Society for Humanistic Judaism mobilizes
App. 2

people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. Humanistic Jews believe each person has a responsibility for their own behavior, and for the state of the world, independent of any supernatural authority. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic and cultural minorities such as Jews, and most especially for Humanistic Jews, who do not espouse a traditional religious belief. The Society for Humanistic Judaism members want to ensure that they, as well as people of all faiths and viewpoints, will continue to feel comfortable in America's parks.