

No. 08-472

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IN THE  
**Supreme Court of the United States**

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KEN L. SALAZAR,  
SECRETARY OF THE INTERIOR, ET AL.,  
*Petitioners,*

*v.*

FRANK BUONO,  
*Respondent.*

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

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BRIEF FOR JEWISH WAR VETERANS OF THE  
UNITED STATES OF AMERICA, INC. AS AMICUS  
CURIAE SUPPORTING RESPONDENT

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The Jewish War Veterans of the United States of America, Inc. (JWV), organized in 1896 by Jewish veterans of the Civil War, is the oldest active national veterans' service organization in America. Incorporated in 1924, and chartered by an act of Congress in 1983, *see* 36 U.S.C. § 110103, JWV's objectives include "preserv[ing] the memories and records of patriotic service performed by the men and women of the Jewish faith and honor[ing] their memory," *id.* § 110103(12), and "shield[ing] from neglect the graves of our heroic dead," *id.* § 110103(13).

JWV has long taken an interest in the appropriate character of federal war memorials. *See, e.g., Jewish War Veterans of United States v. United States*, 695 F. Supp. 3 (D.D.C. 1988) (invalidating display of cross on Marine Corps base under Establishment Clause). JWV is currently a plaintiff challenging the Government's display of a 43-foot-high Latin cross on Mt. Soledad in San Diego, California. *See Trunk v. City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008), *appeal filed sub nom. Jewish War Veterans of United States v. Gates*, No. 08-56415 (9th Cir. filed Aug. 21, 2008). Allen Schwartz, respondent's co-plaintiff who died during the course of this litigation, was Quartermaster of JWV Post 152. Pet. App. 124a.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for amicus certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amicus, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk.

## INTRODUCTION

The United States Government has designated just one national memorial to honor American veterans of World War I: a Latin cross on federal land in the Mojave National Preserve. By choosing Christianity's chief symbol as the nationally endorsed means of paying tribute to World War I veterans, the Government sends the unmistakable message that it deems less worthy of honor the sacrifices of non-Christian veterans, including the 250,000 Jewish service members who answered America's call to duty in World War I. In a ruling not before the Court, the court of appeals held that the display of the Cross violates the Establishment Clause.<sup>2</sup> The Government's superficial attempt to cure its Establishment Clause violation is insufficient to remove its imprimatur from the message that non-Christian veterans are outsiders undeserving of their nation's praise.

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<sup>2</sup> The district court held (Pet. App. 139a), and the court of appeals affirmed (*Id.* at 108a), that the Government's display violates the Constitution. The petition "does not present the question whether the display of a cross in connection with the war memorial at Sunrise Rock violates the Establishment Clause, but rather whether Congress's efforts to resolve any Establishment Clause problem by transferring the land to private hands may be given effect." Pet. 20 n.8. Nor could the petition present that question, as the Government is barred from relitigating that issue in this enforcement proceeding. *See* Resp. Br. 9-10. The constitutional issue not here presented is presented on not dissimilar facts in *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008), appeal filed *sub nom. Jewish War Veterans of United States v. Gates*, No. 08-56415 (9th Cir. filed Aug. 21, 2008).

### SUMMARY OF ARGUMENT

Congress's proposed partial transfer of the land underneath the Latin cross on Sunrise Rock in the Mojave National Preserve does not cure the Government's Establishment Clause violation. The Latin cross is a powerful Christian symbol and is not a symbol of any other religion. Even when labeled a "war memorial," the cross retains its Christian significance because its meaning—either of self-sacrifice or death—is derived from and reinforces core Christian doctrine. Any government effort to promote display of the preeminent symbol of Christianity, even when labeled a "war memorial," bespeaks a religious purpose. In the 2004 Act, the Government acted with a plainly religious purpose by attempting to preserve the display of the Sunrise Rock Cross. That purpose condemns the proposed transfer as inadequate to remedy the Establishment Clause violation.

Under the 2004 Act, the Government's continued control over the Cross and surrounding property would sustain its endorsement of religion. Rather than divesting itself of the display, Congress insisted on a reversionary interest and easement, thus retaining partial ownership. Moreover, by transferring an acre surrounded on all sides by a vast national preserve and labeling that property a national memorial, the Government would retain strong regulatory authority over the land on which the Cross sits. Finally, through the reversionary clause and a criminal prohibition on injuring veterans' memorials, the Government would all but guarantee preservation of the status quo: the symbol of Christianity standing in the middle of the Mojave National Preserve. This limited transfer does not adequately disentangle the Government from the Cross's religious message.

Finally, the transfer does not undo Congress's 2002 designation of the Sunrise Rock Cross as a national World War I memorial. By labeling the Cross as our sole national memorial to veterans of World War I, the Government ignores and denigrates the service of non-Christian veterans of that war. The national-memorial designation perpetuates the Government's endorsement of religion by giving the Government enhanced regulatory powers over the display, conveying the Government's ongoing support for the Cross's message. More importantly, the national-memorial designation is the Government's single most effective means of associating itself with a memorial's message. By selecting the preeminent symbol of Christianity to commemorate World War I veterans, the Government has implied that only Christian veterans are worthy to be honored. The Government's formalistic attempt to cure its Establishment Clause violation while all but guaranteeing the Cross's continued display is inadequate given the Government's ongoing proclamation that the Christian Cross represents all veterans of the First World War.

## ARGUMENT

### I. THE GOVERNMENT'S EFFORT TO PERPETUATE THE CROSS DISPLAY LACKS A SECULAR PURPOSE

The United States Government displays a Latin cross on Sunrise Rock in the Mojave National Preserve (the Sunrise Rock Cross or Cross). Pet. App. 55a. The Government has designated that Cross as our only national memorial honoring World War I veterans. *See* Department of Defense Appropriations Act, 2002 (2002 Act), Pub. L. No. 107-117, Div. A, § 8137(a), 115 Stat. 2278. In response to an injunction barring its display of the Cross, the Government sought to perpetuate the Cross's display by transferring the Cross and the land

underneath it to a Veterans of Foreign Wars (VFW) post. *See* Department of Defense Appropriations Act, 2004 (2004 Act), Pub. L. No. 108-87, § 8121(a), 117 Stat. 1100, *codified at* 16 U.S.C. § 410aaa-56 (note). The 2004 Act defining the terms of the land transfer fails to cure the Establishment Clause violation because it all but guarantees the continuing display of the Cross, a Christian symbol that retains its religious meaning even when labeled a war memorial.

