No. 08-472

IN THE
Supreme Court of the United States

KEN L. SALAZAR, Secretary of the Interior, *et al.*,

Petitioners,

v.

FRANK BUONO,

Respondent.

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

BRIEF OF THE STATES OF INDIANA, ALABAMA, ALASKA, COLORADO, FLORIDA, IDAHO, LOUISIANA, MICHIGAN, SOUTH CAROLINA, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255

**Counsel of Record*

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER L. HAGAN
ASHLEY E. TATMAN
Deputy Attorneys General
Counsel for Amici *States*

(Additional counsel listed inside cover)

ADDITIONAL COUNSEL

TROY KING
Attorney General
State of Alabama

JAMES D. "BUDDY" CALDWELL
Attorney General
State of Louisiana

RICHARD A. SVOBODNY
Acting Attorney General
State of Alaska

MICHAEL A. COX
Attorney General
State of Michigan

JOHN W. SUTHERS
Attorney General
State of Colorado

HENRY MCMASTER
Attorney General
State of South Carolina

BILL MCCOLLUM
Attorney General
State of Florida

GREG ABBOTT
Attorney General
State of Texas

LAWRENCE G. WASDEN
Attorney General
State of Idaho

MARK L. SHURTLEFF
Attorney General
State of Utah

QUESTIONS PRESENTED

1. Whether respondent has standing to maintain this action where 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.

2. Whether, even assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Alaska, Colorado, Florida, Idaho, Louisiana, Michigan, South Carolina, Texas, and Utah respectfully submit this brief as *amici curiae* in support of the United States. The Latin cross war memorial at issue, like many, many other memorials and displays around the country, is a fitting tribute to soldiers who made the ultimate sacrifice in defense of our Nation. Using the Establishment Clause to require destruction of a war memorial that not even the plaintiff finds offensive exhibits unjustified hostility to the public display of religious heritage and insults the memory of those who gave their lives so that others might live free.

Religion is an inescapably significant component of American history and culture. Therefore, like the United States, State and local governments have frequently used religious imagery, texts, and allusions in erecting memorials, constructing monuments, hanging plaques, and maintaining frescos and murals that celebrate both their war dead and their histories and cultures. Such tributes remind citizens and newcomers alike not only of the price of freedom but also of where we came from and what our forbearers valued, and they do so using speech, symbols and context that citizens readily embrace and respond to. The Court's decision in this case will have a direct impact on the continued viability of monuments that have become fixtures of public venues around the country. A decision against the United States may even put some states and localities in the untenable position of having to

destroy substantial longstanding monuments that bear religious symbols.

The *amici* States thus have a compelling interest in defending the ability to commemorate their heritage, including battles to defend liberty, using symbols and texts (religious or otherwise) that effectively convey meaning to their citizens.

SUMMARY OF THE ARGUMENT

Establishment Clause standing doctrine seems to have spiraled out of control. Discussions of standing in Establishment Clause cases draw on "utterly meaningless distinctions which separate the case at hand from the precedents that have come out differently, but which cannot possibly be (in any sane world) the reason it comes out differently." *Cf. Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 127 S.Ct. 2553, 2573 (2007) (Scalia, J., concurring in the judgment). In *Hein* the Court brought discipline to Establishment Clause taxpayer standing. Here, the Court has an opportunity to erase still further the "blot on [its] jurisprudence" that Establishment Clause standing generally has become. *Cf. id*. at 2584.

In short, a plaintiff who is not offended by a memorial that uses religious imagery and rarely, if ever, sees the memorial, should not have standing to challenge its existence in federal court. Buono claims he is injured because another individual, a Buddhist, was not permitted to erect his own monument on public land. If the Buddhist individual had wanted to litigate this case, he could

have. Buono may not litigate on his behalf, and, more generally, mere offense at a government display should not constitute Article III injury.

On the merits, memorials on public land bearing religious symbols and texts abound throughout the United States. In cities such as Indianapolis, memorials to fallen soldiers, war heroes, and venerable statesmen decorate the public square with angels, scripture, and religious figures. Depending as it does on highly factual inquiries of government purpose, Establishment Clause doctrine provides little comfort that such seemingly benign uses of religious imagery would survive legal challenge. To avoid costly litigation, or to cure any violations that may be found, government agencies should be allowed to transfer the property in question to private organizations who have a desire to maintain the memorial. The alternative—destruction of offending monuments, many of which have stood for decades—would not only come at great cost to taxpayers, but would also create a culture of governmental hostility to the role of religion in our Nation's history and in the inspiration of its people.

Indeed, government agencies should not even be faced with decisions about whether to transfer vast numbers of public monuments bearing religious symbols to private hands or risk their destruction. Such monuments hardly convey government endorsement of religious creeds, much less coerce non-believers, but Establishment Clause inquiry into the subjective purposes of long-departed government officials, or even contemporary ones, pose a continuing threat to the legality of many public

memorials. Ultimately, however, inquiries regarding government purpose in Establishment Clauses cases have proven unworkable and indecipherable, not to mention untethered to constitutional text or history. In the context of challenges to religious displays, such inquiries should cease in favor of evaluating the likelihood of actual religious coercion.

ARGUMENT

I. Umbrage at the Government's Rejection of One Religious Display Should Not Confer Standing to Challenge Another, Otherwise Welcome, Display

A. The Court has rejected standing to challenge government land transfers based on psychological distress, and it should reject standing based on mere offense at government's management of its property

Establishment Clause plaintiffs, it is true, have in the past pursued claims for injunctive relief based on nothing more than having encountered offensive government displays on a regular basis. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 682 (2005); *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 852 (2005); *but cf. Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429, 433 (1952) (plaintiffs as "citizens and taxpayers" did not have standing to challenge a state statute requiring readings from the Old Testament at the opening of each public school day, thus mere offense has not always been

cognizable Article III injury in Establishment Clause cases).

