

No. 08-472

In The
Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS

Petitioners,

v.

FRANK BUONO

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

**BRIEF OF THE CENTER FOR INQUIRY AS
AMICUS CURIAE IN SUPPORT OF RESPONDENT**

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INTERESTS OF AMICUS CURIAE¹

The Center for Inquiry (“CFI”) is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of Church and State is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy. The *amicus* submits this brief because the boundaries between government and religion are an essential part of our free society, and because allowing access to the courts is critical to maintaining those boundaries.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government cannot be allowed to circumvent the Establishment Clause with formalistic gestures that fail to accomplish genuine separation between Church and State.

If the Constitution’s prohibition on government sponsorship of religion is to have force, those who are directly exposed to and affected by government-sponsored religious displays must be permitted to challenge them in the federal courts. Plaintiffs cannot be turned away at the courthouse steps because their views are demeaned as merely psychological or only policy disagreements as opposed to objections arbitrarily deemed “spiritual.” Adding

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution intended to fund its preparation or submission. The Petitioner has filed a blanket consent and the consent of the Respondent is being lodged herewith.

a new “spiritual” injury requirement to the test for standing, as the government urges, would force courts to engage in an inappropriate philosophical debate into Establishment Clause plaintiffs’ internal belief structures. That requirement is not supported by precedent, which focuses on the nature of a plaintiff’s contact with the display rather than the beliefs giving rise to offense. Of particular concern to *amicus*, the distinction proposed by the government would risk creating an improper hierarchy of belief systems, denying access to the courts by those whose views are not based on religious tenets. And it would force the Court to wade into the quagmire of deciding what constitutes a religious belief, further muddying the standing inquiry.

The Court must also mandate an appropriately searching review of land transfers purporting to cure Establishment Clause violations. Fashioning a rule or presumption that land transfers remedy any Establishment Clause problem risks creating a dangerous loophole, allowing governmental sponsorship of religion through artful means designed to create the false appearance of compliance with the Establishment Clause. As the Court has consistently done in the past when reviewing Establishment Clause challenges to government action, it should ask whether, based on a thorough and fact-intensive review, the transfer creates a genuine distance between the government and the display.

Neither the purpose nor the effect of the land transfer in this case was to distance the government from the cross display. The challenged legislation was designed to ensure that the cross would remain standing on Sunshine Rock in the midst of the federal parkland. In particular, the government’s reliance on the supposed ability of Veterans of Foreign Wars (“VFW”) to install some different monument

in place of the cross is without merit. Any choice that the VFW has to install a different, secular monument is wholly theoretical; it does not distance the cross from the government's imprimatur. The government transferred the land to those who erected the cross in the first place precisely because it wanted the cross to remain standing. The Court should hold the land transfer invalid, and prevent use of such formalistic devices from multiplying across the country as a court-sanctioned way to feign compliance with the Establishment Clause.

ARGUMENT

I. STANDING TO CHALLENGE A GOVERNMENT-ENDORSED RELIGIOUS DISPLAY DOES NOT REQUIRE A PLAINTIFF TO SHOW ADHERENCE TO CONTRARY RELIGIOUS BELIEFS.

The government urges a dangerous and unwarranted test of whether a plaintiff has standing to challenge a government-endorsed religious display under the Establishment Clause. Where the plaintiff has a "*spiritual stake*" in the controversy, standing would be found. Pet'rs Br. 14-15 (emphasis added) (quotation omitted). In contrast, what the government terms a mere "psychological consequence" of observing the display -- including the "dislike, distress, or offense, however genuine" produced by observation -- would be insufficient. Pet'rs Br. 16; *see also id.* at 14 ("value or policy disagreements" are disfavored bases for standing). The government's proposed standing inquiry thus turns on the nature of the plaintiff's belief structure rather than the objective facts concerning exposure of the plaintiff to the challenged display. Such an inward-focused test would be contrary to precedent, would

improperly favor “religious” objectors to the exclusion of all others, and would turn standing inquiry into an unworkable morass.²

A. Standing Properly Focuses On The Facts Concerning Exposure To The Offensive Display, Not On The Nature Of The Plaintiff’s Internal Belief Structure.

