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 AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. For over twenty years it has defended principles of limited government, individual liberty, and moral virtue. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates that the Constitution be interpreted according to its original meaning. Eagle Forum ELDF has supported longstanding principles of morality in American society, and has consistently defended the right of religious expression. Eagle Forum ELDF has a strong interest in protecting the right to publicly display items that have both religious and historical significance, such as the cross that is a component of the war memorial at issue here.

## SUMMARY OF THE ARGUMENT

The court of appeals' decision articulates a formulation of the standing doctrine that is so broad that it would allow any party to bring any claim no matter how tenuous the party's alleged injury. As such, it directly conflicts with this Court's precedents. The Court has made clear that a plaintiff must suffer an actual and concrete injury in order to seek relief from the federal courts. Here, where plaintiff acknowledges that he is not personally offended by the display of a cross as part of a war memorial, that tangible injury is plainly missing.

If this Court reaches the merits, it should reverse the court of appeals' decision. The Ninth Circuit's decision is a

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[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part; nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

textbook example of the flawed outcomes that have resulted under the Court's "endorsement" test. Neither the text nor history of the Establishment Clause suggests that the presence of a cross in a war memorial, much less a congressionally-approved transfer of the land on which the war memorial sits to a private party for fair value, violates the Constitution. Indeed, the display of crosses and other religious symbolism as part of war memorials on government land is routine and well-ingrained in our nation's history.

Because the courts' application of the endorsement test has led to such flawed outcomes, it should be abandoned in favor of a test akin to that articulated by the plurality in *Van Orden v. Perry*. Displays of religious symbolism that also have established historical or other secular meaning are plainly permissible under the Establishment Clause. The fact that they also have some religious meaning does not render them unconstitutional.

A cross that is part of a war memorial on government land cannot be construed as an "endorsement" of any particular religious doctrine. Nor is it impermissible "endorsement" of religion for Congress to attempt to cure alleged constitutional violations by transferring the land on which the display is found to a private party for fair value. Indeed, the court of appeals' decision here is striking. It summarily enjoins a carefully-crafted statute passed with overwhelming congressional support that was specifically designed to cure the very constitutional defect the court cites. The court of appeals' decision is contrary to the text and history of the Establishment Clause as well as the interpretation of that clause by a coordinate branch of government and should not stand.

## ARGUMENT

### I. The Court Of Appeals' Decision Articulates A Formulation Of The Standing Doctrine That Is Inconsistent With This Court's Precedents.

This Court has articulated well-established elements that comprise the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In order to satisfy the "case or controversy" requirement under Article III, a plaintiff must demonstrate (1) that he has suffered an "injury in fact," (2) that there is a causal relationship between the injury and the challenged conduct, and (3) that the injury will be "redressed by a favorable decision." *Id.* at 560-61. A plaintiff must establish that he has "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Mere allegations of "injury" will not suffice—the injury must be "concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560; *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998).

This Court's precedents make clear that a generalized objection to the unconstitutional expenditure of government funds is insufficient to confer standing. "As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing." *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2563 (2007). Likewise, "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co.*, 523 U.S. at 107; *see also Valley Forge*

*Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982) (finding insufficient injury to confer standing where plaintiffs "fail[ed] to identify any personal injury suffered by them . . . other than the psychological consequence presumably produced by observation of conduct with which one disagrees").

The rules governing standing apply with equal force to plaintiff's allegations here. *See Valley Forge*, 454 U.S. at 489 (holding that an allegation of mere psychic injury "does not become more palatable when the underlying merits concern the Establishment Clause").[2] Thus, in the context of the Establishment Clause, a plaintiff attempting to demonstrate an injury in fact must claim that he was "subjected to unwelcome *religious exercises* or [was] forced to assume special burdens to avoid them." *Id.* at 487 n.22 (emphasis added). "Religious exercises" are not simply "conduct with which one disagrees." *Id.* at 485-86. Rather, there must be a direct and personal nexus between the alleged Establishment Clause violation and the plaintiff's alleged injury.

