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 FOUNDATION FOR FREE EXPRESSION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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The Foundation for Free Expression ("FFE"), as *amicus curiae*, respectfully submits that the decision of the Ninth Circuit Court of Appeals should be reversed.

FFE is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. FFE's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast: True Stories of Hollywood Stars and Their Outrageous Politics*, and *Hollywood Nation: Left Coast Lies, Old Media Spin, and the Revolution*. Mr. Hirsen has taught law school courses on constitutional law.

INTRODUCTION

It would be ironic indeed if the Constitution were used to stifle expression honoring the memory of soldiers who died to preserve the liberties it was written to guarantee. Neither history nor case law mandates the Ninth Circuit's rigid application of the Establishment Clause, which chills expression instead of protecting it.

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

This Court's recent decision in *Pleasant Grove City* is a key to unraveling the case currently before the Court. That case was litigated "in the shadow" of the Establishment Clause. *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1139 (2009) (Scalia, J., concurring). The shadow has now receded and the Establishment Clause challenge is in full view.

I. BUONO DOES NOT ASSERT A DISTINCT INJURY TO HIMSELF THAT WILL BE REDRESSED BY A DECISION IN HIS FAVOR.

Buono is exactly the sort of "concerned bystander" who lacks standing because he is using the judicial process solely to vindicate his own value interests. *United States v. SCRAP*, 412 U.S. 669, 687 (1973); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982).

> [A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.
>
> *Id*. at 483

Standing cannot be achieved by asserting a constitutional violation without identifying a personal injury suffered *by the plaintiff* as a consequence of the alleged error. Mere "observation of conduct with which one disagrees" is not enough to confer standing under Art. III. *Id*. at 485.

Buono's alleges injury in that he is unable to freely use the public land where the Sunrise Rock cross sits and has altered his behavior to avoid it. *Buono v. Kempthorne,* 371 F.3d 543, 547 (9th Cir. 2004). The inability to unreservedly use public land can constitute a sufficient injury for Establishment Clause purposes. *Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 619 (9th Cir. 1996). He might also, though somewhat tangentially, satisfy the proximity requirement that courts have identified as a critical factual distinction. *Suhre v. Haywood County,* 131 F.3d 1083, 1087 (4th Cir. 1997). But Buono's whole case is built on the edifice of an alleged injury to a third party and his disagreement with the government's response to that person. The reason for his inability to use the land, and the reason for his avoidance of the cross, is that he would have to "observe conduct with which he disagrees"--specifically, the government's failure to permit others to erect displays and monuments on the property. The only personal injury he can articulate is his general disagreement with the government decision not to open this land as a public forum for the erection of monuments, and his particular disagreement with their denial of a specific request to erect a Buddhist shrine near the cross.

A brief chronology of Buono's contacts with the memorial exposes the flaws in his claim to standing. Buono was employed by the National Park Service ("NPS") as Assistant Superintendent of the Preserve from 1972 to 1997. There is no record that he ever complained about the cross during his 25-year tenure. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1207 (C.D. Cal. 2002). His objections did not emerge until several years later, after NPS denied the request of Herman R.

Hoops to erect a Buddhist shrine near the cross. Hoops is a former NPS employee and long-term acquaintance of Buono. *Id.* at 1205-1206. As a practicing Roman Catholic, Buono does not find the cross offensive but objects to its presence on federal land solely because the property is not open as a public forum for the erection of other displays such as the one Hoops proposed. *Id.* at 1208. This sequence of events reveals that Buono is not merely asserting the generalized rights of unnamed third parties--which in itself should foreclose standing--but the particular rights of a particular third party who is not before this Court.

As this Court has observed, "cases and controversies" are not simply "convenient vehicles" for correcting perceived constitutional errors or "nuirsances that may be dispensed with when they become obstacles to that transcendent endeavor." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., supra*, 454 U.S. at 488.

A. Buono Cannot Establish Standing By Asserting The Free Speech Rights Of A Particular Third Party (Herman R. Hoops) Who Is Not Before The Court.

It is a well established prudential principle that a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., supra*, 454 U.S. at 474, citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Courts must therefore conduct a "careful judicial examination

of a complaint's allegations to ascertain whether the *particular* plaintiff is entitled to an adjudication of the *particular* claims asserted." *Allen v. Wright,* 468 U.S. 737, 752 (1984) (emphasis added). The power of the judiciary under Art. III exists to redress injury to one or more parties who have a "personal stake in the outcome of the controversy," even though others may also benefit from the judgment. *Warth v. Seldin, supra,* 422 U.S. at 498-499.