To assess standing, this Court’s precedent has uniformly looked to objective facts such as plaintiff’s past and expected future exposure to the challenged display, not at the nature of the plaintiff’s underlying beliefs.

Standing “requires federal courts to satisfy themselves that ‘the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction.’” *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)) (emphasis omitted); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (“[T]he party bringing suit must show that the action injures him in a concrete and personal way.”) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J. concurring)). To show such a “personal stake,” plaintiffs must allege that they are “directly affected [by the challenged action] apart from [their] special interest in the

² In its petition for certiorari, the government argued explicitly that standing should be denied because Respondent’s objection to the display is “ideological, rather than religious.” Pet. 5. Though retreating from that phrasing in its merits brief, the government urges the same distinction by arguing that Respondent lacks standing because his beliefs are merely “psychological consequences” of viewing the display or “policy disagreements” as opposed to the supposedly required “spiritual stake.” Pet’rs Br. 14-15.

subject.” *Lujan*, 504 U.S. at 556; *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963) (“The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.”).

To determine whether harm is sufficiently “concrete,” “personal,” and “direct” to fulfill the injury-in-fact component of standing, the Court has looked to such ascertainable measures as whether the plaintiff has been (and will be in the future) physically exposed to the challenged governmental conduct or the results of that conduct. The Court has used this mode of inquiry in the Establishment Clause context, as well as in environmental cases that are analogous because they also involve interference with the use and enjoyment of public land. *See* Pet. App. 107a (Respondent’s “inability to unreservedly use public land” constitutes injury-in-fact).

The plaintiffs in *Valley Forge* lacked the requisite personal stake because they lived in different states from the property at issue and therefore lacked any direct contact with the challenged conduct. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 487 (1982). Similarly, the plaintiffs in *Lujan* lacked standing because they had not alleged any definite intention to visit locations where they would personally observe the endangered species allegedly threatened by the challenged government action. *Compare Lujan*, 504 U.S. at 564 (“‘Some day’ intentions -- without any description of concrete plans, or indeed even any specification of *when* the some day will be -- do not support a finding of the ‘actual or imminent’ injury that our cases require.”), *with id.* at 566 (“It is clear that the person who observes or works with a

particular animal threatened by a federal decision is facing perceptible harm.”). In *Summers*, the plaintiff likewise lacked standing because he failed to allege a firm intent to visit a particular National Forest that would be affected by an allegedly unlawful project. *Summers*, 129 S. Ct. at 1150 (“[Plaintiff’s affidavit] does not assert . . . any firm intention to visit their locations, saying only that [plaintiff] ‘want[s] to’ go there.”).

Respondent is unlike all of those plaintiffs discussed above who, the Court found, objected to a governmental policy from a safe distance but did not demonstrate the requisite direct exposure to the challenged governmental conduct or its untoward effects. Respondent has viewed the government-sponsored religious display; he intends to visit the Preserve where the cross is displayed in the future; and he will alter his conduct to avoid the cross. J.A. at 64-65. In a detailed affidavit, Respondent states that he “regularly” visits the Preserve -- approximately 2-4 times per year -- and intends to do so at least that frequently, if not more often, in the future. *Id.* at 64. The cross “deeply offends” him, “impairs [his] enjoyment of the Preserve,” and will cause him to go out of his way to avoid encountering the display. *Id.* at 64-65. Respondent has demonstrated a personal stake in the outcome of the case and direct injury based on these facts.