These requirements are clearly absent in the present case. As the district court noted, plaintiff Buono is a "practicing Roman Catholic" who "does not find a cross itself

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[2] Indeed, in *Valley Forge*, a majority of this Court criticized the purported Establishment Clause exceptions to the taxpayer-standing rules that had been read into the Court's decisions in *Frothingham v. Mellon*, 262 U.S. 447 (1923) and *Flast v. Cohen*, 392 U.S. 83 (1968). *See Valley Forge*, 454 U.S. at 484-85 n.20 ("Justice Brennan's dissent is premised on a revisionist reading of our precedents . . . . [T]he dissent must shoulder the burden of explaining why taxpayers with standing have no 'legal interest' in congressional expenditures except when it is possible to allege a violation of the Establishment Clause . . . . [B]oth claims have been rejected, precisely because Art. III requires a demonstration of redressable injury that is not satisfied by a claim that tax moneys have been spent unlawfully.").

objectionable." *Buono v. Norton*, 212 F. Supp. 2d 1202, 1207 (C.D. Cal. 2002). Rather, he is "deeply offended by the cross display on public land *in an area that is not open to others to put up whatever symbols they choose*." *Id.* (emphasis added). Accordingly, plaintiff's alleged injury is merely disagreement with observed government conduct—the precise type of allegation foreclosed by this Court's prior decisions. *See Hein*, 127 S. Ct. at 2563; *Steel Co.*, 523 U.S. at 107; *Valley Forge*, 454 U.S. at 485. Plaintiff simply lacks any direct and personal injury sufficient to confer Article III standing.

Indeed, it is unclear that plaintiff has suffered *any* injury here. In *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009), this Court unanimously held that while "government speech must comport with the Establishment Clause," the government is nonetheless free to select the views that it wants to express under the Free Speech Clause. *Id.* at 1131-32. Accordingly, this Court ruled that the government was free to allow the display of the Ten Commandments at a public park, even though it had rejected requests to display other monuments. As the Court observed, the government's general practice "with respect to donated monuments has been one of selective receptivity," and such government decisionmaking does not raise any free speech concerns. *Id.* at 1133.

While plaintiff here attempts to frame his lawsuit in the guise of an Establishment Clause challenge, the gravamen of his complaint is exactly the same as that in *Summum*. From 1995 until 1999, Mr. Buono was aware of the cross displayed as part of the war memorial erected by the Veterans of Foreign Wars, but was never offended by its presence. Rather, Buono alleges that he first took offense in 1999, when he discovered that the government would not open the land to allow "others to put up whatever symbols they choose." *Buono*, 212 F. Supp. 2d at 1207. Accordingly, as in *Summum*, plaintiff here complains that the

government has failed to create a public forum by failing to allow others to alter, or add to, a pre-existing war memorial erected by a private organization. However, unlike the plaintiff in *Summum*, Buono has not personally applied for, or been denied access to, that forum. Instead, he merely contends that he is offended by the fact that the government has allegedly denied access to that forum *to others*.

This is certainly not the kind of "personal stake in the outcome of the controversy" that this Court has found necessary to "invo[ke] federal-court jurisdiction and to justify exercise of the court's remedial powers" on a plaintiff's behalf. *See Warth*, 422 U.S. at 498 (quoting *Baker*, 369 U.S. at 204); *see id.* at 499 ("A federal court's jurisdiction . . . can be invoked only when *the plaintiff himself has suffered* some threatened or actual injury . . . .") (emphasis added, quotations omitted). Mr. Buono's complaint simply cannot be squared with this Court's "general prohibition on a litigant's raising another person's legal rights." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). Accordingly, plaintiff does not even allege a compensable legal injury, much less the sort of particularized, individual injury sufficient to confer standing.

## II. The Court Should Formally Abandon The "Endorsement Test" Because It Leads To Outcomes That Are Inconsistent With The Plain Language Of The Establishment Clause And Manifests Hostility To Religion.

If this Court reaches the merits of Mr. Buono's claim, it should reverse the court of appeals' decision and use this opportunity to clarify the standards for evaluating challenges to government action under the Establishment Clause. The court of appeals' decision was premised on its finding that there was an "improper governmental endorsement of religion" that "has not actually ceased." *See Buono v. Kempthorne*, 527 F.3d 758, 782-83 (9th Cir. 2008).

However, the "endorsement test" has been the subject of extensive judicial and academic criticism because it is hopelessly vague and results in outcomes that are inconsistent with the Constitution's plain meaning.[3]

Both the constitutional text and early practice suggest that official acknowledgments of religion by the government were not deemed impermissible.[4] Indeed, official acknowledgments of religion have been commonplace in our public life for hundreds of years.[5] As this Court has

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[3] *See, e.g.*, Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 285-86 (2003) (observing that commentators "have criticized the endorsement test as being inconsistent with historical practice" and failing to "bring coherence" to the Establishment Clause analysis); Stephen D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 267 (1987) ("Far from eliminating the inconsistencies and defects that have plagued establishment analysis, the 'no endorsement' test would introduce further ambiguities and analytical deficiencies into the doctrine."); Jay D. Wexler, *The Endorsement Court*, 21 WASH. U. J.L. & POL'Y 263, 265 (2006) ("Since its inception, the endorsement test has been the subject of intense scholarly and judicial criticism.").