It is unclear where such a permissive "offense" standard originated. The decisions in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) and *Lynch v. Donnelly*, 465 U.S. 668 (1984), might seem to countenance implicitly that those who must encounter offensive religious images in public spaces suffer Article III injury, but in fact the lower courts in those cases focused entirely on *taxpayer* standing theories. *See ACLU v. County of Allegheny*, 842 F.2d 655, 656-58 (3d Cir. 1988); *Donnelly v. Lynch*, 691 F.2d 1029, 1030-32 (1st Cir. 1982). Alas, the Court has never specifically addressed the sufficiency of "mere offense" injury in a religious display case.

Furthermore, while permitting Article III standing in Establishment Clause display cases based on mere offense occasioned by regular visual contact is already quite a generous—and dubious—standard, Buono seeks to expand that notion even further. Buono, a practicing member of the Roman Catholic Church, is *not* offended by the Latin cross itself, and he does *not* regularly encounter it on his way to work. J.A. 64-65, 84-85. He claims to be "injured" instead because the National Park Service rejected an individual Buddhist's request to install a "stupa" (a dome-shaped Buddhist shrine) near the cross. J.A. 64-65; Pet. App. 4a-5a. And since the decision to reject the shrine is not something one can see, presumably he is equally offended by this situation whether he is at home in Oregon or near Sunrise Rock.

This abstract offense should not be enough for standing under any standard. On the particular issue of standing to challenge the alienation of property on Establishment Clause grounds, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982), is most directly on point. In addition to rejecting taxpayer standing to challenge executive branch land transfers, the Court said that plaintiffs who allege no injury beyond the "psychological consequence presumably produced by observation of conduct with which one disagrees" do not have standing under Article III. *Id.* A similar "psychological consequence," of course, is all that Buono is able to allege, so he has no greater injury here than did the plaintiffs in *Valley Forge*.

That Buono sought to challenge the monument before it was transferred should hardly matter. Under *Valley Forge*, psychological distress occasioned by the government's management of its own property should not be enough to constitute Article III standing. *Id.* at 485-86. Nor is there any reason to stretch Article III standing in this context to avoid rendering the Establishment Clause unenforceable. Fear of religious coercion, or at the very least being a member of a captive audience, has long provided a better Article III foothold in Establishment Clause cases. *See Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (striking down Kentucky statute that required posting of the Ten Commandments on the wall of each public classroom in the state); *see also Lee v. Weisman*, 505 U.S. 577, 599 (1992) (striking down mandatory graduation prayer and benediction); *Sch. Dist. of Abington Twp.*

Pa. v. Schempp, 374 U.S. 203, 224-25 (1963) (holding Bible reading and Lord's Prayer incompatible with Establishment Clause bar against religious coercion); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962) (deeming official school prayer inconsistent with Establishment Clause).

In fact, the entire range of circumstances where plaintiffs have suffered genuine Article III injury owing to an alleged Establishment Clause violation demonstrates how needless "mere offense" standing really is. *See, e.g.*, *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378 (1990) (finding no Establishment Clause violation by a law requiring religious entities to bear the cost of collecting and remitting a generally applicable sales and use tax); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (holding that a Massachusetts statute granting religious bodies veto power over applications for liquor licenses violates Establishment Clause); *Larson v. Valente*, 456 U.S. 228 (1982) (rejecting state-imposed registration and reporting requirements upon only those religious organizations that solicit more than 50% of their funds from nonmembers).

Federal Courts are meant to provide a forum for remedying genuine injuries, and nothing more. The Establishment Clause does not vitiate that limit on federal judicial power by providing disgruntled citizens "a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge*, 454 U.S. at 487. Conferring standing here, where the plaintiff has no injury distinguishable from any

other citizen offended by the war memorial cross, would backslide Article III doctrine and render federal courts agents of Establishment Clause prospectors.

B. Even if Buono does have standing, he cannot challenge the existence of the cross on its own merits

Even if Buono has suffered Article III injury, the limited nature of that injury should still have a direct impact on the permissible scope of his claim. By claiming offense at the rejection of a Buddhist individual's proposed stupa, but not at the Latin cross itself, Buono limits the case to an evaluation of whether the cross, or the conveyance of the land containing the cross, is valid in light of that rejection. That is, because he is not offended by the cross, but is instead only offended at the presence of the cross in light of the rejection of the Buddhist stupa, he has no real basis for challenging its presence on public land, or the conveyance of that public land to the VFW, independently. The remedy implicated, therefore, is not an injunction against the cross, but against the government's rejection of the Buddhist stupa, which would be the most straightforward remedy for Buono's asserted injury. In essence, then, Buono is invoking the interest of the Buddhist applicant in having the stupa at Sunrise Rock.

Buono has not, however, met the requirements for such *jus tertii* standing. Outside of free-speech overbreadth doctrine, litigants may assert the interests of others only if they first establish "a close

relation to the third party" and "some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991). The rejection of third-party standing is "designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." *Craig v. Boren*, 429 U.S. 190, 193 (1976). Also, "if the claim is brought by someone other than one at whom the constitutional protection is aimed, the claim [could] be an abstract, generalized grievance that the courts are neither well equipped nor well advised to adjudicate." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 n.5 (1984). And perhaps most importantly, requiring "that a party seeking review must allege facts showing that he is himself adversely affected . . . serve[s] as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

The Court applied third-party standing limits in a Religion-Clause case as far back as *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961), where it precluded the plaintiffs, who alleged economic injury owing to Sunday closing laws but who "d[id] not allege any infringement of their own religious freedoms," from advancing free exercise claims because "[t]hose persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights." Buono's Establishment Clause claim is similarly unjustified. He has not even bothered to assert that he has a

close relationship with the Buddhist individual, or that such individual is unable to pursue his own remedies. *Cf. Pleasant Grove City, Utah v. Summum*, -- U.S. --, 129 S.Ct. 1125 (2009) (adjudicating a claim by a religious organization hoping to place a religious monument on public land already containing the Ten Commandments). Buono should not be permitted to take up the cause for him—even in the guise of his own "offense" at the rejection of the shrine—and force an adjudication that the Buddhist applicant, the most proximate "victim" of the allegedly unlawful government acts, does not seek.