#### **A. The Latin Cross Is a Profoundly Religious Christian Symbol**

The Latin cross is the preeminent symbol of Christianity. No “symbol [is] more closely associated with a religion than the cross is with Christianity.”<sup>3</sup> The cross “represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity.” *Ellis v. City of La Mesa*, 990 F.2d 1518, 1525 (9th Cir. 1993). To billions of Christians throughout the world, “the message of the cross” is no less than “the power of God.” I Corinthians 1:18 (NIV).

The centrality of the cross to Christian belief is reinforced by its use in Christian worship (but in the rites of no other religion). The symbol “greet[s] us in the form of the Cross from the tower of every church, from every Christian grave-stone and in the thousands of forms in which the Cross finds employment in daily life.”<sup>4</sup> Use of the cross in church architecture began

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<sup>3</sup> Keister, *Stories In Stone: A Field Guide to Cemetery Symbolism and Iconography* 172 (2004).

<sup>4</sup> Warfield, *The Essence of Christianity and the Cross of Christ*, 7 Harv. Theol. Rev. 538, 592 (1914).

with Catholicism, and “[c]rosses can be now found on nearly every Protestant church in America, from the tops of spires down to decorative cornerstones.”<sup>5</sup> Inside those churches, “[p]lain and decorated crosses hang above Communion tables, glow in stained-glass windows, trim ministers’ vestments, adorn Communion vessels, and mark gravesites in surrounding yards.”<sup>6</sup> The cross is used during Christian worship in liturgical processions or through the “sign of the cross” made by clergy to bless certain people and objects.<sup>7</sup> Outside church, many Christians rely on the cross as a symbol of inspiration, displaying the cross in their homes or on chains around their necks.<sup>8</sup>

The profound religious significance of the cross is so apparent that in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), all nine Justices of this Court joined opinions using the Latin cross as the prototypical example of an unconstitutional religious display.<sup>9</sup> This Court had noted on an earlier occasion that the “church

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<sup>5</sup> Smith, *Gothic Arches, Latin Crosses: Anti-Catholicism and American Church Designs in the Nineteenth Century* 54 (2006).

<sup>6</sup> *Id.*

<sup>7</sup> Quill, *Liturgical Worship*, in *Perspectives on Christian Worship: Five Views* 18, 35-36 & n.28 (Pinson ed., 2009).

<sup>8</sup> *Id.* at 36.

<sup>9</sup> See *Allegheny*, 492 U.S. at 599 (plurality opinion) (adornments could not “negate the endorsement of Christianity conveyed by the cross”); *id.* at 629 (O’Connor, J., concurring); *id.* at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist, C.J., White and Scalia, JJ.) (“[Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall”).

speaks through the Cross,” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943), and many other courts have reached the unsurprising conclusion that the cross is a sacred Christian symbol with great religious significance.<sup>10</sup>

**B. The Use of a Latin Cross as a War Memorial Does Not Sap the Cross of Its Christian Meaning, But Preserves and Enhances Its Religious Significance**

Contrary to the Government and some amici, labeling the cross a war memorial does not deprive it of religious meaning. If the cross does symbolize “the sacrifices of fallen service members” (Pet. Br. 39), that meaning is inseparable from Christian doctrine. If honoring sacrifice is a meaning of the cross, it is because for Christians (but only for Christians), the cross symbolizes Christ’s sacrifice for humankind’s sins. If the cross signifies death, it is because for Christians (but only for Christians), the cross evokes Christ’s death, resurrection, and promise of everlasting life. For non-Christians, the cross carries no such meanings.

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<sup>10</sup> See, e.g., *Gonzales v. North Twp.*, 4 F.3d 1412, 1418 (7th Cir. 1993); *Harris v. City of Zion*, 927 F.2d 1401, 1403 (7th Cir. 1991); *Friedman v. Board of County Comm’rs*, 781 F.2d 777, 781 n.3 (10th Cir. 1985); *ACLU of Ga. v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1110 (11th Cir. 1983); *ACLU v. City of Stow*, 29 F. Supp. 2d 845, 852 (N.D. Ohio 1998); *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065, 1069 (M.D. Fla. 1989); *ACLU of Miss. v. Mississippi State Gen. Servs. Admin.*, 652 F. Supp. 380, 382 (S.D. Miss. 1987); *Libin v. Town of Greenwich*, 625 F. Supp. 393, 398 (D. Conn. 1985); *Greater Houston Chapter of ACLU v. Eckels*, 589 F. Supp. 222, 234 (S.D. Tex. 1984).

The Government makes no effort to explain how the cross—the preeminent symbol of Christianity—can honor America’s veterans, perhaps because any articulation would reveal its Christian roots. Some amici, including Thomas More Law Center, contend that the cross is a “universal symbol of self-sacrifice,” such that “in the context of a war veterans’ memorial, the cross is a symbol of the ultimate sacrifice made for one’s country.” Br. of Amici Curiae Thomas More Law Center et al. (TMLC Br.) 16; *see also* Br. of Amicus Curiae American Legion Department of California (Legion Br.) 13 (“the cross is a uniquely transcendent symbol representing the decision to lay down one’s life for the good of others”). But this theory honors war dead by comparing them to Jesus: Just as Jesus shed his blood for the sinful world, America’s war dead shed blood for the nation. This analogy works only for those who embrace the doctrine of atonement through Christ’s crucifixion, and the comparison intended to honor veterans’ sacrifices simultaneously reinforces Christian beliefs about the nobility of Jesus’s crucifixion through association with brave Americans. Such a message violates the Establishment Clause command that Government “may not promote or affiliate itself with any religious doctrine.” *Allegheny*, 492 U.S. at 590.