This case is a classic third party claim. Buono seeks to adjudicate the rights of a particular third party who is not before the court--his NPS co-worker and long-time acquaintance, Herbert R. Hoops. In 1999, Hoops (also known as "Sherpa San Harold Horpa") requested permission from NPS to erect a dome-shaped Buddhist shrine in an area near the Sunrise Cross. After his request was denied, the American Civil Liberties Union ("ACLU") wrote to NPS, in 1999 and again in 2000, to threaten legal action if they did not remove the cross. *Buono v. Norton, supra*, 212 F. Supp. 2d at 1206.

Prudential limitations on standing exist to avoid "the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them." *Duke Power Co. v. Carolina Envtl. Study Group,* 438 U.S. 59, 80 (1978); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15, n. 7 (2004). The NPS refusal to grant Mr. Hoops' request to erect a Buddhist shrine is what triggered the controversy currently before this Court. Hoops--not Buono--is the "most effective advocate" for the rights at issue. But he is not a party to this case.

Moreover, there is no special relationship between Buono and Hoops that might justify standing. This Court recently denied standing to a non-custodial father seeking to vindicate the rights of his daughter in connection with her school district's recitation of the Pledge of Allegiance. *Elk Grove Unified Sch. Dist. v. Newdow, supra*, 542 U.S. 1. Three of the Justices disagreed, arguing that standing should be predicated on the plaintiff father's right to expose his daughter to his religious views. *Id*. at 24 (Rehnquist, J., concurring). That position acknowledges that in some instances a special relationship might give rise to standing. But Hoops--the most effective advocate for the rights at issue here--is merely a long-time acquaintance of Buono. Buono, who never complained about the cross during his lengthy career with NPS, is precisely the sort of "concerned bystander" who has slipped through the court door attempting to champion the rights of another.

B. If The Third Party (Herman R. Hoops) Were Before This Court Asserting His Right To Erect A Buddhist Shrine, His Claim Would Fail Under This Court's Recent Decision In *Pleasant Grove City v. Summum*.

Buono would no doubt disagree with this Court's decision in *Pleasant Grove City, supra,* 129 S.Ct. 1125. He comes to court through the back door, raising third party free speech rights foreclosed by that decision. His objection to "preferential access to government land" (Opp. 26) presupposes that the land in question is a public forum for the erection of monuments and displays.

Plaintiff Buono is a practicing Roman Catholic who does not personally object to the cross but raises "only the ideological objection that public lands on which crosses are displayed should also be **public fora** on which *other* persons may display *other* symbols." Pet. 9 (italics in original, bold emphasis added); *see also Buono v. Norton, supra*, 212 F. Supp. 2d at 1207-1208. He indirectly raises the very claims that Respondent Summum pursued--and this Court rejected--in *Pleasant Grove City*. One of the main flaws in the Tenth Circuit's reasoning [*Summum v. Pleasant Grove City*, 499 F.3d 1170 (10th Cir. 2007)]--and now Buono's--is the rigid presumption that public land is *always* a public forum for any and every type of expression--even permanent monuments--and that there can never be a legitimate secular purpose for government to integrate a religious symbol into its own non-religious message. *Van Orden v. Perry*, 545 U.S. 677 (2005); *Pleasant Grove City v. Summum, supra*, 129 S.Ct. 1125. The analysis only begins--but does not end--with the observation that the cross on Sunrise Rock is a privately erected display resting on public land.

This Court recently recognized that "[p]ermanent monuments displayed on public property typically represent government speech." *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1132. Government must say something in order to govern, and the First Amendment does not permit a "hector's veto" to suppress the government's voice in the "marketplace of ideas." *Id*. at 1131. Moreover, government may receive assistance from private sources without sacrificing the right to speak or inadvertently creating a public forum. *Id*. at 1131.

Pleasant Grove City was decided after the 9th Circuit decision under review. Although the Establishment Clause was not expressly at issue, it lurked beneath the surface and sparked comments from several concurring Justices. Further development of those observations leads naturally to the conclusion that the Sunrise Rock land was never a public forum for the erection of displays or monuments, and the government had a legitimate secular purpose for its efforts to maintain the cross as a memorial honoring deceased veterans.