[4] *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 787 (1983) ("The tradition in many of the colonies was, of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain."); Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1116 (1998) ("In the period between the Founding and Reconstruction, the federal government involved itself with religion and religious exercise in a variety of ways."); J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?*, 2001 B.Y.U. L. REV. 755, 765 (observing that "[i]n addition to urging the Thanksgiving Proclamation, the House of Representatives authorized the use of its hall for religious services, and the First Congress established a Congressional Chaplain system").

[5] *See* CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 88 (1964) ("During the period

consistently recognized, throughout our nation's history "religion has been closely identified with our history and government." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 212 (1963). "The history of man is inseparable from the history of religion," *Engel v. Vitale*, 370 U.S. 421, 434 (1962), and "[i]nteraction between church and state is inevitable." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Schempp*, 374 U.S. at 213. Indeed, there has been "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). Thus, this Court has declared that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

The "endorsement test" conflicts with this longstanding history. Indeed, in *Van Orden v. Perry* a plurality of this Court expressly rejected the notion that the endorsement test should be used to evaluate a passive, longstanding historical monument on public land, such as the one at issue here. *See* 545 U.S. 677, 686-87 (2005) (plurality opinion) (concluding that the appropriate test for a "passive monument" "is driven both by the nature of the monument and by our Nation's history"); *see also id.* at 700-01 (Breyer, J., concurring in the judgment) (explaining that "this Court's other tests,"

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immediately after the Revolution and previous to the ratification of the federal Bill of Rights, it was generally acknowledged from one end of the nation to the other that government should not be hostile to religion. Indeed, the activities of the Continental Congress indicate clearly that this body was pleased to promote the cause of religion.").

including the "endorsement test," cannot "readily explain the Establishment Clause[]").[6]

The *Van Orden* plurality concluded that the Establishment Clause analysis in such cases should be "driven both by the nature of the monument and by our Nation's history." *Id.* at 686. The plurality emphasized that "[s]imply having religious content or promoting a religious doctrine does not run afoul of the Establishment Clause." *Id.* at 690. In fact, a contrary rule would "evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage." *Id.* at 684. Thus, the plurality found that a longstanding display of the Ten Commandments on the grounds of the Texas State Capitol did not violate the Establishment Clause. As the plurality opinion observed, references to the Ten Commandments are "common throughout America" and have "an undeniable historical meaning." *Id.* at 688, 690.

Justice Breyer's concurrence in *Van Orden* likewise observed that a monument or display may be constitutionally permissible even if it "undeniably has a religious message," because it could also convey a "secular moral message" or "historical message." *Id.* at 700-01 (Breyer, J. concurring in the judgment). Indeed, as Justice Breyer noted, "a contrary conclusion . . . would . . . lead the law to exhibit a hostility to religion that has no place in our Establishment Clause traditions" and could "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.* at 704.

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[6] The Court specifically referenced the endorsement test in a companion Ten Commandments case, *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005). There, however, the facts were much different. The majority found that the case involved a "short (and stormy) history" of legislative attempts demonstrating "substantial religious objectives of those who mounted them." *See Van Orden*, 545 U.S. at 703.

Consistent with the approach in *Van Orden*, this Court has repeatedly upheld government displays of religious symbols where such displays also conveyed a secular meaning. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (upholding display of a cross); *Lynch*, 465 U.S. at 684 (upholding display of a crèche); *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989) (upholding display of a menorah); *see also* Douglas G. Smith, *The Constitutionality of Religious Symbolism After McCreary and Van Orden*, 12 TEX. REV. L. & POL. 93, 98 (2007).[7]

This case falls squarely within the Court's holding in *Van Orden*. Both the "nature of the monument" and our history and customs indicate that the memorial is constitutionally permissible. *See Van Orden*, 545 U.S. at 686-87. Crosses are frequently used to memorialize the deceased on public lands. *See Buono*, 527 F.3d at 765 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that