Other amici claim that a cross labeled a war memorial honors veterans by sending a secular message of death or burial. *See, e.g.*, Br. of Amici Curiae Utah Highway Patrol Ass’n et al. (UHPA Br.) 16 (cross is “an instantly recognizable symbol of death and sacrifice, ... traceable to its prevalent use as a grave marker”); Legion Br. 15 (“Crosses are also commonly used to symbolize death.”). But this theory ignores that crosses used in memorials and cemeteries do not signify death in the abstract but instead declare the de-

ceased's Christian faith. In "a custom ... almost as ancient as the Christian religion itself," Christians mark gravesites with the cross "to signify ... the resting place of a Christian" in a tradition that "remains the standard form of ritual Christian grave-practice in many parts of the world."<sup>11</sup>

Non-Christians do not mark gravesites with the cross, either generally or in the military setting. For instance, the U.S. Department of Veterans Affairs (VA) provides rectangular memorial headstones for the graves of deceased veterans.<sup>12</sup> Recognizing that the cross cannot adequately represent all veterans, the VA permits a veteran's family to honor the veteran's faith by selecting one of 39 "emblems of belief" for inclusion on the headstone.<sup>13</sup> Among these emblems are fifteen different crosses, including the unadorned Latin cross that the VA labels the "Christian Cross." The VA offers many other emblems to mark the graves of veter-

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<sup>11</sup> Sullivan, *The Impossibility of Religious Freedom* 197 (2005) (quoting report of Dr. John McGuckin in *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272 (S.D. Fla. 1999)).

<sup>12</sup> See U.S. Dep't of Veterans Affairs, *Eligibility for a Headstone or Marker*, at <http://www.cem.va.gov/hm/hmelig.asp> (last updated June 8, 2009).

<sup>13</sup> See U.S. Dep't of Veterans Affairs, *Available Emblems of Belief for Placement on Government Headstones and Markers*, at <http://www.cem.va.gov/hm/hmemb.asp> (last updated Mar. 12, 2009). Crosses chosen by veterans and their families to mark veterans' graves do not run afoul of the Establishment Clause because "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring).

ans of the Jewish, Muslim, Hindu, Sikh, Buddhist, and other faiths. These options reflect the VA's conclusion that the cross is not a universal grave marker because is it not a secular symbol of death or sacrifice, but instead conveys the message that the veteran resting beneath was Christian.

The understanding that the Christian cross does not represent non-Christian veterans is also held by the American Battle Monuments Commission, which maintains overseas military cemeteries. During World War I, the War Department determined that the graves of Jewish soldiers who had died in battle would be marked with the Star of David. *See Jewish Soldiers' Graves To Be Marked by a Double Triangle Instead of a Cross*, N.Y. Times, July 25, 1918, at 22. Major General Crosby explained in a 1930 address that “[m]any of our heroic dead lie in Flanders Field, Suresnes, Belleau Wood, and elsewhere. The star of David is mingled with the cross in beautiful and everlasting marble. As they lived together, fought together, so they lie buried, side by side.” 72 Cong. Rec. 11064 (June 17, 1930). To this day, the graves of Jewish soldiers are marked with the Star of David, not a Christian cross, in American military cemeteries overseas.<sup>14</sup>

Nor are crosses so entrenched or ubiquitous as war memorials that they can avoid “convey[ing] a message of endorsement of particular religious beliefs” “despite their religious roots.” *Allegheny*, 492 U.S. at 630-631 (O'Connor, J., concurring in part and concurring in the judgment)). Contrary to the claims by amici supporting

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<sup>14</sup> *See American Battle Monuments: A Guide to Military Cemeteries and Monuments Maintained by the American Battle Monuments Commission* 10 (Elizabeth Nishiura ed., 1989).

the Government that the cross is “commonly” used in war memorials (Br. for Amici Curiae Veterans of Foreign Wars et al. (VFW Br.) 10; *see also* Legion Br. 14; UHPA Br. 19), the Latin cross—because it is so religiously exclusive—has rarely been used to honor veterans collectively.

To prove the supposed ubiquity of the Latin cross as war memorial, amici led by the VFW point (Br. 11) to the use of the Cross of Sacrifice, a cross adorned with a bronze sword, in war cemeteries across the former British Empire. But the British selection of that monument confirms its religious meaning: the Commonwealth War Graves Commission chose the cross in “recognition of the fact that we are a Christian Empire” and to represent “the great majority [for whom] the Cross is the symbol of their faith.”<sup>15</sup> Its design, approved by the Archbishop of Canterbury, *see* Blomfield, *Memoirs of an Architect* 179 (1932), evoked Britain’s use of Christian ideas in wartime propaganda, most famously in a lithograph titled “The Great Sacrifice” that connected soldiers’ deaths to the crucified Christ, *see* King, *Memorials of the Great War in Britain: The Symbolism and Politics of Remembrance* 129-130 (1998). Britain—a nation with an established church headed by its monarch as Defender of the Faith—chose the cross as war memorial precisely because it was religious, illustrating why it is such an inappropriate symbol for a country that is not a “Christian Empire.”

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<sup>15</sup> Sir Frederick Kenyon, *War Graves: How the Cemeteries Abroad Will Be Designed* (1918), available at [http://yourarchives.nationalarchives.gov.uk/index.php?title=The\\_Kenyon\\_Report\\_Part\\_1](http://yourarchives.nationalarchives.gov.uk/index.php?title=The_Kenyon_Report_Part_1).

Amici further assert that the Latin cross is “typical” in war memorials (VFW Br. 10) and that cross memorials appear in “countless” places across the United States (*id.* at 13). In truth, the cross is so infrequently used as a war memorial that amici can only muster ten examples from the tens of thousands of war memorials across the country.<sup>16</sup> And even among those ten outliers, rarely are unadorned crosses used to represent all veterans. The Celtic cross—one of 1300 monuments at Gettysburg—represents a brigade of Irish immigrants; the French Cross in New York represents French sailors who died in American waters; and the Canadian Cross of Sacrifice—a gift from the Canadian government—represents Americans who fought for the British Empire in the Canadian Armed Forces during World War I. And unlike the Sunrise Rock Cross, these other crosses are typically adorned with or surrounded by symbols of war and nationhood. The claim that the Latin cross is frequently used to honor American veterans lacks support.