Moreover, the core purposes of standing are amply served by applying the existing mode of inquiry, which permits those plaintiffs actually exposed to an offensive religious display to mount a challenge. Standing is meant, in part, to uphold the separation of powers by preventing plaintiffs from bringing “generalized grievances” about governmental conduct that could be brought by every citizen. *See, e.g., Valley Forge*, 454 U.S. at 482-83. The Court has

also stated that standing serves to “preserve[] the vitality of the adversarial process” by ensuring that questions are resolved “not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” *Massachusetts v. EPA*, 549 U.S. at 517 (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J. concurring)). Allowing Respondent to sue by virtue of his personal exposure to the cross creates no worry that government displays could be challenged from afar by anyone who disagrees with a display, irrespective of proximity to or contact with it. There is no danger that the federal courts would be turned into “ombudsmen of the general welfare,” *Valley Forge*, 454 U.S. at 487, if those individuals who actually view a display during their work or recreation, or who are forced to change their conduct on account of the display, are granted standing. Allowing standing under these circumstances will simply permit an individual who has suffered a direct injury to vindicate his rights. There is no cause to impose a newly-minted requirement that to bring suit, a plaintiff must establish a “religious” injury resulting from contact with a challenged display.

B. This Court’s Precedent Demonstrates That Holding A Contrary Religious Belief Is Not Required To Have Standing.

Whether offense at the government-sponsored display is based on a religious disagreement with the cross is immaterial. The Court has never made a distinction based on whether the injury is sufficiently “spiritual” or whether, as the government suggests, it reflects a mere “commitment to certain constitutional views.” Pet’rs Br. 14-16. Nor has the Court imposed a requirement that an injury under the Establishment Clause be rooted in religious beliefs or

membership in a religious group different from that endorsed by the challenged display.

The Court has thus repeatedly addressed the merits of an Establishment Clause challenge where the plaintiff has not professed a “religious objection” to the conduct in question. In *Van Orden v. Perry*, 545 U.S. 677 (2005), the Court reached the merits despite the plaintiff’s testimony in the district court that he was “not religious” and that “he does not acknowledge the existence of any god, and he specifically does not adhere to either the Christian faith or the Jewish faith.” *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at *2 (Oct. 2, 2002 W.D. Tex. 2002) (plaintiff testified that the religious display in question “symbolizes a state policy to favor the Jewish and Christian religions over other religions and over non-believers, which ‘policy’ the Plaintiff finds to be personally offensive”). Similarly, the plaintiffs in one of the two appeals decided in *Schempp* were “professed atheists,” whose petition “particularized [their] atheistic beliefs.” 374 U.S. at 211-12. Moreover, when plaintiffs of various professed faiths have challenged a display, this Court has not analyzed whether their offense was religious in nature. See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).³

³ It is not self-evident that an objection by a religious person to a display endorsing a different religion would be any more “spiritual” than Respondent’s. For example, a Jewish person would presumably not have any religious objection to the display of a cross on the grounds of a neighborhood church, but might well object to the municipality installing a prominent cross in the middle of the town square. Such an objection would be directed at *the government’s* endorsement of the cross; not to the teachings of any religious doctrine or to crosses generally. It is unclear under the government’s proposed test whether such an objection to the government’s display of a cross would be deemed “spiritual” or a mere “commitment to certain constitutional views.” Pet’rs Br. 14-16. If

The Court also has never imposed any requirement that the plaintiff be a member of a religious group different from the religion allegedly endorsed by the display. *Compare* Pet’rs Br. at 4-5, 14 (arguing that plaintiff lacks standing because he is a Catholic and the display is a Christian symbol), *and id.* at 15 (standing must be premised on feelings of being an “outsider”), *with Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000) (Mormon and Catholic plaintiffs challenged a school district policy permitting student-led nonsectarian prayers before football games), *and Lee v. Weisman*, 505 U.S. 577, 584 (1992) (Jewish plaintiffs’ objection to a nonsectarian prayer offered by a rabbi at a middle school graduation was acknowledged by this court to be a “live and justiciable controversy”).⁴

The government misreads this Court’s precedent in urging that beliefs deemed only “philosophical” are unworthy of standing. In *Valley Forge*, the plaintiffs lacked standing because they “failed[ed] to identify any *personal* injury suffered by them as a consequence of the alleged constitutional error.” 454 U.S. at 485 (emphasis altered). That is because the plaintiffs in *Valley Forge* had only read about the challenged action in a news release. *Id.* at 487 (“Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court.”). The Court’s rejection of standing had nothing to do with the nature of the plaintiffs’ beliefs and whether their offense was motivated

the latter, then it is hard to imagine anyone who would have standing under the government’s proposed test.