II. THE ESTABLISHMENT CLAUSE SHOULD NOT BE USED TO SILENCE FREE EXPRESSION OR PURGE THE PUBLIC SQUARE OF ALL RELIGIOUS SYMBOLISM.

In litigating the recent *Pleasant Grove City* case in this Court, the city hesitated to align itself too closely with the Ten Commandments monument at issue because that could raise Establishment Clause concerns. Justices Scalia and Souter both observed the tension between the emerging government speech doctrine and the so-called "wall of separation" between church and state. *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1139 (Scalia, J., concurring); *id*. at 1141-1142 (Souter, J., concurring).

There is an "inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other" and the inevitable reality that absolute separation of these two spheres is not possible. *Lynch v. Donnelly,* 465 U.S. 668, 672 (1984). The common "wall of separation" metaphor has limited usefulness. Although the Constitution forbids an established church, no

institution can exist in a vacuum. *Id*. at 673. Therefore, this Court has refused to adopt a simplistic, absolutist approach to the Establishment Clause that would undermine its objectives by invalidating every government act that might incidentally confer some benefit on religion. *Id*. at 678.

There are war memorials all across America that utilize the cross as a symbol of the sacrifice of fallen soldiers, particularly those who served in World War I. Examples include the Argonne Cross Memorial and the Canadian Cross of Sacrifice in Arlington National Cemetery; the French Cross Monument in the Cypress Hill National Cemetery; the Peace Cross in Bladensburg, Maryland; the Unknown Soldiers Monument in Prescott National Cemetery; and the Wall of Honor at the Pennsylvania Military Museum. *Buono v. Kempthorne*, 527 F.3d 758, 765, n. 6 (9th Cir. 2008) (O'Scannlion, J., dissenting). The National Park Service manages sites that contain "thousands of privately designed or funded commemorative objects, including the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial." *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1133.

The Establishment Clause does not require that the public square be purged of all religious symbolism. The Religion Clauses work together to protect religious freedom from government interference. "It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it." *Elk Grove Unified Sch. Dist. v. Newdow, supra*, 542 U.S. at 44-45. This Court recognized an analogous

potential irony when it upheld the inclusion of a creche in a city's holiday display:

> It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so "taint" the city's exhibit as to render it violative of the *Establishment Clause*.
>
> *Lynch v. Donnelly, supra,* 465 U.S. at 686

Similarly, it would be ironic if the Establishment Clause were used to erase a well-recognized image of military sacrifice merely because of its outward resemblance to a single religious symbol.

A. Government Display Of A Monument With Religious Overtones Is Not Necessarily Government Speech Endorsing Religion.

Not every religious display on public land gives rise to an Establishment Clause challenge. The Oregon Supreme Court considered a cross veterans' war memorial in a public park and drew the eminently reasonable conclusion that there was no Establishment Clause violation in light of the secular purpose, the absence of government entanglement with religion, and the lack of evidence that the display advanced or inhibited religion. *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338 (Or. 1976).

Government entities use public land for a variety of civic interests and sometimes reserve space for

projects unrelated to free speech. *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1141 (Breyer, J., concurring). The National Park Service should be free to utilize some space to honor the service of deceased military veterans without either opening a public forum or violating the Establishment Clause merely because the symbol used has religious overtones in other contexts. Moreover, the cross does not restrict the right of any visitor to the area to engage in speech or other transitory expression typically associated with a public forum.

In some contexts, the government may "speak" using a display with religious text or meaning, yet without violating the Establishment Clause. Goverment museums, art exhibits, libraries, and holiday displays may include religious items without endorsing particular religious beliefs. The benefit to any one faith or religion is too "indirect, remote, or incidental" to be considered impermissible endorsement or advancement. *Lynch v. Donnelly, supra,* 465 U.S. at 683.

As Justice Souter observed in *Pleasant Grove City*, there is much to be worked out concerning the interaction between the Establishment Clause and the government speech doctrine. But as those issues remain open for further discussion, it would be wise to recognize that:

> [T]here are circumstances in which government maintenance of monuments does not look like government speech at all. *Sectarian identifications on markers in Arlington Cemetery come to mind*.

> *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1142 (Souter, J., concurring) (emphasis added)

Honoring the nation's war heroes through the use of sectarian symbols is a well-established practice that in no way violates the Establishment Clause under any of the relevant tests. This legitimate secular purpose would not lead any observer--reasonable or otherwise--to believe that the government intended to adopt or endorse the tenets of a particular religion. Commemoration of fallen soldiers is hardly the sort of activity "motivated wholly by religious considerations" that this Court should invalidate. *Lynch v. Donnelly, supra,* 465 U.S. at 680.