II. Many Longstanding State and Local Monuments with Religious Imagery May be Vulnerable if Buono Prevails

Across the country, state and local parks, squares, cemeteries, government buildings, and schools boast monuments honoring soldiers who gave the "last full measure of devotion" to their country so that the rest of us may live free. Many of these monuments contain religious imagery, including crosses, Stars of David, citations to scripture, angels, and the like. These memorials not only honor veterans but also have their own historical and artistic value, and all have emotional significance to the groups who helped procure or commission them. A ruling for Buono would deny these groups the opportunity to maintain memorials that they value in the event the monuments are found to establish religion.

The decision to erect a war memorial on public land often involves local civic and religious groups that raise the necessary funding and design and commission the memorial. *See* Jay Alan Sekulow and Erik M. Zimmerman, Pleasant Grove City v. Summum: *Upholding the Government's Authority to Craft Its Own Message Through Privately Donated or Funded Monuments, Memorials, and Artwork*, 3 Charleston L. Rev. 175, 176 (2009). It is common for both subtle and obvious religious imagery to be embedded within the resulting memorials since they reflect both historical context (including religious culture) and the interests of the groups involved. *See Van Orden v. Perry,* 545 U.S. 677, 689 (2005) (listing examples of monuments with religious imagery in the Nation's Capital). Countless memorials located on public lands, therefore, contain religious symbolism and may be at risk of a judicial order for removal or destruction.

1. Indianapolis is a city fond of war memorials, the most famous being the Soldiers and Sailors monument on what is now called Monument Circle which commemorates the valor of Hoosiers who fought in all wars prior to World War I. The city also boasts the Congressional Medal of Honor Memorial and the USS Indianapolis National Memorial. The Indiana War Memorial Historic District, located on state property in downtown Indianapolis, includes 24 acres of monuments, statues, sculptures and fountains, including the gargantuan Indiana War Memorial and, of particular significance to this discussion, the Indiana War Memorial Obelisk and the Schuyler Colfax memorial.

Built of black granite, and completed in 1930, the Obelisk is a post-World War I symbol of regeneration of the Nation. *See* National Register of Historic Places, Indiana World Memorial Plaza Historic District, 6, http://nps.gov (last visited on June 4, 2009). The Obelisk is one hundred feet tall and has four bas-relief bronze panels at its base. *Id.* Designed by Henry Hering, these panels represent the four fundamentals on which the nation's hopes are founded: Law, Science, Religion, and Education. The Law panel depicts Moses holding tablets representing the Decalogue. Religion is portrayed by a woman and girl praying in front of a Celtic cross.

Nearby in University Park is a monument to Schuyler Colfax, the Speaker of the United States House of Representatives who signed the resolution proposing the Thirteenth Amendment, and who later served under Ulysses S. Grant as the Seventeenth Vice President of the United States. The statue, erected by the Independent Order of Odd Fellows and unveiled in 1888, is centrally located in University Park, which is publicly owned. *Id.* at 10-12. At the base of the statue are symbols representing Faith, Hope, and Charity, as well as a prominent bronze medallion depicting a scriptural scene of Rebekah at the well giving a drink to Isaac's servant.

In short, both the Obelisk and the Colfax statue are owned by the government, rest on state ground, and plainly bear religious text or imagery. Hopefully no successful court challenge to either will arise, and certainly the State maintains that neither poses an Establishment Clause problem. As Establishment

Clause doctrine now stands, however, the legal analysis may well depend on who attended the dedication of the memorials and what they said. If either were declared an Establishment Clause violation, a sensible solution would be to convey each to a sympathetic group (such as the American Legion, whose national headquarters sits amidst the War Memorial District, or the Odd Fellows, who commissioned the Colfax statue) who would be likely to maintain it as-is.

Under the doctrine advocated by Buono, however, successful Establishment Clause challenges would mean destroying these monuments, and many others like them across the country, by sand-blasting offensive religious allusions or dynamiting them altogether, at considerable financial and moral costs to citizens and taxpayers. In this vein, it is worth noting that crude physical destruction was the self-help remedy of choice for a disgruntled citizen who objected to a Ten Commandments monument on the Indiana State House lawn. *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 768 (7th Cir. 2001), *aff'd*, 259 F.3d 766 (7th Cir. 2001). In the event the Court affirms the decision below, thus would untold numbers of monuments to important historical figures and ideas meet their demise, taking with them encomia to genuine American experience, not to mention national morale.

2. Military symbols often have religious overtones, so it is unsurprising that many statues and memorials—both those dedicated to soldiers and others—contain religious imagery. *See* Br. of Veterans of Foreign Wars of the United States, *et. al.*

as *Amicus Curiae* in support of Petition for Certiorari 7-11. The most obvious example is the Latin cross, such as that at issue here, which is a prevalent image in war memorials owing to its status as a military symbol for sacrifice. *See, e.g., Eugene Sand and Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 346-47 (Or. 1976).