⁴ Thomas A. Schweitzer, *The Progeny of Lee v. Weisman: Can Student-Invited Prayer at Public School Graduations Still Be Constitutional*, 9 BYU J. PUB. L. 291, 292 (1995) (noting that plaintiffs in *Lee v. Weisman* were Jewish).

by religious concerns. Moreover, the Government's suggestion that *Schempp* has been read to mean that a "spiritual" injury is required to find standing is erroneous. Pet'rs Br. at 14 (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970)). As noted above, certain of the plaintiffs addressed by *Schempp* were atheists. *Schempp*, 374 U.S. at 211. Nevertheless, all of the plaintiffs in *Schempp* suffered injury because they were "directly affected by the laws and practices against which their complaints are directed." *Valley Forge*, 454 U.S. at 487 n.22 (quotation omitted).

In fact, the Court has scrupulously avoided looking inward into the genesis of the plaintiff's offense at the government-sponsored religious display. The Court has thus explicitly rejected the assessment of standing through examination of the plaintiff's motives or intensity of plaintiff's internal beliefs. *See id.* at 486 n.21 ("[T]he essence of standing 'is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct.'" (quoting *Doremus v. Bd. of Educ.*, 342 U.S. 429, 435 (1952))); *id.* at 486 ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy."). Nor have cases dealing with injury to the use of public land shown concern with why the plaintiff felt his or her enjoyment to be diminished. So long as the plaintiff can show that the harm is "concrete and particularized," a harm affecting "the recreational or even the mere esthetic interest of the plaintiff . . . will suffice." *Summers*, 129 S. Ct at 1149 (citing *Sierra Club v. Morton*, 405 U.S. 727, 734-736 (1972)). The proper focus of standing under the Court's established precedent is on the directness of the plaintiff's exposure to the challenged governmental conduct, not the philosophical underpinnings of the offense.

C. A Standing Test Based On The Nature of A Plaintiff's Beliefs Would Improperly Favor Some Belief Systems Over Others And Would Be Arbitrary and Unworkable.

A standing inquiry focusing on the existence of particular religious beliefs, or whether the plaintiff is part of an arguably “excluded” religious minority, would impose an arbitrary rule that would threaten to disenfranchise those with genuine injury from seeking recourse in the federal courts.

The Establishment Clause protects against not only government favoritism of a particular religion, but the elevation of religion over irreligion generally. *See, e.g., Van Orden*, 545 U.S. at 710 (“We have repeatedly affirmed that neither a State nor the Federal Government can constitutionally pass laws or impose requirements which aid all religions as against non-believers.” (quotation omitted)); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (“Neither [a state nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another.”). Permitting only the religious to object to a religious display cannot be squared with the substantive protection against the government favoring *all* religion that the Clause affords.

Indeed, granting standing only to those whose objections are deemed “religious” or “spiritual” would improperly establish a hierarchy of belief structures, under which only those who espouse certain types of beliefs are permitted access to the courts. Other beliefs, equally deeply held, would be relegated to second-class status. This is of particular concern to *amicus*, an organization that embraces a scientific world-view referred to as “scientific naturalism” or

“philosophical naturalism.” This naturalistic outlook seeks to provide a rational, ethical alternative to the current religious systems of belief. *Amicus* is concerned that the government’s rule would deny it a voice, despite the fact that the beliefs held by *amicus* regarding the separation of Church and State are equally as sincere as any rooted in conventional religious belief.

Not only would the government’s proposed rule threaten to marginalize certain beliefs, but it also would require courts to venture into the philosophical quandary of trying to separate “spiritual” from merely “philosophical” beliefs. For example, in dicta, this Court once characterized secular humanism as a “religion” that does not teach “what would generally be considered a belief in the existence of God.” *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961). *Amicus* would take issue with the characterization of secular humanism as a religion and suggests that it is more appropriately viewed as an alternative to religion. See *Random House Webster’s Unabridged Dictionary* 1730 (2d ed. 2001) (defining secular humanism as “any set of beliefs that promotes human values without specific allusion to religious doctrines”); see also *Kalka v. Hawk*, 215 F.3d 90, 99 (D.C. Cir. 2000) (“The Court’s statement in *Torcaso* does not stand for the proposition that humanism . . . amounts to a religion under the First Amendment. The Court offered no test for determining what system of beliefs qualified as a ‘religion’ under the First Amendment.”); *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994) (“[N]either the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are ‘religions’ for Establishment Clause purposes.”). How, then, would the Court treat a secular humanist plaintiff who objects to a government-sponsored religious display?