B. A Reasonable Observer Would Understand That The Cross Is There To Honor Fallen Soldiers--Not To Endorse Religion.

The cross has traditionally been used as a symbol to honor and memorialize the sacrifice of America's veterans. All branches of the Nation's service utilize it for that purpose. The Navy Cross, the Distinguished Service Cross (Army), the Air Force Cross, and the Distinguished Flying Cross are examples of the pervasive use of the cross in military culture. (VFW Amicus 9.) This Court should protect the honor it rightly accords to America's veterans, rather than affirming the Ninth Circuit's strained application of the Establishment Clause:

> It is disheartening and distressing to think that Arlington Cemetery must be gutted because

> there are those who are offended by the religious imagery.
>
> VFW Amicus 17

No reasonable observer of the Sunrise Rock cross memorial--presumably familiar with its history and context--would misconstrue its presence or the Congressional efforts to preserve it as an improper endorsement of religion. The Ninth Circuit ignores history, context, and the fundamental manner in which monuments convey meaning.

1. Even If The *Lemon* Test Applied, A Reasonable Observer Would Understand That Honoring The Nation's War Heroes Is A Secular Purpose That Only Incidentally Benefits Religion.

Early in this litigation, the 3-prong *Lemon* test was presumed to be the standard governing the constitutionality of the Sunrise Rock cross. *Buono v. Norton, supra*, 212 F. Supp. 2d at 1214; *see Lemon v. Kurtzman,* 403 U.S. 602 (1971). But in the intervening *Van Orden* decision, this Court determined the *Lemon* test is not useful to analyze a passive monument. *Van Orden v. Perry, supra*, 545 U.S. at 686; *see Buono v. Kempthorne, supra*, 527 F.3d at 764 (O'Scannlion, J, dissenting). Passive acknowledgements of the Nation's religious heritage are "common throughout America," including "the Washington, Jefferson, and Lincoln Memorials." *Van Orden v. Perry, supra*, 545 U.S. at 688, 689, n. 9. War memorials are among those commonly accepted acknowledgements.

Some references to religion in public life are not only acceptable but inevitable in view of the Nation's religious roots. *Elk Grove Unified Sch. Dist. v. Newdow, supra*, 542 U.S. at 35 (O'Connor, J., concurring). One legitimate secular purpose for such a reference is "encouraging the recognition of what is worthy of appreciation in society." *Lynch v. Donnelly, supra,* 465 U.S. at 693 (O'Connor, J., concurring). Surely the sacrifice of American military veterans is worthy of recognition and appreciation through a universally recognized symbol--the cross--that, in light of its "history and ubiquity," would not be " understood as conveying government approval of particular religious beliefs." *Id*. at 693.

This is not the first time the Ninth Circuit has ignored the clear secular purpose of a cross-shaped war memorial merely because some observer might wrongly perceive it as endorsement of religion. *See Separation of Church and State Comm. v. City of Eugene, supra*, 93 F.3d 617. But this Court has repeatedly rejected the proposition that a "heckler's veto" trumps all other observers. *Elk Grove Unified Sch. Dist. v. Newdow, supra*, 542 U.S. at 35 (O'Connor, J., concurring).

> [T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe.... [W]e do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable

> person *might* think [the State] endorses religion.
>
> *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779, 780 (1995) (O'Connor, J., concurring)

The Sunrise Rock cross does not benefit religion generally or Christianity in particular except in a remote, indirect, or incidental manner. This passive use of a religious symbol does not improperly advance religion. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 662 (1989); *Lynch v. Donnelly, supra,* 465 U.S. at 678. It does not compel anyone to do or believe anything--or even to look at it. *Van Orden v. Perry, supra*, 545 U.S. at 694 (Thomas, J., concurring). The cross should not be removed merely because one unduly sensitive observer misperceives its purpose and effect. On the contrary, if the cross were forcibly removed, a reasonable observer might rightly perceive hostility to religion.