Poignant monuments bearing crosses are everywhere on public property. For example, West Perry High School in Pennsylvania has a Veterans Memorial Grove, which features memorials to World War II, Korea, Vietnam, and the military actions in Mogadishu. *See* Pennsylvania Department of Military and Veterans Affairs, West Perry High School Monuments, http://www.milvet.state.pa.us (last visited on June 4, 2009). Students participated in the design, construction, and dedication of these monuments as cross-curriculum projects involving History, Art, English, and Music. *Id.* The World War II memorial, dedicated in 1995, consists of a cross draped in a United States flag. *Id.* Particularly given its relatively recent vintage, this is exactly the sort of monument that might be rendered vulnerable to destruction by a decision favorable to Buono. Such community projects should be commended, not vilified.

New York City is home to the massive Father Francis Patrick Duffy statue honoring this chaplain-soldier who served in the Spanish-American War and World War I. Father Duffy is depicted holding a bible in his hand and he is standing in front of a 17-foot tall Celtic cross. *See* New York City Dept. of Parks & Recreation, Father Duffy Statue,

http://www.nycgovparks.org (last visited on June 4, 2009). If a court were to find this public display unconstitutional, one would hope the city could convey it to a private group, as happened in *Freedom From Religion Foundation v. City of Marshfield*, 203 F.3d 487, 491, 497 (7th Cir. 2000), where the court held valid the sale of public park land containing a statue of Jesus.

The Mount Soledad Veterans Memorial Cross in San Diego has been the subject of numerous lawsuits, with litigation occurring in both California and Federal courts for over a decade. *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199, 1204 (S.D. Cal. 2008), *appeal docketed*, Nos. 08-56415 and 08-56436 (9th Cir. Aug. 27, 2008). The district court held that Congress had the secular purpose of honoring war veterans in transferring the land to private ownership, and that the cross does not violate the Establishment Clause regardless. *Id.* at 1221.

3. Other types of religious allusions also show up on war memorials. The citizens of Wentzville, Missouri, established one of the first Vietnam Veterans memorials in the United States in 1967, and their monument consists of a single column topped by a carved eagle with Ruth 1:16 carved in its base: "Whither thou goest I will go." *See* Vietnam Veterans Homepage, Vietnam Veterans Memorial; Wentzville, Missouri, http://www.vietvet.org (last visited on June 4, 2009). An eternal flame monument outside of the Baldwin County Courthouse in Alabama is inscribed with "Dedicated to the Glory of God and in Honor of the Veterans of All Wars." *See* Craig Myers, *Veterans Honored at*

Several Events in Bay Minette, al.com, November 11, 2008, http://www.al.com/news (last visited on June 4, 2009). The Delhi Township Veterans Memorial Park in Ohio is the site of a Wall of Honor dedicated in 2007 that consists of five marble walls prominently displaying in large letters "In God We Trust." *See* Delhi Township Veterans Association, Veterans Memorial Park & Monuments, http://www.delhiveterans.com (last visited June 4, 2009).

And there are more. The Vietnam Veterans Memorial Bridge in West Sacramento, California, is inscribed with "May they forever rest in peace in the bosom of our Lord." *See* Bridges – Vietnam Veteran's Memorial Bridge – Ryan E. Galt, http://www.worldwidepanorama.org (last visited June 4, 2009). The Veterans Memorial in Rocky Ripple, Indiana, contains "A salute to those known but to God." *See* Rocky Ripple Veterans Association, http://theripple effect.net (last visited June 4, 2009). The Veterans Memorial in Williams Township Pennsylvania contains an inscription of John 15:13: "Greater love has no one than this, that one lay down his life for his friends." *See* Lehigh Valley Military Affairs Council, Williams Township Monuments, http://www.lvmac.org (last visited June 4, 2009).

This is just a sampling of the religious symbolism that is prevalent in American war memorials. One can only imagine how many similar monuments exist on state and local government land in small towns and big cities throughout the country. If the presence of the cross on Sunrise Rock violates the Establishment Clause, so may many other monuments. If similar lawsuits are filed, after

protracted and expensive court battles, local or state governments who lose the Establishment Clause lottery would have two options: first, they might transfer the land on which the memorial sits to a private party; or second, be forced to destroy or remove the monument. Destruction or removal of every such instance of religious symbolism would sterilize public land of important cultural references and reflect hostility to religion.

War memorials, significant for their artistic and historical value, are also the location of ceremonies honoring soldiers who sacrificed their lives for this Nation. Unsurprisingly, therefore, veterans groups have proven willing and interested in maintaining such monuments by accepting conditional land transfers. Such groups should not be seen as "straw purchaser[s]," Pet. App. 82a-83a, or as tools to avoid the Establishment Clause, but as collections of soldiers who wish to preserve pieces of history that have served generations of men and women as a source of comfort. The Court should permit them, once again, to come to the aid of their fellow citizens. *Cf. Regan v. Taxation with Representation,* 461 U.S. 540, 551 (1983) ("Our country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages.").

III. The Court Should Abandon Establishment Clause Inquiry Into Government Purpose

In refusing to give effect to the Act of Congress providing for transfer to private hands of the land on

which the cross sits, the Ninth Circuit agreed with the district court's holding that "the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin Cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." Pet. App. 84a. Thus, when evaluating the government's actions, the court inferred a government intent to preserve the cross and, presumably, to endorse its religious message. This "government purpose" test, however, leads to inconsistent and unfair results. The Court should abandon it in favor of a test that more meaningfully inquires whether a government display "establishes" religion, such as by asking whether it is coercive.