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[7] This Court has likewise upheld numerous government policies or acknowledgements of religion—which provided far greater benefit to religion than any incidental benefits provided here—so long as the policies in question were not undertaken for an "exclusively religious" purpose. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding a school voucher program even though a majority of students had enrolled in religious schools); *Zobrest v. Catalina Foothills Schools Dist.*, 509 U.S. 1 (1993) (upholding a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986) (upholding a vocational scholarship program that provided aid to a student at a religious institution studying to become a pastor); *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (upholding the Nebraska legislature's practice of opening legislative sessions with a prayer on the ground that such practices were "deeply embedded in the history and tradition of this country"); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (allowing non-categorical grants to church-sponsored colleges and universities); *Tilton v. Richardson*, 403 U.S. 672 (1971) (permitting federal grants for college buildings of church-sponsored institutions).

the cross "serves the secular purpose of memorializing fallen soldiers"). Such "[s]ectarian identifications on markers" do not violate the Establishment Clause. *Summum*, 129 S. Ct. at 1142 (Souter, J., concurring in the judgment). There is simply nothing constitutionally questionable about a religious symbol being used to commemorate the lives of deceased war veterans. A contrary holding would undermine one of the few bright lines drawn in the Establishment Clause context and invite protracted litigation regarding displays across the nation—including other war memorials and cemeteries—that have heretofore never raised constitutional concerns.

Indeed, the court of appeals' decision demonstrates the inherently flawed nature of the endorsement test and its hostility to religious expression. The court of appeals ruled that a display that had gone unchallenged for approximately seventy years constituted an "establishment" of religion and, moreover, that a reasonable attempt by Congress to cure such alleged violation was itself an "endorsement" of religion. *Cf. Van Orden*, 545 U.S. at 702 (Breyer, J. concurring) (given that Ten Commandments monument had stood unchallenged for approximately 40 years, "few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect").

While this Court has underscored that the endorsement test is an objective one based on the perceptions of a "reasonable" observer, in practice it has frequently degenerated to authorize a heckler's veto of legitimate religious expression. *See McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 872-74 (2005) (confirming objective nature of the test); *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring) (same). In doing so, it manifests an inherent bias against religious expression and in the process only perpetuates "the very kind of religiously

based divisiveness that the Establishment Clause seeks to avoid." *See Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment). Because it is inconsistent with the text and history of the Establishment Clause, the endorsement test should be abandoned.[8]

## III. Congress Remedied Any Alleged Constitutional Violation By Transferring The Land On Which The Memorial Sits To A Private Party For Fair Value.

Even if the war memorial at issue here could be viewed as properly raising constitutional concerns (and for the reasons discussed above, it cannot), any such problems were remedied by the congressional legislation transferring the land on which the memorial sits to the VFW for fair value. It is axiomatic that "an Establishment Clause violation must be moored in government action of some sort." *Pinette*, 515 U.S. at 779. Without government action, there is no constitutional claim. Accordingly, once Congress transferred the land on which the memorial sits to a private party, there was no longer a cause of action under the Establishment Clause.

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[8] The Court may also wish to take the opportunity to expressly abandon the three-prong test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Van Orden v. Perry*, 545 U.S. 677, 685-86 (2005) (observing that "our recent cases simply have not applied the *Lemon* test"). Indeed, at least one circuit sitting *en banc* has concluded that the Court effectively abandoned this test in *Van Orden*. *See ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) ("Taking our cue from Chief Justice Rehnquist's opinion for the Court and Justice Breyer's concurring opinion in *Van Orden*, we do not apply the *Lemon* test."). As with the endorsement formulation, the *Lemon* test has been criticized as being inconsistent with the text and history of the Establishment Clause as well as leading to arbitrary outcomes. *See supra* note 3.

The court of appeals' contrary decision is inconsistent with well-reasoned decisions issued by other courts of appeals involving nearly identical facts. For example, drawing upon this Court's holding in *Evans v. Newton*, 382 U.S. 296 (1966), the Seventh Circuit has concluded that a similar land transfer "effectively ended state action" and "validly extinguished any government endorsement of religion" where the parties "performed the necessary formalities to effect a transfer of property, paid a fair price and assumed traditional duties of ownership." *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000). This was true even though the government imposed a restrictive covenant that maintained some lingering government interest in the transferred property. *Id.* at 492-93. The court found, in straightforward fashion, that "absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Id.* at 491.

The Seventh Circuit reached a similar conclusion in *Mercer v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005). Relying on *Marshfield*, the court held that the sale of a small parcel of land containing a Ten Commandments monument was sufficient to cure any alleged Establishment Clause violation. *Id.* at 702. The court rejected the plaintiff's contention that the government's action in "keep[ing] the monument in its challenged location" violated the Establishment Clause. Rather, as the court observed, such a sale effectively eliminated any constitutional problems where there were "no unusual circumstances surrounding the sale of the parcel of land so as to indicate an endorsement of religion." *Id. See also Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1260 (10th Cir. 2005) (sale of easement was proper to "avoid further litigation involving potential constitutional violations").