The Court has recognized the difficulties in seeking to define religion. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“[A] determination of what is a ‘religious’ belief or practice . . . present[s] a most delicate question.”); *see also Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981) (“Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment.”); *Callahan v. Woods*, 658 F.2d 679, 685 (9th Cir. 1981) (“[D]efining religious belief is often quite difficult.”); Laurence H. Tribe, *American Constitutional Law* 1181 (2d ed. 1988) (“The most common approach to defining religion is to draw analogies to generally accepted religions. When such analogies focus on the externalities of a belief system or organization, they unduly constrain the concept of religion.”).⁵

⁵ In the few instances when this Court has opined on what constitutes a religious belief, it has tried to avoid this difficulty by expansively defining religion. *See, e.g., United States v. Seeger*, 380 U.S. 163, 176 (1965) (“The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly [holding “religious” beliefs].”); *Welsh v. United States*, 398 U.S. 333, 340 (1970) (“If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content . . . those beliefs certainly occupy in the life of that individual a place parallel to that filled by . . . God in traditionally religious persons.” (quotation omitted)). But this sort of test would effectively base standing on the intensity or passion of the litigant’s beliefs, which is no easier to measure and has already been repudiated as an inappropriate gauge of standing. *See Valley Forge*, 454 U.S. at 486 (“[S]tanding is not measured by the intensity of the litigant’s interest or the fervor of his advocacy.”).

Theologians, philosophers, and sociologists also have acknowledged the difficulty in describing what constitutes a religious belief. *See, e.g.*, William P. Alston, *Religion*, in 7 *The Encyclopedia of Philosophy* 140, 141 (Paul Edwards ed., 1967) (“One could hardly expect to get an adequate statement of the nature of so complex a phenomenon as religion, essentially involving, as it does, all these forms of human activity by restricting oneself to belief, feeling, ritual, or moral attitude alone.”); Paul Tillich, *Christianity and the Encounter of the World Religions* 292 (1963) (“[T]he term religion is open both to limiting and to enlarging definitions . . . one can even take the further step of subsuming under religion those secular movements which show decisive characteristics of the religions proper, although they are at the same time profoundly different.”); William James, *The Varieties of Religious Experience* 26 (1920) (“[T]he very fact that [definitions of religion] are so many and so different from one another is enough to prove that the word ‘religion’ cannot stand for any single principle or essence, but is rather a collective name.”); Max Weber, *The Sociology of Religion* 1 (1922) (“To define ‘religion,’ to say what it *is*, is not possible at the start of a presentation such as this . . . [t]he external courses of religious behavior are so diverse that an understanding of this behavior can only be achieved from the viewpoint of the subjective experiences, ideas, and purposes of the individuals concerned.”).⁶

⁶ Legal commentators have similarly noted the complexities involved in attempting a definition of religion. *See, e.g.*, Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 Wm. & Mary L. Rev. 1831, 1905 (2009) (“Religion is a category that is hard to delimit.”); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 Cal. L. Rev. 753, 762 (1984) (“Religion is a highly complex concept . . . and agreement upon a settled account of what makes something religious has been elusive.”); George C. Freeman, *The Misguided Search for the Constitutional Definition of ‘Religion’*, 71 Geo.

Plaintiffs should not be required to prove that their objections are religious under a standard so inherently arbitrary and nebulous. *United States v. Ballard*, 322 U.S. 78, 86 (1944) (“Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.”); *see also, e.g., Gillette v. United States*, 401 U.S. 437, 457 (1971) (noting the dangers of “state involvement in determining the character of persons’ beliefs and affiliations” (quotations omitted)); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449-50 (1969) (holding that courts should not resolve “controversies over religious doctrine and practice”). The Court should decline the government’s invitation to base standing on whether an objection is “spiritual” rather than a “value or policy disagreement[.]” Pet’rs Br. at 14.