A. The purpose test leads to inconsistent and unfair results

1. This case is about a cross on public (or formerly public) land, so it is fitting first to examine how other similar displays have fared under current doctrine. First, of course, is the case most directly in conflict with this case, *Freedom From Religion Foundation v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000), where the court held that a conveyance of public land containing a statue of Jesus Christ to a private religious organization was valid. The court found that a covenant running with the land requiring upkeep and maintenance of the statue was compliant with state law, which compliance in turn suggested a benign government purpose. *Id.* at 492-93. Here, the Court found that a similar covenant betrayed a *nefarious* government purpose. *See* Pet. App. 82a-83a. One sale was valid,

the other not, based on an infinite number of attitudinal indicators suggested by the circumstances.

Other cross cases similarly demonstrate the futility of achieving consistent and just outcomes using the purpose test. In *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 349 (Or. 1976), the court permitted a city park to display a large cross because, notwithstanding any earlier improper purposes, a new secular purpose had emerged to justify its display. But in *Gonzalez v. North Township of Lake County*, 4 F.3d 1412, 1414-15, 1421 (7th Cir. 1993), the court rejected a city park's claim that it was displaying, as a war memorial, a crucifix donated by the Knights of Columbus because a Knights spokesperson (not a public official) had referred to the cross in religious terms twenty-eight years earlier. Because of the purpose test, one government may display a religious symbol for secular reasons, while another may not. There is little predictability in this doctrine.

2. Unfortunately, the Court's recent decisions applying the purpose test to Ten Commandments displays have only muddied the waters further. In *Van Orden v. Perry*, 545 U.S. 677, 681 (2005), the Court permitted the Texas State Capitol to display a Ten Commandments monument because it found a valid secular purpose to display a series of monuments representing the state's political and legal history. On the very same day, in *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 850-51, 881 (2005), the Court held that a display of the Ten Commandments as part of a series of monuments in

a Kentucky courthouse did not have a valid secular purpose. Thus, Texas was permitted to display the Ten Commandments amongst other displays while Kentucky was not.

Applying these opinions and the purpose test to subsequent cases has proved to be a considerable challenge for the lower courts. Indeed, confounded by the ten separate opinions in *Van Orden* and *McCreary*—and, perhaps, inspired by the biblical milieu—lower courts have described the current state of the law as both "Establishment Clause purgatory," *ACLU v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005), and "limbo," *Green v. Board of County Commissioners of Haskell*, 450 F. Supp. 2d 1273, 1285 (E.D. Okla. 2006). Lower courts have been left to wade into this "murky, turbulent water," *Weinbaum v. Las Cruces Public Schools*, 465 F. Supp. 2d 1116, 1127 (D.N.M. 2006), with little guidance as to how to apply the purpose test in a way that will lead to clear, consistent results. Unsurprisingly, therefore, results in the wake of *McCreary* and *Van Orden* have been anything but consistent.

For example, as with *McCreary* and *Van Orden* themselves, the secular context in which a monument with religious overtones is displayed has sometimes been found to mitigate the appearance of government religious endorsement and, at other times, to be nothing but an attempt by government to sneak around the Establishment Clause. In *O'Connor v. Washburn University*, 416 F.3d 1216, 1228 (10th Cir. 2005), the court upheld a statue allegedly hostile to Roman Catholicism because

nearby secular displays would give a reasonable observer the sense of being in a museum rather than amidst government denigration of a particular religious faith. In *ACLU v. Grayson County, Ky.*, 2008 WL 859279, at *9 (W.D. Ky. 2008), however, the court rejected a courthouse "Foundations of American Law and Government" display that included the Ten Commandments with other documents because "[a]n objective observer would understand that the Foundations Display's sponsor desired to post the Ten Commandments in the Courthouse for purely religious reasons." Meanwhile the Eighth Circuit found a Ten Commandments monument standing *alone* to be constitutional—but not without dissent. *ACLU v. City of Plattsmouth*, *Neb.*, 419 F.3d 772, 778 (8th Cir. 2005); *id.* at 780-81 (Bye, J., dissenting).

To put it mildly, there is logical tension in the notion that the Establishment Clause permits one locale, Plattsmouth, to display a Ten Commandments monument without any kind of secular context, but prohibits another, Grayson County, from doing so even in context with other historical documents, and permits still a third, Washburn University, to maintain a monument hostile to religion because it is set amongst other statues. Yet the government purpose test, and the current state of Establishment Clause doctrine generally, make such results inevitable.

In order to avoid such incomprehensible outcomes, courts sometimes treat religious symbols as predominantly secular. In *American Atheists, Inc. v. Duncan*, 528 F. Supp. 2d 1245, 1260 (D. Utah

2007), the court held that twelve-foot-tall crosses placed on public land in memoriam to police officers who died in the line of duty did not violate the Establishment Clause because crosses for burial have a predominantly secular meaning. The court compared the crosses to Christmas trees, finding that over time their religious meaning has become subordinate to a secular one. *Id*. at 1258. That courts must decide when a cross ceases to be religious suggests a need to rethink Establishment Clause doctrine.

3. States and other government entities also find it difficult to know what types of monuments are permissible and whether certain words or actions on their part will cause an otherwise permissible monument to run afoul of the Establishment Clause. In Indiana, the federal courts enjoined replacement of a Ten Commandments monument destroyed by vandals because the Governor, when announcing the replacement monument (which also included the Bill of Rights and the Preamble to the Indiana Constitution) said the Ten Commandments represented "core values." *Ind. Civil Liberties Union v. O'Bannon*, 110 F.Supp.2d 842, 847 (S.D. Ind. 2000), *aff'd*, 259 F.3d 766 (7th Cir. 2001). Unfortunately, factual as they are, *Van Orden* and *McCreary* provide no real guidance concerning the correctness of those lower court decisions.