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<sup>16</sup> See VFW Br. 12-13 (citing Argonne Cross and Canadian Cross of Sacrifice in Arlington National Cemetery; French Cross Monument in Cypress Hill National Cemetery; Unknown Soldiers Monument in Prescott National Cemetery in Arizona; Memorial Peace Cross in Bladensburg, Maryland; Wall of Honor at Pennsylvania Military Museum); States Br. 14-15 (citing memorial at West Perry High School in Pennsylvania and Mt. Soledad Cross in San Diego, California); TMLC Br. 16 (citing Irish Brigade Memorial in Gettysburg National Military Park and memorial in Taos Plaza).

**C. The 2004 Act—Designed To Perpetuate the Display of a Christian Symbol—Has an Unmistakable Religious Purpose That Makes It Wholly Inadequate to Remedy an Establishment Clause Violation**

**1. No Purpose To Preserve a “War Memorial” Cross Can Be Deemed Secular**

The Establishment Clause forbids the Government from “act[ing] with the ostensible and predominant purpose of advancing religion.” *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005). As this Court has held, a government can act with respect to religion in such an overt way that “the government action itself besp[peaks] the purpose.” *Id.* at 862. In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), for example, “the object of required Bible study in public schools was patently religious,” *McCreary*, 545 U.S. at 862. And in *Stone v. Graham*, 449 U.S. 39 (1980), this Court held that “[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature.” *Id.* at 41.

Because the government’s actions in those cases touched on inherently religious matters with such obvious religious ramifications, the Court needed no extra evidence to identify a religious purpose. *See Abington*, 374 U.S. at 223; *Stone*, 449 U.S. at 41-42; *see also McCreary*, 545 U.S. at 869 (“When the government initiates an effort to place [an unmistakably religious statement] alone in public view, a religious object is unmistakable.”). Government professions of secular purpose were implausible given the “pervading religious character” of the challenged conduct. *Abington*, 374 U.S. at 224.

Government action rarely bespeaks a religious purpose more plainly than when the government promotes the display of a symbol as profoundly religious as the Latin cross. In *Abington*, this Court so easily found religious purpose in part because “the place of the Bible as an instrument of religion cannot be gainsaid.” 374 U.S. at 224. Likewise, when the government attempts to perpetuate the display of the Latin cross, indisputably an instrument of religion, the attempt is patently religious regardless of the absence of statutory text or legislative history to confirm that religious objective.

The religious purpose of government efforts to perpetuate the display of the Latin cross is obvious even when the cross is labeled a “war memorial.” The asserted secular purpose of such displays—honoring veterans—is empty because not all veterans are Christians. See *Abington*, 374 U.S. at 224 (plainly religious character of Bible not “consistent with the contention that the Bible is here used ... as an instrument for non-religious moral inspiration”). Approximately one million Jews served in America’s armed services during the twentieth century. It defies logic to suggest that the Government would aim to remember Jewish (or other non-Christian) veterans by displaying the symbol of Christianity. There is no rational connection between the avowed purpose of honoring veterans of all religions and the act of displaying the symbol of only one religion.

## **2. The 2004 Act Does Not Cure the Government’s Establishment Clause Violation**

As the Constitution forbids Congress from acting with a religious purpose, the Government plainly cannot remedy an Establishment Clause violation with a

similarly motivated law. The 2004 Act outlining the transfer of land to the VFW has a religious purpose because its central object is to ensure that the Sunrise Rock Cross remains standing. According to the Government (Br. 36), the purpose of the 2004 Act is to “preserv[e] a national memorial to fallen service members.” But this asserted purpose—as just explained—makes no sense because the statute merely preserves a Latin cross, which cannot serve as a secular memorial to service members. In all but the rarest of circumstances, not present here, government action to encourage the display of Christianity’s symbol must be deemed to have a religious purpose.

While a government’s avowed secular purpose is entitled to some deference, it is “the duty of the courts to distinguish a sham secular purpose from a sincere one,” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (internal quotations omitted and alterations in original incorporated); this Court “ha[s] not made the purpose test a pushover for any secular claim,” *McCreary*, 545 U.S. at 864. The purpose test would have “no real bite” if courts simply rolled over whenever lawmakers offered some barely plausible explanation, “given the ease of finding some secular purpose for almost any government action.” *Id.* at 865 n.13. Where, as here, there is no logical connection between the asserted purpose (honoring veterans of all religions) and the goal (displaying the symbol of one religion), the asserted purpose must be rejected.

Beyond pleading for deference, the Government seeks to blindfold the reasonable observer, whose knowledge and perception are the Establishment Clause touchstones for determining whether a government’s action endorses religion. *See, e.g., McCreary*, 545 U.S. at 866; *Santa Fe*, 530 U.S. at 308. The Gov-

ernment contends that Congress's 2001 enactment, which prohibited the use of federal funds to remove the Cross (Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, App. D, § 133, 114 Stat. 2763, 2763A-230), and the 2002 Act are irrelevant to understanding the 2004 Act because "[t]hose two statutes ... predate the district court's permanent injunction preventing display of the cross." Pet. Br. 32. This contention revives the argument squarely rejected in *McCreary*: "that purpose ... should be inferred, if at all, only from the latest news about the last in a series of governmental actions, however close they may all be in time and subject." 545 U.S. at 866. The artificial line drawn by the Government unrealistically suggests that Congress (1) only learned of the Cross display's constitutional infirmity once the district court entered the injunction; or (2) suddenly abandoned its theretofore unconstitutional efforts to preserve the Cross after the court entered the injunction.

Neither theory is plausible. The court of appeals rightly recognized that the 2001 and 2002 enactments were just "first step[s] in forestalling inevitable enforcement of a federal injunction" when Congress learned of the threatened (and subsequently filed) lawsuit. Pet. App. 83a. And the 2004 Act, rather than moving away from those earlier efforts to keep the Cross standing, embraces them; the 2004 Act explicitly references and reaffirms the 2002 effort to bolster the federal display of the Cross. *See* 2004 Act § 8121(a).