2. The Reasonable Observer Would Understand The Memorial Purpose Of The Cross In Light Of Its History And Context.

The Ninth Circuit has turned a blind eye to the history and context of the Sunrise Rock memorial cross. But the reasonable observer is deemed "fully cognizant of the history, ubiquity, and context" of the cross. *Elk Grove Unified Sch. Dist. v. Newdow, supra*, 542 U.S. at 40 (O'Connor, J., concurring); *see County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, supra,* 492 U.S. at 629 (O'Connor,

J., concurring). Moreover, the knowledge attributed to such an observer is not limited to information obtained from merely viewing the cross. *Capital Square Review and Advisory Bd. v. Pinette, supra*, 515 U.S. at 780 (O'Connor, J., concurring).

Time, location, and the prevalance of other similar American war memorials are among the contextual factors that would lead any reasonable observer to conclude that the government has not endorsed religion. "[T]he history of a given practice is all the more relevant when the practice has been employed pervasively without engendering significant controversy." *Elk Grove Unified Sch. Dist. v. Newdow, supra*, 542 U.S. at 38 (O'Connor, J., concurring). The creche at issue in *Lynch* failed to generate political friction or divisiveness in the 40-year history of Pawtucket's Christmas celebration. *Lynch v. Donnelly, supra,* 465 U.S. at 684. The Ten Commandments monuments in *Van Orden* and *Pleasant Grove City* stood without challenge or controversy for 40 years before a single objection was raised. *Van Orden v. Perry, supra*, 545 U.S. at 702 (Breyer, J., concurring); *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1139-40 (Scalia, J., concurring). The Sunrise Rock memorial has stood peacefully for seven decades--more than twice the time in *Lynch*, *Van Orden,* or *Pleasant Grove City*. This confirms that any reasonable observer would understand its "secular commemorative purpose." *Buono v. Kempthorne, supra*, 527 F.3d at 765 (O'Scannlion, J., dissenting).

The isolated setting of the cross also supports its constitutionality. The Ninth Circuit ignored its location, ruling that even after the land had been sold,

the privately owned parcel was merely a "donut hole" carved out in the midst of a vast federally owned preserve. *Buono v. Kempthorne*, 502 F.3d 1069, 1085-1086 (9th Cir. 2007). But unlike many other Establishment Clause cases, the Sunrise Rock cross is nowhere near the seat of government or even any well-traveled public area. As Justice Thomas observed when this litigation was just beginning:

> [A] park ranger has claimed that a cross erected to honor World War I veterans on a rock in the Mojave Desert Preserve violated the *Establishment Clause*, and won. See *Buono v. Norton,* 212 F. Supp. 2d 1202, 1204-1205, 1215-1217 (C.D. Cal. 2002). If a cross in the middle of a desert establishes a religion, then no religious observance is safe from challenge.
>
> *Van Orden v. Perry, supra*, 545 U.S. at 695 (Thomas, J., concurring)

The reasonable observer must be deemed aware of the multitude of similar war memorials across America. The use of a lone cross to honor the sacrifice of fallen war heroes is widely understood and accepted. VFW Amicus 8; *Eugene Sand & Gravel, Inc. v. City of Eugene, supra*, 558 P.2d 338. Monuments on government land are generally presumed to be government speech, but in certain contexts--like the sectarian markers in Arlington National Cemetery--there is a common understanding that a display with religious symbolism does not represent the government's chosen views. *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1142 (Souter, J., concurring). The Ninth Circuit displays callous indifference to religion by disregarding the ubiquity of

this time-honored symbol and the common understanding of its memorial purpose.

Unlike the Ninth Circuit, a reasonable observer would also understand why the government has denied similar access to others, including Buono's Buddhist acquaintance. The government has neither established a public forum nor endorsed a particular religious viewpoint. The reasonable observer would furthermore recognize the government's efforts to maintain the cross in terms of honoring war heroes--not promoting religion.

3. The Cross May Convey More Than One Meaning And Its Message May Change Over Time.

No one denies the place of the cross in the Christian religion. But as this Court recently recognized, a monument may convey more than one message, and the message perceived may not coincide with the one originally intended by the sculptor or donor. The same monument may be interpreted by different observers in a variety of ways. *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1135. A memorial monument funded by many small donations may be motivated by a multitude of differing sentiments--the Vietnam Veterans Memorial Fund, for example, constructed a memorial using funds from over 650,000 donors. *Id*. at 1136, n. 6, referencing J. Scruggs & J. Swerdlow, To Heal a Nation: The Vietnam Veterans Memorial 23-28, 159 (1985). A museum collection might include a painting of a religious scene, but it does not automatically follow that the museum intends to convey the sentiments of the artist or donor. *Pleasant Grove City v. Summum,*

supra, 129 S.Ct. at 1136, n. 5; *O'Connor v. Washburn Univ.,* 416 F.3d 1216, 1225, n. 3 (10th Cir. 2004).