Accordingly, the purpose test encourages state officials to keep silent when adding monuments to government land—and certainly to keep clergy away from the dedication—lest a comment about the monument, or the mere presence of a religious

figure, be misinterpreted as religious endorsement. *See, e.g., McCreary*, 545 U.S. at 869; *see also ACLU v. Rowan County, Ky.*, 513 F. Supp. 2d 889, 892 (E.D. Ky. 2007) (lack of ceremony and officials present during initial display of monument was critical to finding of no religious purpose); *but see Card v. City of Everett*, 520 F.3d 1009, 1020 (9th Cir. 2008) (finding secular government purpose despite presence of clergy at dedication of monument). Promoting silence is not consistent with the mission of educating the public, which is the fundamental reason for having monuments in the first place.

B. The purpose test has shifted over time

The purpose test, which originated with the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), and was later refined by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring), isn't what it used to be. Its metamorphosis over the years provides another reason to reexamine it.

1. In *Lemon*, the Court accepted the government's asserted secular purposes because such claims must "be accorded appropriate deference." 403 U.S. at 613. Later, in *Lynch*, the Court observed that it "has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was *motivated wholly* by religious considerations." 465 U.S. at 680 (1984) (citations omitted) (emphasis added). After observing that "[t]he narrow question is whether there is *a* secular purpose for Pawtucket's

display of the crèche," the Court took Pawtucket at its word that it sponsored the display to "celebrate the Holiday and to depict the origins of that Holiday." *Id.* at 681 (emphasis added). Notably, the Court held "only that Pawtucket has a secular purpose for its display, which is all that *Lemon* requires" and specifically disclaimed Pawtucket's need of an *exclusively* secular purpose. *Id.* at 681 n.6.

The Court has at times reaffirmed this deferential approach. In *Bowen v. Kendrick*, 487 U.S. 589, 603 (1988), the Court sided with the government because, even if the Adolescent Family Life Act "was motivated in part by improper concerns, the parts of the statute to which appellees object were also motivated by other, entirely legitimate secular concerns." Similarly, in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 249 (1990), a plurality of the Court agreed that the Equal Access Act's religious activity protections were justified by the secular purpose of preventing speech discrimination notwithstanding that some legislators may have wanted to protect religious speech in particular: "[W]hat is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *See also Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (observing that even "a statute that is motivated in part by a religious purpose" may be valid).[1]

---

[1] *Widmar v. Vincent*, 454 U.S. 263 (1981), is instructive as well. The Court held that providing religious groups with access to a state university's

This line of cases yields a relatively light standard whereby "the Court is "reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned . . . ." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Yet this has not been the operative consideration in all cases.

2. The Court has at times undertaken a more searching analysis and attempted to look behind the plausible or stated purposes of government action to discern the government's supposed *actual* purposes. The Court has also employed a comparative test whereby it attempts to discern the *primary* purpose for governmental action supported by both religious and secular purposes.

In *Stone v. Graham*, 449 U.S. 39, 41 (1980), for example, the Court rejected the asserted secular purpose behind posting the Ten Commandments on public school classroom walls, saying that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." The Court arrived at this conclusion notwithstanding its acknowledgement that the Ten Commandments may be part of a public school curriculum for multiple secular reasons. *Id.* It simply chose not to defer to the government's asserted secular purpose.

---

open forum would be permissible because doing so "would have a secular purpose." *Id.* at 271 & n.10. This implies that any improper purposes that administrators might also have would be irrelevant.

Similarly, in *Edwards v. Aguillard,* 482 U.S. 578, 594 (1987), the Court accepted the notion that states could require public schools to teach creation science under the pure secular purpose of promoting skeptical inquiry. Nonetheless, the Court second-guessed Louisiana's stated secular purpose for its creation-science law because, based on a few comments by the legislative sponsor, it deemed the Act's "primary purpose" to be endorsement of religious beliefs. *Id.* at 592-94. The Court even listed in detail possible sources of information for discerning in future cases the primary purpose behind assertedly secular legislation. *Id.* This approach evinces a skeptical attitude that is far different from the deferential approach of *Lemon*, *Lynch*, *Bowen*, *Mergens* and *Mueller*.

In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Court rejected a public school's stated secular purpose for permitting a student message or invocation at football games. The school policy declared that the purpose was to solemnize the event, and the Court acknowledged that this purpose was "entitled to some deference." *Id.* at 306, 308. Nonetheless, the Court ultimately concluded that, because prayer is the most obvious way to solemnize an event, because the policy specifically permitted an "invocation," and because the school had a prior policy of permitting student-led prayer at football games, the "specific" purpose of the policy must have been to preserve a religious practice. *Id.* at 309. Particularly significant in *Santa Fe* was the Court's assertion that these factors

made it "reasonable" to infer that a religious purpose underlay the policy. *Id.*

Thus, while *Mueller* ruled that the Court should be reluctant to second-guess a plausible secular purpose, *Santa Fe* ruled that the Court could do so as long as it was merely "reasonable" to infer that a religious purpose may have existed. As professor Steven Smith has written, "[i]t is far from clear how a court can be expected to distinguish sham purposes from sincere ones when it is also required to 'defer to . . . stated intent.'" Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 286 (1987) (quoting *Wallace*, 472 U.S. at 74-75 (O'Connor, J., concurring)).