The Government's principal argument is a bizarre one: that the 2004 Act does not actually do what Congress intended it to do. The Government makes the contradictory claims that in 2004 Congress intended "the preservation of a longstanding memorial" (Br. 32) but that Congress "d[id] nothing 'to preserve and main-

tain the cross” (Br. 33). The Cross display is surely “longstanding”; its “preservation” requires that it continue to stand, not be replaced by something new. Yet to save the 2004 Act, the Government adopts a fanciful interpretation that eviscerates Congress’s goal of preserving the display of the Cross.

The 2004 Act conveys to the VFW “a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by [the 2002 Act]) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.” 2004 Act § 8121(a). That conveyance is “subject to the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war.” *Id.* § 8121(e). The Government contrasts the 2002 Act, which designates both the “five-foot-tall white cross” and “a limited amount of adjoining Preserve property” as a memorial, with the 2004 Act, which requires only that “the conveyed property” be maintained as a memorial. Br. 33. Under the Government’s interpretation, because the “2004 Act does not mention a cross,” the Cross is not part of “the conveyed property” that the legislation requires to be maintained as a memorial. *Id.*

This reading compels the absurd conclusion that the conveyance to the VFW includes only the land underneath the Cross while the Government retains ownership of the Cross itself. It further ignores the fact that the Cross, which has been bolted into the rock (Pet. App. 56a), is a fixture that is by definition part of the conveyed real property. *See* 35A Am. Jur. 2d *Fixtures* § 3 (2001) (“A fixture is owned by the owner of the land upon which the structure is permanently af-

fixed[.]”). The Government’s odd interpretation would mean that Congress carried out its Government-proclaimed goal of “preserving a national memorial to fallen service members” (Pet. Br. 36) by writing a law that did nothing to preserve that memorial. Finally, the Government’s construction would do nothing to remedy the Establishment Clause violation, since the continued display of the Cross would be correctly attributable to its owner, the United States.

## **II. THE GOVERNMENT EXERCISES ONGOING CONTROL OVER THE CROSS AND SURROUNDING LAND, FURTHER UNDERSCORING ITS UNCONSTITUTIONAL ENDORSEMENT OF CHRISTIANITY**

At Sunrise Rock, the Government has attempted to outsource its religious display to a private owner, but has not relinquished its control over that display. The Government’s continued control over the Cross at Sunrise Rock perpetuates its endorsement of religion and renders the selected remedy insufficient to cure the constitutional violation. This control is exerted in a variety of ways, including the threat of civil and criminal penalties if the Cross is removed.

### **A. The Government Maintains Control Over the Cross and Adjoining Land**

The Government’s ongoing and pervasive control over the land and Cross at Sunrise Rock perpetuates its endorsement of religion. *See Santa Fe*, 530 U.S. at 314. In at least four ways, the Government has ensured its control over the venue of the Sunrise Rock Cross:

- Congress mandated a reversionary interest that is triggered if the land is used in any way other than what the Government prescribes (and may

even require the continued display of the Cross, *see infra* Part II.B).

- The location of the transferred land entirely within a national preserve subjects it to heightened government regulation.
- The National Park Service (NPS) is responsible for the “supervision, management and control” of the national memorial at Sunrise Rock.
- Congress required a governmental easement for the purpose of installing a plaque.

These provisions perpetuate the Government’s control and would cause the objective observer to perceive continued governmental endorsement of the Cross. *See Santa Fe*, 530 U.S. at 308.

### **1. The Government’s Reversionary Interest Underscores, and Does Not Remedy, Its Endorsement**

When the Government sought to transfer the Cross and land to the VFW, it denied the VFW one of the fundamental features of ownership: the right to use the property as desired. Instead, the Government obligated the VFW to continue a single, narrow use by preserving for the Government a reversionary interest that would be triggered if the land no longer is used as a war memorial. 2004 Act § 8121(e).

This type of interest has been held to constitute government control and state action. *See, e.g., Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir. 1962). In *Hampton*, after the City of Jacksonville, Florida was enjoined from operating two segregated golf courses, it sold the properties with a reversionary clause requiring the purchasers to use the properties “only ‘for the pur-

pose of a golf course.” *Id.* at 320-321. The Fifth Circuit “conclude[d] that the inclusion of the reversionary clause in these conveyances constituted the purchasers of the two golf courses state agents.” *Id.* at 323. The Government’s reversionary clause here is identical in form to that condemned in *Hampton*.<sup>17</sup> The reversionary clauses in both cases mandate the continued operation of the property in the very same way that, while under government control, was found constitutionally objectionable.

Similarly, in *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964), a racially segregated private hospital was subject to a reversionary clause held by local government units requiring that the property “be used and maintained as a Hospital for the benefit of the County and City.” *Id.* at 712. The Fourth Circuit adopted as “persuasive” *Hampton*’s conclusion that the existence

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<sup>17</sup> *Hampton* cannot be distinguished, as the Government suggests, on the ground that the golf-course sales were not “bona fide.” Pet. Br. 44 n.8. To the contrary, the sale at issue in *Hampton* was cited by the Fifth Circuit as an example of a bona fide purchase. 304 F.2d at 322. In the passage to which the Government points, the court compared such a bona fide sale not to a sham sale, but to a *lease*, and concluded there was no relevant difference “between a long-term lease for a particular purpose with the right of cancellation of the lease if that purpose is not carried out on the one hand, and an absolute conveyance of property, subject, however, to the right of reversion if the property does not continue to be used for the purpose prescribed by the state in its deed of sale.” *Id.* The Fifth Circuit’s conclusion that a bona fide sale with a reversionary clause is conceptually identical to a long-term lease refutes the Government’s argument that a reversionary interest alone cannot demonstrate government control. As a later court noted, “in *Hampton* the reverter clause was the only relationship the city retained with the property.” *Eaton v. Grubbs*, 329 F.2d 710, 714 (4th Cir. 1964).

of a reverter clause was “itself sufficient to constitute ‘state action.’” *Id.* at 714 (citation omitted).<sup>18</sup>

As in *Hampton* and *Eaton*, by requiring that the VFW continue to use the transferred land as a memorial, the Government has effected ongoing control. There is now an “absolute obligation on the part of the [VFW] that [it] immediately, presently and always use the ... property for [memorial] purposes, and no other.” *Hampton*, 304 F.2d at 322. Because the Government has so forcefully dictated how the property must be used, it continues to control such use.