The mixed-message phenomenon is even more pronounced where the monument contains no text:

> [T]ext-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and *the effect of monuments that do not contain text is likely to be even more variable*.
>
> *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1135 (emphasis added)

An earlier decision of this Court--also involving a cross--illustrates the point. A review board for the State of Ohio unsuccessfully argued that it could exclude a Ku Klux Klan cross from a holiday display on Establishment Clause grounds. *Capital Square Review and Advisory Bd. v. Pinette, supra*, 515 U.S. 753. This case applied public forum principles and appears to have been decided under the assumption that the cross was a religious symbol. However, Justice Thomas' concurrence highlights the chasm between the Christian use of the cross and the KKK:

> In Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan. The cross is associated with the Klan not because of religious worship, but because of the Klan's practice of cross burning.... *The Klan simply has appropriated*

> *one of the most sacred of religious symbols as a symbol of hate*.
>
> *Capital Square Review and Advisory Bd. v. Pinette, supra*, 515 U.S. at 770-771 (Thomas, J., concurring) (emphasis added)

The KKK hijacked one of Christianity's primary symbols for its own hateful purposes. Military culture has appropriated the cross for honorable use as a universal symbol of sacrifice. When properly viewed in context, the military cross is no more an endorsement of religion than the KKK cross.

The meaning conveyed by a particular symbol or monument may change over time. This Court has recently observed that trend with reference to war memorials in particular:

> The "message" conveyed by a monument may change over time. A study of war memorials found that "people reinterpret" the meaning of these memorials as "historical interpretations" and "the society around them changes." J. Mayo, War Memorials as Political Landscape: The American Experience and Beyond 8-9 (1988).
>
> *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1136

The Court went on to describe the metamorphosis of the Statute of Liberty as "a striking example of how the interpretation of a monument can evolve." *Id*. at 1136-37.

The Sunrise Rock cross was originally set in place in 1934 by the Veterans of Foreign Wars (VFW), a private, secular organization. Similarly, private organizations donated the Ten Commandments monuments challenged in *Van Orden* and *Pleasant Grove City*. Selective receptivity is normal government practice with respect to donated monuments, and the donee governmental entity does not necessarily endorse the donor's intended message. *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1133, 1136. But in this case, even if the government did subscribe to VFW's message, there is no Establishment Clause concern. The "message" is not religious at all, but rather a visible public memorial to honor the sacrifice of fallen soldiers.

C. The Ninth Circuit Decision Creates The Hostility To Religion That The Establishment Clause Should Prevent.

This Court has observed that "the *Establishment Clause* does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden v. Perry, supra*, 545 U.S. at 699 (Breyer, J., concurring). The time has come to reign in the runaway Establishment Clause jurisprudence that stifles religious expression and creates the very hostility the Clause was intended to prevent. Removing the Sunrise Rock memorial, merely because of its outward similarity to a religious symbol, would be a draconian solution dishonoring to America's military veterans and hostile to religion.

There is a long line of unbroken authority in this Court holding that the Constitution does not require a complete and absolute separation of church and state,

but rather "mandates accommodation" and "forbids hostility." *Lynch v. Donnelly, supra,* 465 U.S. at 673. In spite of other distinctions and nuances, landmark Establishment Clauses cases over the past sixty years are consistent on this point:

> Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with the accepted habits of our people.
>
> *McCollum v. Board of Education*, 333 U.S. 203, 256 (1948)
>
> The First Amendment does not say that in every and all respects there shall be a separation of Church and State.... Otherwise the state and religion would be aliens to each other--hostile, suspicious, and even unfriendly.
>
> *Zorach v. Clauson*, 343 U.S. 306, 312-313 (1952)
>
> [T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970)
>
> It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths.