II. THE COURT SHOULD NOT ADOPT ANY RULE OR PRESUMPTION FOR LAND TRANSFERS, BUT SHOULD LOOK AT ALL THE CIRCUMSTANCES TO DETERMINE WHETHER A LAND TRANSFER GENUINELY DISTANCES THE RELIGIOUS DISPLAY FROM GOVERNMENT SPONSORSHIP.

The Court should adopt neither an absolute rule nor a special presumption that the transfer of land to a private party separates the government from a religious display so as to end any Establishment Clause violation. It is not true that observers will necessarily attribute speech to a private party who owns the land. Pet’rs Br. at 23. Just as the government arranging for a private party to be the nominal speaker does not insulate government-sponsored prayer from challenge,

L.J. 1519, 1565 (1983) (“There simply is no essence of religion, no single feature or set of features that all religions have in common and that distinguishes religion from everything else.”).

see Santa Fe, 530 U.S. at 305, conveying title to a private landowner does not necessarily avoid actual or perceived government sponsorship of a religious display.

Fashioning a new presumption that a land transfer will cure a constitutional violation would encourage the sort of peculiar gerrymandering accomplished by the statute at issue here, as government actors devise increasingly ingenious schemes to create the appearance of compliance with the Establishment Clause.⁷ Rather than applying a rote presumption, the Court should look to all of the relevant circumstances, including the history and context of the government action, to determine whether transferring the title of government-owned land to a private entity reflects a meaningful and genuine separation of the display from the government's imprimatur. *See id.* at 305 (holding that the government “failed to divorce itself from the religious content” of invocations by devising a scheme for the prayer to be led by a student speaker); *McCreary County v. ACLU*, 545 U.S. 844, 846 (“[S]ecular purpose [must] be genuine, not a sham, and not merely secondary to a religious objective.”).

A holistic assessment of the facts and circumstances concerning a purportedly curative land transfer is in keeping with the Court's longstanding method of analyzing compliance with the Establishment Clause. Although the contours of the test applied in Establishment Clause cases have varied, the Court has repeatedly stated that the Establishment Clause analysis must be nuanced and fact-specific, not a mechanical exercise. When reviewing the validity of a statute challenged under the Establishment

⁷ Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121, 117 Stat. 1100 [hereinafter “2004 Act”].

Clause, courts “not only can, but must, include an examination of the circumstances surrounding its enactment. Whether a government activity violates the Establishment Clause is ‘in large part a legal question to be answered on the basis of judicial interpretation of social facts. . . . Every government practice must be judged in its unique circumstances.’” *Santa Fe*, 530 U.S. at 315 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1984)) (O’Connor, J., concurring)). This inquiry includes an awareness of the “history and context of the community and forum.” *Id.* at 317 (quoting *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in part and concurring in judgment)).

As Justice Breyer’s concurring opinion stated in *Van Orden*, “I see no test-related substitute for the exercise of legal judgment. That judgment is not a personal judgment. Rather, as in all constitutional cases, it must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes.” 545 U.S. at 700 (citations omitted) (Breyer, J., concurring); *see also McCreary*, 545 U.S. at 859 n. 10 (“Establishment Clause doctrine lacks the comfort of categorical absolutes.”). Likewise, the plurality in *Van Orden* grounded its inquiry on examination of “the nature of the monument,” as well as by a historical inquiry into the symbol’s meaning and significance. *See Van Orden*, 545 U.S. at 686.

