

Case at a Glance

Seventy-five years ago, as a memorial to fallen service members, the Veterans of Foreign Wars (VFW) erected a cross in a remote federally controlled area that later became a federal preserve. The district court held the presence of the cross on federal land violated the Establishment Clause and permanently enjoined its display. Congress responded by directing the transfer of the plot of land on which the cross sat to the VFW in exchange for a nearby parcel of equal value.



When Does a Plaintiff Have Standing to Challenge Religious Displays on Public Land?

by Vikram David Amar and Whitney E. Clark

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To have standing under Article III of the Constitution, a plaintiff must have suffered “an ‘injury in fact’—an invasion of a legally protected interest” that was caused by the complained-of conduct. Among the additional “prudential” requirements for standing (that is, requirements created by the courts rather than demanded by the Constitution) that are invoked by the government in this case is the general prohibition on a litigant’s raising another person’s legal rights.

ISSUES

Does respondent have standing to maintain this action given that he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols?

Assuming respondent does have standing, did the court of appeals err in refusing to give effect to the act of Congress providing for the transfer of the land to private hands?

FACTS

In 1934, the Veterans of Foreign Wars (VFW) erected a memorial in the form of a wooden cross set atop an outcropping known as Sunrise Rock in San Bernardino County, California. Private parties have replaced the cross several times, most recently in 1998. A plaque accompanied the original cross identifying it as a war memorial, but there is no longer a plaque at the site. The current cross is between five and eight feet high and is constructed of four-inch white metal pipes.

Sunrise Rock and the surrounding lands are currently under the authority of the National Park Service (park service), and are part of the Mojave National Preserve (preserve), which encompasses approximately 1.6 million acres of land in the Mojave Desert. Slightly more than 90 percent of that land is federally owned, with approximately

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86,000 acres owned by private individuals and 43,000 acres owned by the state of California.

The preserve is located in southeastern California, approximately 60 miles east of Barstow, California. It is in a remote location that is part of the natural desert environment. Sunrise Rock rises 15 to 20 feet above grade, and the cross is visible to vehicles on Cima Road from 100 yards away.

Although Easter Sunrise services have been held at the cross for more than 70 years, the cross has been deemed to have no historic significance, and no other displays (religious or otherwise) are permitted in the vicinity of the cross.

The cross has been the subject of federal legislation as well as litigation. In 1999, the Park Service denied a request to erect a Buddhist shrine near the cross and indicated its intention to remove the cross. In the late summer of 2000, Frank Buono (respondent), a Roman Catholic and former park service official who now lives in Oregon but once worked at the preserve and returns periodically for visits, wrote to the park service director expressing constitutional concern about the presence of the cross in the preserve. Shortly thereafter, Congress prohibited the park service from spending federal funds to remove the cross. Consolidated Appropriations Act, 2001 (2001 Act).

In March 2001, respondent filed a lawsuit challenging the constitutionality of the government's display of the cross. Buono does not object to a cross being on public land per se, but he does assert that he is offended by the display of a cross on government property that "is not open to groups and individuals to erect other freestanding, permanent dis-

plays," and claims that he would avoid the cross on future visits to the preserve.

In January 2002, while respondent's suit was pending in the district court, Congress designated the "five-foot-tall white cross" as well as a limited amount of adjoining preserve property as a national war memorial and ordered the secretary of the interior (secretary) to acquire a replica of the original plaque and cross and install the plaque at the memorial. Department of Defense Appropriations Act, 2002 (2002 Act).

In July 2002, the district court held that Buono had standing to sue because he was "subjected to an unwelcome religious display, namely the cross. It also concluded that the presence of the cross on federal land in the preserve violates the Establishment Clause because its "primary effect" was to advance religion. Accordingly, the court permanently enjoined the display of the cross. In October 2002, Congress again banned the use of federal funds to remove the cross—prohibiting the spending of any federal funds to remove any World War I memorial. Department of Defense Appropriations Act, 2003 (2003 Act).

The government appealed the district court's ruling and the court of appeals stayed the district court's injunction "to the extent that the order required the immediate removal or dismantling of the cross." The government subsequently covered the cross with a large plywood box, and the cross remains so covered.

While the government's appeal of the district court's decision was still pending, Congress enacted yet more legislation. It ordered the secretary to convey to the VFW, without open

bidding or any other competitive process, the Sunrise Rock war memorial property in exchange for a five-acre parcel of land elsewhere in the preserve that is owned by the private parties who had erected the current cross in 1998. The Department of Defense Appropriations Act, 2004 (2004 Act), directed the secretary to have the properties appraised and to equalize their values through cash payment, as necessary. Congress further provided that 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.