## **2. The Government’s Regulatory Authority Over Inholdings Underscores, and Does Not Remedy, Its Endorsement**

The Sunrise Rock property is subject to extensive regulatory control because it is located within the boundaries of a national preserve. The Government concedes (Br. 41 n.6) that NPS has regulatory authority of inholdings related to solid waste disposal and mineral rights. More broadly, the Government is authorized by statute to take, without the consent of the owner, any inholding if “the property is being developed, or proposed to be developed, in a manner which is detrimental to the integrity of the preserve or which is otherwise incompatible with the purposes” of the statutes

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<sup>18</sup> The Government tries to distinguish *Eaton* because the local government’s involvement with the hospital extended beyond its reversionary interest. Br. 44 n.8. But the *Eaton* court recognized the reversionary clause as “the most significant evidence of the state’s involvement in the hospital’s affairs.” 329 F.2d at 713. In addition, as discussed below (*see* Part II.A.2-4, *infra*), the Government’s control over the Sunrise Rock property extends far beyond its reversionary interest.

establishing the Preserve. 16 U.S.C. § 410aaa-56. That statutory authority is exercised in the Preserve’s General Management Plan, which states that NPS “authority extends not only to federal lands, but to private inholdings and adjacent private land where activities carried out on those lands interfere with the designated use of the federal lands.”<sup>19</sup>

NPS’s power to ensure that the character of the transferred land at Sunrise Rock remains consistent with the character of the Preserve is exactly the sort of control that promotes the perception of government endorsement. The manager of the government land actually has the duty to ensure that the private land is used in a manner consistent with the millions of acres of government-owned land surrounding it. An objective observer traveling through the uniform Preserve landscape would “unquestionably perceive” that the Cross has been “stamped” with the Government’s “seal of approval.” *Santa Fe*, 530 U.S. at 308.

### **3. The Government’s Regulatory Authority Over National Memorials Underscores, and Does Not Remedy, Its Endorsement**

Because Congress proclaimed the Cross a “national memorial,” NPS has additionally imposed obligations to care for and maintain the transferred property. Section 2 of Title 16 requires the NPS director,

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<sup>19</sup> U.S. Dep’t of the Interior, National Park Service, *Mojave National Preserve General Management Plan* 78 (2002); *see also* General Management Plan Abbreviated Final Environmental Impact Statement Mojave National Preserve, California, 67 Fed. Reg. 17,441-02 (Apr. 10, 2002) (prohibiting development on inholdings that is “detrimental to the integrity of the Preserve or otherwise incompatible with the [California Desert Protection Act].”)

“under the direction of the Secretary of the Interior [to] supervis[e], manage[], and control ... national parks and national monuments ... and reservations of like character as may be created by Congress.” This responsibility includes care of the Mojave National Preserve. 16 U.S.C. § 410aaa-46(a) (“The Secretary shall administer the preserve in accordance with this part and with the provisions of law generally applicable to units of the National Park System[.]”).

Because Congress designated the acre at Sunrise Rock “as a national memorial” (16 U.S.C. § 410aaa-56 (note)), it also falls within the NPS authority to care for “national monuments.” *Id.* § 2; *see also id.* § 431 (identifying national memorials as a category of national monuments); *infra* n.27. Since the land transferred by the 2004 Act is coterminous with the national-memorial designation, the transfer does little or nothing to diminish Government control. Congress merely switched the source of the Secretary’s authority to manage the property from one provision (16 U.S.C. § 410aaa-46) to another (*id.* § 2). Moreover, the 2004 Act explicitly required that the NPS continue to fulfill the requirements of the 2002 Act, including treating the land and Cross as a national memorial.<sup>20</sup>

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<sup>20</sup> Although the Government now argues that the national-memorial designation “has no legal significance” (Br. 41-42) and that the 2004 Act “does not require any ongoing federal control over the memorial” (*id.* at 45), it argued differently before the court of appeals. There, the Government admitted that the designation requires the NPS to “treat[] the cross and the adjoining Preserve property identified by the Secretary as a memorial” (Pet. C.A. Br. 38), and that the 2004 Act required NPS to continue such treatment after the transfer (*id.*). The Government’s original ar-

#### **4. The Government's Easement Underscores, and Does Not Remedy, Its Endorsement**

Finally, even the one-time requirement that the Secretary install a plaque at the site demonstrates Government control that furthers its endorsement of religion. The district court found that this obligation constituted an easement over the land. Pet. App. 93a. Although the Government represents that the Secretary intends to defy Congress and not acquire a replica cross (Br. 37 n.5), it is not yet clear how the Secretary will install the plaque—for example, whether the plaque will state that it was installed by the Government. What is known, however, is that the Secretary has an existing right and obligation to go onto the land to place the plaque.<sup>21</sup>

#### **B. The Reversionary Clause Requires Continued Display of the Cross**

Beyond simply demonstrating Government control of the Sunrise Rock property (*see* Part II.A.1, *supra*), the reversionary clause in the land transfer may require the display of the Cross itself. The 2002 Act designates the “five-foot-tall white cross [and adjoining property] ... as a national *memorial commemorating*

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gument correctly acknowledged that the designation conveys to the NPS a regulatory responsibility preserved in the 2004 Act.

<sup>21</sup> The Secretary's obligation to install the plaque, required by the statutory text to be a “replica,” also underscores the absurdity of the Government's claim (Br. 33) that Congress did not intend to constrain the VFW to maintain the Cross. A replica of the original plaque, which describes the Cross, would be meaningless if the VFW removed the Cross.

*United States participation in World War I, and honoring the American veterans of that war.*” 2002 Act § 8137(a). When Congress attempted to transfer the property to the VFW, it included a reversionary clause conditioned on the maintenance of a memorial described in *identical* terms:

REVERSIONARY CLAUSE. — 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 and honoring the American veterans of that war*. If the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States.