Establishing a presumption that transferring title to the land immediately surrounding a display will end attribution of the display to the government is also inconsistent with the Court’s recent decision in *Pleasant Grove City v. Summum*, which concluded that donated displays in public parks are strongly identified with the

government. 129 S. Ct. 1125, 1130 (2009). The Court held in *Summum* that “the placement of a permanent monument in a public park is best viewed as a form of government speech.” *Id.* at 1129. That is because “[p]ublic parks are often closely identified in the public mind with the government unit that owns the land.” *Id.* at 1133. When the government chooses to allow particular monuments in a public park, the Court stated, they “are meant to convey and have the effect of conveying a government message.” *Id.* at 1134. The association between the government and monuments displayed in public parks was so strong that, the Court held, it was unnecessary for jurisdictions formally to proclaim monuments to be their own expressive vehicles for the monuments to be considered government speech; simply putting the monuments on display “provided a more dramatic form of adoption” than a formal statement of endorsement. *Id.*⁸ Presuming that a land transfer so easily and abruptly ends the governmental endorsement of a display standing for decades on government land in a national preserve would be contrary to *Summum*.

III. THE LAND TRANSFER DOES NOT DISTANCE THE GOVERNMENT FROM THE RELIGIOUS DISPLAY IN THIS CASE.

The government’s transfer of title of the immediate parcel of land where the cross sits does not provide any meaningful distance from governmental endorsement of

⁸ Although the Court found a formal proclamation unnecessary to create a link between the government and a donated display, in this case there is also formal legislation adopting and embracing the monument as promoting a government message. *See* Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, Div. A, § 8137(a), 115 Stat. 2278 [hereinafter “2002 Act”] (designating Mojave Cross as a national memorial).

religion and does not transform maintenance of the cross into private action. To the contrary, the purpose and effect of the land transfer legislation are to ensure that the cross continues to stand in the midst of public parkland.

The argument that the 2004 Act does not represent a governmental effort to maintain the cross in the Mojave Preserve rests on the slimmest of reeds: that the reversionary clause of the 2004 Act “requires only that the VFW maintain the conveyed property as ‘a’ war memorial, not ‘the’ war memorial [i.e., the cross] that had been designated in the 2002 Act.” Pet’rs Br. at 33 (emphasis added) (citing 2004 Act § 8121(e) (“The conveyance under subsection (a) shall be subject to the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I.”)). The government argues that because of this wording, “once the property is conveyed, how to commemorate World War I veterans will be up to the VFW,” thereby shifting the religious message conveyed by the cross to the VFW, a private party. *Id.* The government’s argument that private choice of the VFW and not government action is responsible for the continued maintenance of the cross is not credible under the circumstances. *Cf. McCreary*, 545 U.S. at 864 (secular purpose of government action “has to be genuine, not a sham”); *Santa Fe*, 530 U.S. at 308; (governmental representations about purpose of its actions are “entitled to some deference [b]ut it is . . . the duty of the courts to distinguish a sham secular purpose from a sincere one.” (quotations omitted)).

First, the government’s interpretation of the 2004 Act as leaving to the VFW the ability to erect some other monument without triggering reversion is contrary to the plain reading of the statute. Section 8121(a) transfers a

specific war memorial -- namely, the white cross designated as a national memorial by the 2002 Act. *See* 2004 Act § 8121(a) (“[T]he Secretary . . . shall convey . . . a parcel of real property consisting of approximately one acre . . . *and designated [by the 2002 Act] as a national memorial.*” (emphasis added)). Read in conjunction with subsection (a), the reversionary clause in subsection (e) refers to the same war memorial as specifically referenced in subsection (a) of the 2004 Act. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (“Statutory construction is a holistic endeavor.” (citations omitted)); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (court has a “duty to construe statutes, not isolated provisions”).

Consistent with this reading, Representative Jerry Lewis, sponsor of the 2004 Act, characterized the statute’s purpose as ensuring that the cross is maintained. Representative Lewis issued a press release shortly after the Ninth Circuit’s ruling now subject to review emphasizing the designation by Congress of the “Mojave Cross” as a national memorial (the result of legislation which he also sponsored) and characterizing the 2004 Act as “strong support by Congress . . . for *this historic memorial.*” *See* Press Release, Jerry Lewis, *Ninth Circuit Erred in Attacking Mojave Cross Veterans Memorial, Lewis Believes* (Sept. 7, 2007), available at <http://www.house.gov/jerrylewis/september72007.html> (last visited July 30, 2009). Representative Lewis would not tout the statute as showing “strong support” for the specific Mojave Cross memorial if the 2004 Act was intended to let the new nominal owners install a different monument. The government’s contrary interpretation of the statute is a *post hoc* effort to re-cast the legislation as leaving the decision whether to maintain the cross in private hands.