In June 2004, a three-judge panel of the Court of Appeals for the Ninth Circuit affirmed the district court's judgment. The panel held that the case had not been rendered moot by the 2004 Act, because "the land transfer could take as long as two years to complete," and even after the land transfer, "the land may revert to the federal government." The court expressed no view as to whether a transfer completed under the 2004 Act would pass constitutional muster, leaving that question for another day.

The court then held that respondent had standing to challenge the cross, because he had suffered a "concrete, personalized injury" rather than "an abstract generalized grievance" and because he "will tend to avoid Sunrise Rock on his visits to the preserve as long as the cross remains standing." The court rejected the government's argument that respondent lacks standing to maintain this action because his only asserted injury is an ideological, rather than religious, objection concerning other persons' rights to erect other symbols.

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On the merits, the court of appeals held that the case was “squarely controlled” by its prior decision in *Separation of Church & State Committee v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (per curiam), which held that a 51-foot concrete Latin cross with neon inset tubing, displayed in a city park and first identified as a war memorial more than 30 years after it was erected, violated the Establishment Clause. The court declared the factual distinctions between the cases “of no moment”—Sunrise Rock cross’s “shorter height,” “remote location,” and “placement by private individuals” made it “no less likely that the Sunrise Rock cross will project a message of government endorsement to a reasonable observer.” The government sought neither en banc review of the court of appeals’ decision nor review of that decision in the U.S. Supreme Court.

In November 29, 2004, respondent filed a motion in the district court asserting that the 2004 Act was an unlawful attempt to evade the district court’s injunction, and asking the court to enforce, or modify, that injunction by expressly prohibiting the land transfer. The district court agreed because in its view, “the government’s apparent endorsement of a particular religion has not actually ceased” and “the proposed transfer of the subject property can only be viewed as an attempt to keep the ... cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation.” The court therefore permanently enjoined the government from implementing the 2004 Act.

After the government appealed that ruling, in September 2007, a different panel of the Ninth Circuit affirmed. The panel observed but declined to adopt a presumption adopted by the Seventh Circuit that

absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion. Instead, the panel determined that the 2004 Act violated the permanent injunction granted to respondent because the transfer would not cause “government action endorsing religion” to actually cease and held that the land transfer “cannot be validly executed without running afoul of the injunction.”

In May 2008, with five judges dissenting, the court of appeals denied the government’s petition for en banc review.

Petitioners then filed a petition for certiorari, which the U.S. Supreme Court granted on February 23, 2009.

CASE ANALYSIS

Standing

As an initial matter, the government contends that because respondent has no objection to religious symbols or imagery on private property—rather he objects to the display of a religious symbol on public property—he lacks standing. According to the government, the transfer of the land on which the cross sits to a private party eliminates any constitutional injury Buono may have incurred because the religious display is no longer attributable to the government. However, the key question on the merits is whether the land transfer under the 2004 Act eliminates any impermissible government endorsement of religion, and the Court is unlikely to rule that the respondent lacks standing on this basis alone.

The government further attacks respondent’s constitutional standing by denying that he has alleged a personal “injury in-fact.” The Supreme Court has repeatedly recognized that persons who suffer

noneconomic injuries may have Article III standing in Establishment Clause cases. The touchstone of Article III standing in such cases is direct and unwelcome contact with government action alleged to be impermissibly religious in nature.

The government claims that standing analysis must examine why the contact is alleged to be unwelcome; the government highlights the fact that the cross on Sunrise Rock doesn’t violate respondent’s own Roman Catholic religious beliefs. Because respondent’s asserted injury is not that he has been subjected to religiously offensive exercises, indirect coercion, or exclusion from the political community, but rather that he must observe government conduct (the use of land for a particular memorial) with which he disagrees, his alleged injury is constitutionally insufficient.

Moreover, the government contends that prudential considerations counsel against hearing this suit. Respondent is an inappropriate plaintiff because he does not seek to erect a religious display himself but seeks only to assert the rights of others to erect displays on public property. He thus objects to displaying the cross on public property only because that property is not an open forum on which other people—not himself—may erect other religious displays.

Buono also advances procedural arguments—based on statutory time requirements and principles of res judicata stemming from the Ninth Circuit’s first decision (*Buono I*)—that the government is foreclosed from challenging respondent’s standing. The government counters that respondent would still have to demonstrate that he has standing to challenge the constitutionality of the 2004 Act transferring the memorial, which the *Buono I* court



expressly declined to address. In any event, respondent contends he had standing in *Buono I* under Supreme Court precedent—including the Court’s recent cases of *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005), involving religious symbols on public property—because he is directly and personally affected by the religious symbol to which he objects and will for that reason tend to avoid Sunrise Rock.