2004 Act § 8121(e). The court of appeals correctly concluded that “the cross itself is the memorial” and that removal of the Cross would trigger the reversion. Pet. App. 21a.

The Government’s attempt to explain away the reversionary clause rests entirely on a single word. According to the Government, because Congress required that the VFW “maintain the conveyed property as ‘a’ war memorial, not ‘the’ war memorial” (Br. 33), the VFW is not required to maintain the present memorial.

Congress’s use of the indefinite article cannot bear the weight that the Government places upon it for three reasons. First, the reversionary clause requires the VFW to maintain a memorial meeting the exact 17-word description supplied for the Cross in Section 8137. It is a basic canon of statutory construction that identical terms should be presumed to have the same meaning (particularly where, as here, those terms are used

in the same context). Thus, where Congress used the same precise phrase to describe the memorial in both the national-memorial designation and the reversionary clause, it was referring to the same memorial.

Second, the reversionary clause requires the VFW to “maintain” the memorial. As this Court has explained, “[t]he ordinary meaning of the word ‘maintain’ is ‘to keep in existence or continuance; preserve; retain.’” *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 433 (2002) (quoting *Random House Dictionary of the English Language* 1160 (2d ed. 1987)). This ordinary meaning would be defied by a construction that permits the VFW to dismantle the present memorial and to create a new one. Because Congress required the VFW to “maintain” the property as a memorial, not only to “use” the property as such, the clause must be read to require the VFW to maintain the Cross.

Third, as discussed in Part I.C.2, *supra*, the “conveyed property” protected by the reversionary clause must be read to include the Cross, not just the land beneath it. Any other reading would mean that Congress’s “conveyance” included only the land adjoining the Cross, and that the Government retained ownership of the Cross itself. Because the VFW is required to maintain the conveyed property—including the Cross—its removal or destruction of the Cross would trigger the reversionary clause.

Thus, the reversionary interest in this case is conditioned on continuation of exactly the same activity deemed an Establishment Cause violation when the Government held the property. As a result, “an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive

it as a state endorsement of” religion. *Santa Fe*, 530 U.S. at 308.<sup>22</sup>

### C. Congress Preserves the Cross Display With Threats of Civil and Criminal Consequences

The Government has created two mechanisms triggered by the removal of the Cross that, if enforced, would result in civil and criminal penalties for the VFW. First, the reversionary clause discussed in Part II.B, *supra*, if executed, would deprive the VFW of the land at Sunrise Rock. Second, removal of the Cross could subject the VFW to prosecution under 18 U.S.C. § 1369, which makes it a crime to “injure or destroy, any structure, plaque, statue, or other monument on public property commemorating the service of any person or persons in the armed forces of the United States.”<sup>23</sup> Notwithstanding the Government’s argument of a low *probability* of the application of these statutes, the *possibility* of their application encourages the display of the Cross atop Sunrise Rock. The only way that the VFW can be *certain* that it will not lose its land or face prosecution is to continue displaying the Cross.

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<sup>22</sup> This reversionary clause is unlike the one in the Government’s principal case, *Freedom from Religion Foundation v. City of Marshfield*, 203 F.3d 487, 490 (7th Cir. 2000), because the clause in that case did not so tightly bind the recipient to maintain the religious display on the transferred land, but rather only “restrict[ed] the use of the parcel to public park purposes.”

<sup>23</sup> A federal prosecutor might charge under Section 1369 if he understood the pervasive government control of the land or the national-memorial designation of the Cross to bring the site within the statute. *See also* Resp. Br. 44-45 & nn.30-31 (describing possible application of Section 1369 to VFW’s removal of the Cross).

The Government concedes that the reversionary clause could be read to permit the Secretary to seize the acre at Sunrise Rock if the VFW removes the Cross, but argues that Secretary Salazar or some future Secretary could use his discretion under the clause to avoid violating the Constitution. Br. 43 (“This Court should presume that the Secretary will exercise his discretion consistently with the Establishment Clause.”). As a practical matter, however, the risk that the Secretary might do otherwise sharply circumscribes the VFW’s ability to end the Cross display. Rather than trusting in the discretion of the Secretary to allow the VFW to retain the land even if the organization removes the Cross that Congress has long fought to protect, practically speaking, the VFW will never remove the Cross to avoid the possibility of reversion.

Moreover, the Government’s approach would prevent the judiciary from invalidating unconstitutional laws that require implementation by a public official. For example, criminal laws, which are enforced at the discretion of prosecutors sworn to uphold the Constitution, could not be invalidated. Citing *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004), the Government posits (Br. 43) that an endorsement of religion by Congress is not unconstitutional if an executive branch official may act to minimize or eliminate the endorsement. *Favish* does not mandate anything like the abdication of judicial review the Government proposes. *See* 541 U.S. at 174 (requiring evidence of public interest related to government misfeasance to overcome privacy interest in FOIA, given presumption of no misfeasance; “presumption ... less a rule of evidence than a general working principle”). The discretion granted to the Secretary is not a

buffer that prevents the invalidation of an unconstitutional law.

Furthermore, 18 U.S.C. § 1369, which imposes criminal penalties for injuring veterans' monuments, also creates a substantial practical impediment to the VFW's removal of the Cross. The Government argues that "this Court should construe Section 1369 ... to avoid casting constitutional doubt on Congress's transfer of the land." Br. 42. This argument concedes that Section 1369 could fairly be read to criminalize the VFW's removal of the Cross. The threat of criminal penalty will surely chill the VFW's inclination to remove the Cross. *Cf. Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956-957 (1984) ("rather than risk punishment for his conduct in challenging the statute," an individual instead "will refrain from engaging further in the protected activity").

### III. CONGRESS'S DESIGNATION OF THE CROSS AS A "NATIONAL MEMORIAL" EXACERBATES THE UNCONSTITUTIONAL GOVERNMENTAL ENDORSEMENT OF THE CROSS'S RELIGIOUS MESSAGE

As noted, in 2002, Congress designated the "five-foot-tall white cross" at Sunrise Rock as a "national memorial commemorating United States participation in World War I and honoring the American veterans of that war." 2002 Act § 8137(a). No other World War I memorial bears that designation. With this designation, the United States has declared that Latin cross an important site of national significance and has publicly announced its endorsement of the Cross's message.