Second, Congress transferred the land to the same group that erected the cross originally. Inferring the intent of ceding the land to that particular party is easy. Its purpose was to ensure that the new landowner would continue to maintain the cross. No “private decision” creates a genuine circuit-breaker between the government and the religious message conveyed by the cross under these circumstances. Compare *Mitchell v. Helms*, 530 U.S. 793, 810 (2000) (plurality) (“[I]f numerous private choices, *rather than the single choice of a government*, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.”), with *Santa Fe*, 530 U.S. at 305 (rejecting argument that student-led invocations were constitutional because under “the realities of the situation” the student choice was not a private “circuit-breaker”). It was the government’s choice to transfer the land to precisely the party most likely to keep the cross intact; so the fact that the cross remains standing is attributable to the government’s action.

Had Congress intended for any decision to maintain or take down the cross genuinely to be a private decision, it could (for example) have sold the land through a competitive bidding process. The government, however, chose not to solicit bids by others, instead choosing to transfer the land to the group which it must have known would maintain the cross. Nor did Congress choose to erect in place of the cross a secular war memorial, an action that would have fulfilled its purported goal of continuing to maintain “a” war memorial without endorsing any religious message.

Third, the government’s professed rationale for transferring the land reveals that it always intended for the cross to be maintained. Petitioners’ brief acknowledges that

the 2004 Act and the statutes that preceded it had as their purpose “the preservation of a *longstanding* memorial,” not some new memorial erected in place of the cross. Pet’rs Br. at 32 (emphasis added). All of the legislation enacted by Congress on this issue was, in the government’s conception, of a piece: to “avoid social conflict” that would be caused by taking down the cross. *Id.* at 28-29 (“[R]ecognizing the probability that the Park Service’s proposed action [of removing the cross] would engender social conflict, Congress intervened first by preventing the use of federal funds to remove the cross, then by designating the cross as a national memorial, and finally by transferring the site to the VFW.”). Even assuming the government’s ultimate motive was to avoid social conflict rather than to promote religion *per se*, its immediate and expressed goal was to ensure that the cross remained standing. The government cannot credibly argue that the 2004 Act created a genuine private choice whether or not to keep the cross intact when it admittedly transferred the cross to avoid the social conflict that would be caused by the cross’s removal.

In any event, avoiding “social conflict” is not a valid justification for the government to support maintenance of a religious symbol. Permitting the Ten Commandments display to remain in the Kentucky courthouse might have caused less consternation among those Kentuckians who supported the display, but that did not make it constitutional to leave it displayed in the courthouse. *See McCreary*, 545 U.S. at 881. Nor could a public school teacher continue to lead students in morning prayers simply because most of the parents in the district would complain if the prayers were forbidden. *See Schempp*, 374 U.S. at 226-27. Permitting government endorsement of religion in the name of avoiding “social conflict” would surrender core constitutional protections to the majoritarian will.

Finally, Congress has never revoked its specific designation of the cross as a national memorial. *See* 2002 Act § 8137(a) (“The five-foot-tall white cross first erected by the Veterans of Foreign Wars . . . is hereby designated as a national memorial.”). If the government wished to end its endorsement of the religious message that the cross conveys, it would have repealed the legislation. *See McCreary*, 545 U.S. at 871-72 (that resolutions evidencing religious purpose “were not repealed or otherwise repudiated” was evidence of continued improper purpose).

In sum, the government’s actions here illustrate the dangers of establishing any rule or presumption that land transfers cure Establishment Clause violations arising from religious displays. The Court should not fashion a rule that would breed similar artifice.

CONCLUSION

For all of the foregoing reasons, this Court should affirm Respondent's standing as proper. This Court should also hold that, considering all of the circumstances, the land transfer at issue does not end the Establishment Clause violation.

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