> Eradicating such references would sever ties to a history that sustains this Nation even today.
>
> *Elk Grove Unified Sch. Dist. v. Newdow, supra*, 542 U.S. at 35-36
>
> "There is 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).
>
> *Van Orden v. Perry, supra*, 545 U.S. at 686

The government must carefully avoid intervention in religious matters that would endanger religious freedom, but need not--indeed, must not--display hostility by erasing all references to the nation's religious heritage. Many Establishment Clause challenges could be averted "if the Court would return to the views of the Framers and adopt coercion as the touchstone for our *Establishment Clause* inquiry." *Id*. at 697 (Thomas, J., concurring). The controversy over the Sunrise Rock memorial cross is a good example. In no way does this cross coerce anyone to affirm a religious doctrine or engage in a religious exercise--and its clear purpose has nothing at all to do with religion. Removing it, particularly after a lawful sale at fair market value to a private organization, is exactly the type of hostility the Constitution prohibits.

Moreover, the cross is unlikely to create the sort of religiously based divisiveness the Establishment Clause seeks to prevent. Like the Ten Commandments monument in *Van Orden*, it has stood uncontested for over seven decades. Requiring its

removal would most likely trigger disputes rather than avoid them. *Van Orden v. Perry, supra*, 545 U.S. at 704 (Breyer, J., concurring).

D. Even If There Were A Violation Of The Establishment Clause, Transfer Of Title To The Land Is An Effective Cure.

The Ninth Circuit decision stretches the Establishment Clause beyond recognition. But even if the memorial improperly endorsed religion, the violation ended with the government's sale to Veterans of Foreign Wars (VFW) at fair market value. That sale facilitates free expression protected by the First Amendment and terminates any perceived governmental endorsement of religion.

If the sale had been well below market value to a religious organization, there would be valid concerns. *Mercier v. Fraternal Order of Eagles,* 395 F.3d 693, 702 (7th Cir. 2005). It would also be improper for the government to delegate its civic authority to a religious entity or group chosen according to religious criterion. *Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 698 (1994). But VFW is not a religious organization. Even its name is evidence of the secular, non-religious purpose for display of the cross memorial.

The government's sole remaining interest is the possibility that it may reacquire title if the property is no longer used to maintain a war memorial. This is a future interest, unlike the easement in *First Unitarian Church* that constituted a present interest used by the public for free speech and thus subject to forum analysis. *First Unitarian Church of Salt Lake v. Salt*

Lake, 308 F.3d 1114 (10th Cir. 2002). Future interests are not entitled to compensation under the Fifth Amendment. *Utah Gospel Mission v. Salt Lake City Corp*., 425 F.3d 1249, 1257 (2005). The right of reentry is not a constitutionally cognizable property interest. This future governmental interest does not render the Sunrise Rock property a public forum wherein Buono's Buddhist acquaintance might be entitled to erect his shrine next to the cross. *Id*. at 1257; *First Unitarian Church of Salt Lake v. Salt Lake, supra*, 308 F.3d at 1122-23. Affirming the Ninth Circuit ruling would not even redress Buono's concerns about the inability of others to erect displays on the land.

Congressional efforts to maintain the cross do not automatically produce an Establishment Clause violation. *Mercier v. Fraternal Order of Eagles, supra,* 395 F.3d at 702. Even if the memorial were truly religious expression--which it is not--government may lawfully accommodate or acknowledge religion. The government respects the best of American traditions when it acts to protect the liberties of its citizens rather than restricting them. That is exactly what happened when the Sunrise Rock property was sold to VFW.

The sale to VFW facilitates free expression honoring war heroes, and it does so in a manner that distances the government from any perceived improper endorsement of religion. Moreover, even if there were residual concerns following the transfer, these should be remedied in a manner that respects the rights of VFW and Americans who wish to join its efforts to honor the memory of deceased veterans. As the Seventh Circuit observed in *Marshfield*, "the only redressable harm that the City must correct is the

perception that it has endorsed the speech." *Freedom from Religion Foundation v. City of Marshfield*, 203 F.3d 487, 497 (7th Cir. 2000) (emphasis added). Signs, fences, and gated walls could be used to visibly distinguish the small piece of land at Sunrise Rock and identify the expression as that of the new private owner.

1. In The "Public Function" Cases, The Land Transfers Facilitated The Denial Of Constitutional Rights. In This Case, The Land Transfer Facilitates The Exercise Of Constitutional Rights.

The Ninth Circuit declined to adopt a presumption concerning the effectiveness of a land sale to cure an alleged Establishment Clause violation. *Buono v. Kempthorne, supra*, 527 F.3d at 759; *Buono v. Kempthorne, supra*, 502 F.3d at 1082, n. 13. The Court went on to cite from a line of "public function" cases discussed in *Marshfield* to suggest that constitutional violations are not presumptively cured by the mere transfer of land.