The Government's embrace of that message is so troubling because—in labeling that Christian symbol a memorial to World War I veterans—the Government has ignored—and thereby even denigrated—the ser-

vice of non-Christian veterans, including the 250,000 Jews who fought for the United States in World War I.<sup>24</sup> Rather than honoring non-Christian veterans, the Government’s sponsorship of the Cross sends the message to non-Christian veterans “that they are outsiders, not full members of the political community.”<sup>25</sup> Thus, even if the transfer effected by the 2004 Act satisfactorily cured the Establishment Clause violation—and for the reasons set out in Parts I and II, it does not—the 2002 designation alone unconstitutionally places the Government’s imprimatur on a religious symbol.

Congress has in public laws declared approximately fifty sites that commemorate historic persons or events as “national memorials.” Some—like Mount Rushmore or the Washington Monument—are familiar, while others—like the Astronauts Memorial at Florida’s JFK Space Center or New Orleans’ Buffalo Soldiers Memorial—are less well known. The vast majority of these memorials, including the “White Cross World War I Memorial” at Sunrise Rock, are listed in 16 U.S.C. § 431.<sup>26</sup> National memorials are administered as units of the NPS.<sup>27</sup> About fifteen of these national memori-

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<sup>24</sup> Fredman & Falk, *Jews in American Wars* 38 (1942).

<sup>25</sup> *McCreary*, 545 U.S. at 860 (quoting *Santa Fe*, 530 U.S. at 309, and *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

<sup>26</sup> Others are included elsewhere in Title 16. *See, e.g.*, 16 U.S.C. § 450nn (General Grant National Memorial, popularly known as “Grant’s Tomb”); *id.* § 450ss-2 (Oklahoma City National Memorial).

<sup>27</sup> National “memorials” are a subspecies of the broader group of national “monuments.” *See* 16 U.S.C. § 431 (note) (listing na-

als, including the Vietnam Veterans Memorial and the U.S. Marine Corps Memorial, relate to the commemoration of war or veterans.<sup>28</sup> The Sunrise Rock Cross is the only national memorial dedicated to honoring veterans of the First World War.<sup>29</sup>

The Government asserts that Congress’s designation of the Cross as our national World War I memorial “has no legal significance.” Br. 41. By this, the Government apparently means that the designation “does not transfer any regulatory authority over private property to the government.” *Id.* As discussed in Part II.A.3, *supra*, this assertion is incorrect. The statutory

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tional monuments, including category of “national memorials”). As one former NPS official wrote, “uniformity and consistency are not characteristics of park system nomenclature.” Rettie, *Our National Park System* 40 (1995). Our park system has the “most complex, the most carefully articulated, and thus the most specific system in the world,” with twenty-one types of units including national parks, seashores, monuments, and memorials. Winks, *The National Park Service Act of 1916: “A Contradictory Mandate”?*, 74 *Denv. U. L. Rev.* 575, 576 (1997). To address the confusion created by these varying labels, in 1970 Congress passed the General Authorities Act, which broadly defined the park system to include all areas administered by the NPS and declared that previous statutory references to narrow categories of park system units should “not be construed as limiting such Acts to those areas.” Pub. L. No. 91-383, § 2, 84 Stat. 825, 826 (1970).

<sup>28</sup> Other war-related memorials include the Battle of Midway National Memorial, the National D-Day Memorial, the Prisoner of War/Missing in Action National Memorial, and the U.S. Navy Memorial. 16 U.S.C. § 431 (note).

<sup>29</sup> During the current session of Congress, representatives from Missouri have introduced legislation to designate the Liberty Memorial in Kansas City, Missouri as the “National World War I Memorial.” See H.R. 1849, 111th Cong. (2009); S. 760, 111th Cong. (2009).

designation of the Cross as a national memorial makes it a unit of the national park system over which the Secretary, through the NPS, has the statutory powers of “supervision, management, and control.” 16 U.S.C. § 2.

Perhaps more importantly, even if the Government had no enhanced regulatory authority over the Sunrise Rock Cross, observers are likely to attribute the Cross’s message to the Government because of the act of designation, without more. In *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), this Court explained that when the government accepts donations of monuments from private entities for display on government property, observers of those monuments “routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf,” because it is “not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated.” *Id.* at 1133. The Court noted that governments “exercise[] selectivity,” “tak[ing] some care” to “select the monuments that portray what they view as appropriate.” *Id.* Because of that selectivity, “[t]he monuments that are accepted ... are meant to convey and have the effect of conveying a government message.” *Id.*

Just as privately donated monuments on public property convey a government message, so *a fortiori* do statutorily designated national memorials. Observers reasonably interpret national memorials as conveying federal endorsement because the Government does not designate as national memorials those “monuments that convey a message with which [it] do[es] not wish to be associated.” *Pleasant Grove*, 129 S. Ct. at 1133. To the contrary, national-memorial designation is Con-

gress's most straightforward means of associating with a monument's message.

Indeed, the Government's association with the message of a national memorial is much stronger than its association with the message of a privately donated monument. National-memorial designation is far more selective, as Congress has selected only fifty sites as memorials from the innumerable possibilities. And while a donated monument is accepted only in response to a private offer, the national-memorial designation is initiated by the Government, affirmatively demonstrating the strength of governmental support for the memorial's message.

The United States Government has designated only one memorial to honor the four million American veterans of World War I: the Sunrise Rock Cross. That unadorned symbol of Christ's crucifixion and resurrection has been established by the federal government as our national means of honoring the American veterans of that war. By selecting the preeminent symbol of Christianity to commemorate World War I veterans, the Government has implied that only Christian veterans are worthy to be honored. Yet in World War I, more than 250,000 Jews answered America's call to action: more than 3,500 were killed; more than 12,000 were wounded; and more than 1,100 received decorations for bravery. *See* Fredman & Falk, *supra* n.24, at 38-40. It denigrates their service and sacrifice, and those of other non-Christians, to purport to honor them with the display of the profoundly religious symbol of another's faith.

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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