As to the court of appeal’s 2007 decision (*Buono II*), respondent argues he is the proper party to enforce the permanent injunction entered in *Buono I* because he is the named beneficiary of the injunction and he suffered an injury in fact when Congress enacted the 2004 Act that interfered with that injunction.

Buono claims there is no logic to the government’s assumption that because he takes no offense to a religious symbol on *private* property, he lacks a cognizable objection to the placement of a sectarian symbol on *government-owned* property. Devout persons of all faiths, respondent contends, may welcome diversity of private religious exercise and expression, while also objecting to governmental favoritism toward a particular religious sect—even one’s own religion. The Court’s precedents are rooted in the history of the adoption of the Establishment Clause, which was intended not only to protect members of minority faiths from government action contrary to their religious beliefs, but also to protect members of majority faiths from government action that supports their religious beliefs—as such intertwining of church and state may tend to degrade their sect, not benefit it.

Respondent rebuts the government’s prudential standing argument by claiming it rests on the mistaken assumption that respondent sought to redress not his own injury, but the injuries of third parties who may wish to erect other religious displays at Sunrise Rock.

The Merits

Respondent argues that because neither the district court nor the court of appeals held that Congress’s land transfer statute (the 2004 Act) violated the Constitution, but merely held that the 2004 Act did not cure the previously adjudicated Establishment Clause violation, the only merits issue before the Supreme Court is whether Congress’s proposed transfer of Sunrise Rock cures the previously adjudicated constitutional violation—not whether the 2004 Act itself is unconstitutional. Accordingly, respondent contends the ultimate question turns on the nature and extent of the violation, and whether the transfer will “eliminate so far as possible” the effects of the violation and bar it from recurring, *United States v. Virginia*, 518 U.S. 515, 547 (1996). Under this standard, respondent argues that the 2004 Act is an insufficient remedy because the government continues to impermissibly endorse the Christian cross in four independent ways.

First—by Act of Congress—the cross will remain designated a national memorial even if the land transfer to the VFW were permitted, thus perpetuating sectarian government favoritism of a sectarian religious symbol. As one of a small, select group of displays that Congress has designated as national memorials, the cross would necessarily reflect continued and impermissible government association with the preeminent symbol of Christianity. This violates the clear-

est command of the Establishment Clause that one religion cannot be officially preferred over another.

Second, the government maintains an important ownership interest in and continued supervisory duties over the land on which the cross is located by virtue of the statute’s reversionary clause, and federal control over the larger area.

Third, the structure of the transfer perpetuates the government’s longstanding favoritism toward the cross. By permitting only the VFW and the private party who erected the most recent cross on Sunrise Rock to participate in the land transfer, the government is perpetuating the favoritism and exclusion that precipitated the Establishment Clause violation. Further, the unusual method that Congress employed to transfer the land—a special provision in an appropriations bill—as opposed to employing federal land transfer statutes, implicates the concern for sectarian favoritism and undermines the remedial legitimacy of the 2004 Act.

Fourth, Congress’s conceded purpose and the history of congressional enactments concerning the land demonstrate that the transfer was designed to ensure that the Christian cross remained in the very same location on Sunrise Rock.

In summary, respondent argues that if the principal effect of displaying a Christian cross on government property, with or without any disclaimers, is impermissibly to advance a sectarian religious message, then a series of government acts, including the land transfer provision, that have the purpose and effect of ensuring that the same sectarian display remains standing in the same location with ongoing government involvement and endorsement constitutes an insufficient

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remedy for the adjudicated violation. The government is effectively “contracting out” its establishment of religion, by encouraging the VFW to exhibit what the government could not itself display. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring in part and concurring in the judgment).

The government’s core argument is that Congress’s transfer of the land to the VFW—a private party—is a constitutionally permissible way to cure the Establishment Clause violation because it ends any governmental endorsement of the cross; any display on the now-private land will no longer be attributable to the government, as the government will be neither financing the cross, nor displaying it on public land. Looking at the 2004 Act, an objective observer would conclude that Congress divested itself of an unconstitutional display—which served the joint secular aims of curing an Establishment Clause violation while preserving a national war memorial. Moreover, a reasonable observer will attribute the unattended display at Sunrise Rock, and any message it conveys, as belonging to the now-private owner—the VFW.

At a minimum, the 2004 Act presumptively ends any endorsement, and in the absence of any evidence that the land transfer is “a sham,” the transfer should be held to remove any First Amendment issue. The government argues that the Court should presume that Congress’s transfer of the land is genuine rather than pretextual, and it contends Congress acted appropriately in transferring the land at fair value for the legitimate secular purpose of preserving a war memorial.