The Court's more recent opinions in *Van Orden* and *McCreary* have done nothing to clarify the issue. In *McCreary*, as in *Stone*, *Edwards*, and *Santa Fe*, the Court looked past the stated secular purpose behind the Ten Commandments displays and even went so far as to analyze the events surrounding the two *previous* versions of the displays. *See McCreary*, 545 U.S. at 868-71. The Court found that the presence at the dedication ceremony of a pastor who testified to the existence of God was evidence of the religious purpose behind the prior and current displays. *Id*. at 869. It even considered documents that the Counties chose *not* to include in the display, such as the Fourteenth Amendment and the original 1787 Constitution, and held that the omission of these documents and inclusion of others would lead the casual observer to "suspect that the Counties were simply reaching for any way to keep a religious

document on the walls of courthouses constitutionally required to embody religious neutrality." *Id.* at 872-73. This broadening of the purpose test to include not just analysis of the display itself but conjecture as to why other monuments or displays were not chosen instead demonstrates just how far afield of the deferential *Lemon* test Establishment Clause doctrine has run.

In *Van Orden*, by contrast, the Court held that the *Lemon* test was "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." 545 U.S. at 686. Without explaining why the test was "not useful," the Court went on to evaluate the monument's constitutionality in the context of its nature and the role of religion in the nation's history. *Id.* at 686-692. Citing *Lynch*, the Court noted that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Id.* at 690. Thus, without looking to the government purpose behind the display of the monument, the Court held that Texas's display of the Ten Commandments monument did not violate the Establishment Clause. *Id.* at 692. This approach is much more in line with the Court's earlier, more deferential, Establishment Clause cases and was issued on the same day as *McCreary*, a decision that is anything but deferential. It is no wonder, therefore, that lower courts and government entities alike have had difficulty squaring these opinions and knowing when and how to apply the government purpose test.

3. The "taint" doctrine is part of the purpose test's problematic metamorphosis.

As mentioned, the Court in *Santa Fe* ascribed religious purposes to an assertively secular school policy in part because the policy at one time had provided for student-initiated prayer. 530 U.S. at 309. But obsessive focus on long-ago stated purposes and the history surrounding prior displays deviates substantially from the Court's earlier understanding of the purpose test. In particular, in *McGowan v. Maryland*, 366 U.S. 420, 444-47 (1961), the Court upheld Maryland's Sunday closing laws because, regardless of the religious origins of such laws, a secular justification had emerged over time. *See also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 41 (2004) (O'Connor, J., concurring in the judgment) (stating that even if some legislators voted to add "under God" to the Pledge of Allegiance out of religious motivations, "[a]ny religious freight the words may have been meant to carry originally has long since been lost.").

Indeed, this focus on the legal history of monuments and the long-ago stated purposes behind them leads to unfair results for states who attempt to cure Establishment Clause violations. In *McCreary*, the Counties attempted to cure an earlier Establishment Clause problem by displaying the Ten Commandments amongst other more secular monuments. 545 U.S. at 855. However, despite focusing on these curative acts, the Court instead based its decision on the earlier problems and found that the display still violated the Establishment

Clause because at some prior point the government evinced an intent to endorse religion.

Although the Court stated in *McCreary* that past action does not forever taint a monument, it provided no guidance as to what measures should be taken to cure an Establishment Clause violation. *Id.* at 873-74. Lower courts, likewise, have been hesitant to provide any guidance of their own. *See, e.g., ACLU v. Garrard County, Ky.*, 517 F. Supp. 2d 925, 945 (E.D. Ky. 2007) (holding that history and context leave open the factual claim that an otherwise permissible Foundations Display violates the Establishment Clause); *Green*, 450 F.Supp.2d at 1288 (noting the "difficult questions" surrounding whether or not new displays have a "constitutional strike against them"); *Grayson County*, 2008 WL 859279, at *9 (holding history and context make the Foundations Display violate the Establishment Clause). Thus, government officials are essentially required to get it right on the first try when they wish to display a monument or document with any sort of religious content, which again encourages silence about new monuments.

C. The purpose test is inherently unsuitable for detecting "establishments" of religion

The Court's varying applications of the purpose test reflect the extraordinary difficulty of applying the test and, more to the point, the test's vulnerability to manipulation (even if unintentional) and its inherent inability to provide equal justice over time. These are systemic problems that follow

from the lack of a well-understood connection with the values underlying the Establishment Clause.

1. The most obvious difficulty in applying the secular purpose test (as understood in, *e.g.*, *Stone*, *Edwards*, and *Santa Fe*) is to divine the supposed actual or prevailing purpose of a government official or body. Judges applying the purpose test probe deep into a government body's political culture, legislative history, interpretations and statements regarding the law, historical context, and even the fit between the act and its secular ends. The objective is to unravel an infinite variety of complementary, intertwined purposes and determine not just what they are, but which among them is "primary."

That judges undertake to determine whether the articulated secular purposes of public officials (who are equally under oath to uphold the Constitution) are nothing but a "sham" implies institutional distrust and deeply offends comity. *Edwards*, 482 U.S. at 586-87; *see also id.* at 610 (Scalia, J., dissenting) ("[T]he Court today holds . . . that the members of the Louisiana Legislature knowingly violated their oaths and then lied about it."). That courts often must grope for the actual purposes of entire legislative bodies and not just individual government officials turns the implausible into the futile. *Id.* at 637 (Scalia, J. dissenting) ("To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist."). It is inherently unjust for constitutionality to turn on a single legislator's (or government executive's) ill-conceived comment in support of a law or a display,

as if the resulting law were the "fruit of a forbidden tree." *Id*. at 638.

A plurality of the Court may have backed away from such an incredulous approach in *Mergens*, where the Court upheld the Equal Access Act notwithstanding the religious motivations of some who voted for it. 496 U.S. at 249-50. But even the *Mergens* plurality ultimately reasoned that having a religious *motivation* is distinguishable from having a *purpose* of advancing religion. *Id.*; *but see*, *e.g.*, *Lynch*, 465 U.S. at 680 (articulating the purpose test in terms of motivations). The supposed distinction is that, while the Establishment Clause prohibits government from advancing religion, it does not enjoin government officials from pursuing secular policies with religious motives. *See Edwards*, 482 U.S. at 614-15 (Scalia, J., dissenting) (contrasting cases that speak of activities "endorsing," "advancing," or "establishing" religion from secular policies pursued for religious motives, such as providing for the homeless).