As the Seventh Circuit correctly recognized, under this Court's precedents, it is only the "unusual" or

"extraordinary" case in which such land transfers will not effectively cure alleged Establishment Clause violations. A violation may persist only where "a set of unusual facts and circumstances demonstrate[] that the government remain[s] *intimately involved in exclusively public functions* that ha[ve] been delegated to private organizations." *Marshfield*, 203 F.3d at 492 (citing *Evans*, 382 U.S. 296) (emphasis added). In *Evans*, for example, an entire park was turned over to "private" trustees, but the municipality continued to sweep, manicure, water, patrol, and maintain the park. *Evans*, 382 U.S. at 301. The municipality completely controlled the park, exempted it from taxation, and continued to keep it segregated, reserving its use to whites only. *Id.*

In stark contrast, there is *no* evidence in this case that the federal government has remained involved, much less "intimately involved" in the maintenance of the war memorial here. *See Buono*, 527 F.3d at 763 (O'Scannlain, J., dissenting from denial of rehearing en banc) (finding that there is no evidence that the government "has maintained or will maintain or support" the memorial after the land transfer). In reaching its erroneous conclusion, the court of appeals relied upon the fact that the National Park Service manages the preserve that surrounds the war memorial. However, as a result of the land transfer, the parcel on which the war memorial sits is no longer part of the preserve that is maintained by the government. *See id.* at 779. There is simply nothing in this Court's precedent, and certainly nothing in the Constitution, that would render a monument impermissible merely because the areas *surrounding the parcel* are maintained by the government, while the parcel itself is not.

It bears noting that a contrary ruling would have wide-ranging negative effects. The Ninth Circuit's decision would seemingly require complete divestment of an entire park in order to cure an Establishment Clause violation; reasonable, targeted transfers like the one in this case would seldom, if

ever, be effective. At bottom, the court of appeals' decision would make it almost impossible for the government to cure alleged Establishment Clause violations while preserving longstanding monuments and memorials that have significant historical significance. *See Buono*, 527 F.3d at 762 (O'Scannlain, J., dissenting from denial of rehearing en banc) ("The opinion in this case announces the rule that Congress cannot cure a government agency's Establishment Clause violation by ordering sale of the land upon which a religious symbol previously was situated."). Moreover, it would do so in the face of a strong expression of contrary congressional understanding. Congress overwhelming approved the land transfer, taking steps to carefully ensure that the transfer was for fair value and that the government would not have any ongoing role in the administration of the war memorial. *See* Department of Defense Appropriations Act of 2004, Pub. L. No. 108-87, § 8121(c), (d), 117 Stat. 1100.

In sharp contrast to the rule adopted by the Ninth Circuit, it is well established that alleged Establishment Clause violations *can* be cured. The federal reports are filled with cases from this Court and numerous courts of appeals upholding displays or government policies that have become permissible, even if their origins may have been susceptible to constitutional challenge. *See, e.g.*, *McGowan v. Maryland*, 366 U.S. 420, 431 (1961) (upholding "Sunday closing laws" even though "the original laws which dealt with Sunday labor were motivated by religious forces"); *ACLU of New Jersey v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) (upholding a display containing religious content, even though a prior display was held to violate the Establishment Clause); *Granzeier v. Middleton*, 173 F.3d 568, 574 (6th Cir. 1999) (holding that the state defendants could continue with the Good Friday holiday closing by adopting a secular rationale for the closing); *Metzl v. Leininger*, 57 F.3d 618, 623-24 (7th Cir. 1995) (same). Of

course, for reasons discussed above, the monument in the present case never violated the Establishment Clause. However, even if it had, "the fact that a particular [monument] was once constitutionally suspect does not prevent it from being reinstated in a constitutional form." *Granzeier*, 173 F.3d at 574.

The Ninth Circuit's ruling exhibits precisely the type of "hostility toward religion" that the Court found impermissible in *Van Orden v. Perry*. *See* 545 U.S. at 704 (Breyer, J. concurring in the judgment) (noting that "hostility toward religion . . . has no place in our Establishment Clause traditions"). The court of appeals' decision enjoining carefully-crafted congressional action designed to avoid any alleged constitutional concerns should be overturned.

## CONCLUSION

For the foregoing reasons, the court of appeals' decision should be reversed.

Respectfully submitted,

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