The government contends that while respondent views the cross as a religious symbol, many members

of the community view it is a symbol of the sacrifices of fallen soldiers and are deeply opposed to its removal. By placing the land in private hands rather than removing the cross, Congress ended any endorsement of the cross in the way that best promoted the significant government objectives of showing respect for this country’s fallen service members and avoiding social conflict and religious divisiveness that would likely result from removal of the cross.

The government denies that it continues to impermissibly endorse the Christian cross and addresses the respondent’s four arguments as follows:

First, designation as a national memorial has no legal significance because such a declaration standing alone does not transfer any regulatory authority over private property to the federal government. Once the property is conveyed to the VFW, how to commemorate World War I veterans will be up to the VFW; and whether the VFW elects to display the cross or other symbols (or both), its choice will no longer be attributable to the government.

Second, the government will not retain any impermissible control over the property. The park service cannot require the VFW to either display or remove the cross; the site’s designation as a national memorial confers no regulatory authority on the Park Service; and the reversionary clause only requires maintenance of a war memorial, not display of the cross or any continuing control over the property. In addition, the VFW is not barred from removing the cross by 18 U.S.C. § 1369, as that provision only prohibits the destruction of a war memorial on public property. The property will not be “under the jurisdiction of” the federal gov-

ernment merely because it is located within the boundaries of the preserve. The park service may regulate Sunrise Rock only insofar as activities on those holdings affect the purposes of federally owned lands. None of the statutes the respondent refers to confer on the federal government any authority to require the VFW to maintain the cross following the transfer.

Third, Congress sensibly transferred the memorial for equal value to its original donor, which as a veterans’ group is likely to care appropriately for a war memorial. That the land transfer was mandated in a congressional appropriations act casts no doubt whatsoever on its validity. Respondent has argued that the government could remedy the constitutional violation either by transferring the cross (but not the land on which it stands) to the VFW or by selling the land to the highest bidder. But nothing would prevent the VFW from placing the cross within the preserve—presumably the government could even remove the cross and then sell the land to the VFW, at which point the VFW could erect an identical cross. This approach treats the Establishment Clause as empty formalism.

Respondent does not cite any authority for the proposition that to dissipate an endorsement of religion, the government must transfer real property as part of a competitive bidding process—the 2004 Act requires the government to receive market value in the exchange, and it should make no difference whether than compensation comes through an open sale or a closed exchange.

Fourth, Congress is entitled to a presumption that it acted constitutionally in enacting the 2004 Act for the legitimate secular purpose of preserving a war memorial. The two



statutes prohibiting the use of federal funds to remove the cross predate the district court's permanent injunction preventing display of the cross—and the court of appeals improperly imputed the motivations it found in those statutes to the 2004 Act. Those prior legislative acts are neither relevant nor indicative of anything other than the same secular goal. The proper inquiry is whether an “objective observer” would find the legislative purpose of the 2004 Act “predominately religious.” *McCreary County*, 545 U.S. at 862, and it should be upheld unless the secular justification is a “sham” or “merely secondary to a religious objective.” *Id.* at 864. Here, the legitimate secular purpose of preserving a national war memorial appears on the face of the 2004 Act. The act's text does not suggest a predominately religious purpose, and faced with the district court's injunction against display of the cross, Congress should be presumed to have selected a legitimate remedy—a bona fide transfer of property rather than a sham transaction.

SIGNIFICANCE

While the Supreme Court is unlikely in this case to answer the question of whether a Latin cross displayed on public property invariably or even presumptively violates the Establishment Clause, it may well help clarify the injury requirement for having standing to challenge the display of religious symbols on public land. Alternatively, the Court may decide whether Congress can avoid the First Amendment question simply by transferring public sites with religiously themed displays to private buyers.

The Supreme Court has decided a number of Establishment Clause cases involving religiously based displays on public land, but it has never had occasion to squarely address the contours of the Article

III standing requirements for the typical “offended observer.” This case presents an opportunity for the Court to identify the distinction between ideological and political differences that are best addressed by the executive and legislative branches of government, and the concrete noneconomic injuries that are suitable for adjudication in the context of perceived government endorsement of displays with religiously based components.

If the Court reaches the merits of the case, it may well determine the fate of numerous war memorials on public land throughout the United States that include a cross and thus arguably embody the dual symbolism of religion and the commemoration of fallen soldiers. However, because the circumstances of this case involve more than a complete divestment of public interest in an arguably sectarian display, the Court's decision is more likely to provide incremental guidance rather than a complete resolution of this hotly contested issue.

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