Requiring courts to find a blurry line between the two is yet another impediment to principled, consistent adjudication. Indeed, if courts fail to draw the motive/purpose distinction accurately, the purpose test may ultimately result in judicial decisions that effectively exclude the religious from political participation. *See id*. at 615. Regardless, the purpose test is laden with entirely subjective inquiries, making it highly susceptible to unequal applications.

2. The impossibility of applying the secular purpose test with objectivity and consistency rests in part on its questionable jurisprudential rationale. "It is . . . far from an inevitable reading of the Establishment Clause that it forbids all governmental action intended to advance religion; and if not inevitable, any reading with such untoward consequences must be wrong." *Edwards*, 482 U.S. at 639 (Scalia, J., dissenting). The endorsement test as a whole has been derived from the notion that the Establishment Clause exists in part to prevent religious minorities from feeling like "outsiders." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). The implicit theory for including a secular purpose component appears to be that, regardless of the effect of government action, the mere existence of a religious purpose alone can somehow exclude or create outsiders.

Even aside from the conceptual riddle of how a religious purpose can exclude when the effect does not, the Establishment Clause roots of the "outsider" premise are far from clear. For example, Steven Smith wrote that the Establishment Clause had once been "primarily concerned with maintaining proper institutional relations." Smith, *Symbols*, *supra* at 299. He describes the "outsider" premise as reconceiving the Establishment Clause as a source of individual rights rather than as a regulator of institutional relations. *Id.* Professor Michael Paulsen has argued that, even if it is intended to advance religion, if government action has no religiously coercive impact, "the Establishment Clause supplies no justification for outlawing it," and "[t]he purpose prong of *Lemon* thus serve[s] no

legitimate function[.]" Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795, 803 (1993); *see also, e.g.*, Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 Geo. L.J. 1667, 1720-21 (2006) (arguing that the focus on religious division is misguided because divisive state policies on hot button issues are "an unremarkable staple of political life in our democracy"); Douglas G. Smith, *The Constitutionality of Religious Symbolism After McCreary and Van Orden*, 12 Tex. Rev. L. & Pol. 93, 106 (2007) ("Requiring an inquiry into purpose arguably generates unwarranted litigation with little societal benefit").

In light of the secular purpose test's rather shaky jurisprudential foundation, it is no wonder that enforcement varies so wildly: Courts are unsure what the doctrine is ultimately trying to achieve.

D. Historical displays with religious connotations should be judged only as to whether they represent actual religious coercion

Particularly because the purpose test suffers from deep and insoluble practical problems leading to unjustified disparate treatment of similar government displays, the Court should, with respect to display cases at least, discard the endorsement test entirely and consider employing instead the coercion test proposed by Justice Kennedy in his *Allegheny* opinion. *County of Allegheny v. ACLU*, 492 U.S. 573, 659-63 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (describing parameters of coercion test). *See also*

Van Orden, 545 U.S. at 693 (Thomas, J., concurring) ("The Framers understood an establishment necessarily to involve actual legal coercion.") (citation and internal quotation omitted). Doing so would not only result in greater equality across jurisdictions, but it would also provide government officials with more predictable outcomes.

The Court has understood the Establishment Clause to permit government traditions having religious significance because of its appreciation for the secular dimensions and common acceptance that also characterize those traditions. *See Marsh v. Chambers*, 463 U.S. 783, 792 (1982), in particular, ruled that legislatures may hire a chaplain to conduct legislative prayer because Congress and state legislatures have engaged in that practice throughout our history. *Marsh* held that a government's "tolerable acknowledgement of beliefs widely held among the people of this country" will not offend the Establishment Clause. *Id.* Similarly, the "common sense of the matter" permits the Court to open its sessions with "God save the United States and this Honorable Court" and for the currency to bear the motto "In God We Trust." *Zorach v. Clausen*, 343 U.S. 306, 312-13 (1952); *see also Marsh*, 463 U.S. at 792; *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (stating that the "history and ubiquity" of practices with religious significance enables them to convey a message related to common secular culture rather than religion).

As set forth in Part II, *supra*, state and local governments all over the country have a long and rich tradition of displaying tributes to our religious

roots and heritage. For these reasons, the coercion test can safely be used in government display cases as a safeguard against presentations that go too far. As long as the display, new or old, does not "coerce anyone to support or participate in any religion or its exercise," it should be permitted under the Establishment Clause. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part).

As for the display at issue here, it seems obvious that a cross in the middle of the desert does not coerce support for religion. Had the coercion test been the rule of law, this lawsuit probably would not have been wending its way through the court system for the last 8-plus years, much less would the courts below have faulted the government for taking steps to put the display in private hands.

* * *

Our Founders created secular government and disestablished religion, but their own religious learning profoundly influenced their actions and the endurance of the Republic. Like nearly all government tributes to religious heritage, the Latin cross here is fully consonant with the First Amendment: It coerces nobody, creates no impression of religious endorsement, and belongs to a government tradition with rich secular significance. To compel its destruction is to condemn thousands of similar monuments around the country through unnecessary hostility to religious heritage.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington
Street
Indianapolis, IN 46204
(317) 232-6255

*Counsel of Record

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
HEATHER L. HAGAN
ASHLEY E. TATMAN
Deputy Attorneys General

Counsel for Amici *States*

Dated: June 8, 2009