But in those "public function" cases, the land transfers facilitated the continuation of a pattern of racial discrimination practiced by the facilities involved. *United States v. Mississippi*, 499 F.2d 425 (5th Cir. 1974) (school); *Eaton v. Grubbs,* 329 F.2d 710 (4th Cir. 1964) (hospital); *Hampton v. City of Jacksonville,* 304 F.2d 320 (5th Cir. 1962) (public golf course). Accommodation and perpetuation of such practices is contrary to both public policy and the Constitution, whereas accommodation of religion and other free expression is mandated by the Constitution.

None of these cases involved a passive display--religious or otherwise. Each involved the ongoing operation of an active program serving the community. In each case, the governmental entity remained "inextricably intertwined with the ongoing operations of the private entity, and the property served the same primary function as before." *Utah Gospel Mission v. Salt Lake City Corp*., *supra*, 425 F.3d at 1257. The land transfers to private entities were all thinly veiled attempts to evade the requirements of the Fourteenth Amendment and perpetuate a patently unconstitutional practice of discrimination.

The Mississippi case in the Fifth Circuit involved a school. *United States v. Mississippi, supra*, 499 F.2d 425. The government leased an unused school facility to a civic association which in turn leased the property to a private segregated school. This convoluted arrangement was devised to circumvent a desegregation directive to local government. *Id*. at 432.

The case in the Fourth Circuit involved a hospital that continued to perform the state's function of providing medical services to the public. *Eaton v. Grubbs, supra,* 329 F.2d at 713. The city and county donated land and a building to the private corporation that operated the hospital. The government's intimate involvement was further evidenced by capital construction subsidies for expansion. *Id*. at 712. The hospital was given the power of eminent domain that would ordinarily belong to government. *Id*. at 713.

In the other Fifth Circuit case, the Court upheld an injunction against private individuals who purchased two golf courses from the City of Jacksonville and

operated them for "white patrons only." *Hampton v. City of Jacksonville, supra,* 304 F.2d 320.

These cases, like the one at bar, involved reversionary interests and restrictive covenants in favor of the governmental entity transferring land to a private operator. The similarity ends there. As the Seventh Circuit observed, there was continued state action under these "unusual facts and circumstances" where "the government remained intimately involved in exclusively public functions that had been delegated to private organizations." *Freedom from Religion Foundation v. City of Marshfield, supra*, 203 F.3d at 492. The active operations in these cases involved "continuing and excessive involvement between the government and private citizens." *Id*. at 492. The passive display of a war memorial is neither an "exclusively public function" nor an active service to the community like a hospital, school, or golf course. The Ninth Circuit is wrong to equate Congress' efforts to preserve the war memorial on a small piece of land in a remote desert area with the blatantly unconstitutional practices in these "public function" cases.

2. No Reasonable Observer Would Understand The Land Transfer Or The Government's Efforts To Maintain The Cross As An Endorsement Of Religion.

Courts ordinarily assume that a property owner controls the expression on its own property, and therefore will "recognize the effect of formal transfer of legal title to property as a transfer of imputed expression from a public seller onto a private buyer." *Freedom from Religion Foundation v. City of*

Marshfield, supra, 203 F.3d at 491. There are occasional exceptions, particularly where a reasonable observer would not be adequately informed about the change. For example, a public forum may still exist where the property transferred is dedicated to public use, historically associated with a public forum, and physically located so as to create confusion about its ownership. *Id*. at 494. Under such unusual circumstances, a reasonable observer might believe there is improper governmental endorsement of religion. *Id*. at 495. Proximity to the seat of government is another factor that weighs in favor of finding such endorsement. *Id*. at 496. In *Marshfield*, the large cross display was located in a public park that since its creation had expressed only one message--the religious message conveyed by the statue. *Id*. at 495.

There is no such confusion in this case. The cross at Sunrise Rock has stood unchallenged for decades as a memorial to fallen soldiers. It sits in a remote area, nowhere near the seat of government. Although the land might have been deemed a public forum for transitory expression, it has never been a public forum for the erection of permanent structures--nor is there ordinarily a right to erect such structures comparable to the right to speak or distribute fliers. *Pleasant Grove City v. Summum, supra*, 129 S.Ct. at 1129.

The government's purposes and involvement in the sale are also key to the analysis. The lower court concluded that VFW was a "straw purchaser" because of its "significant interest and personal investment in preserving the cross" and the government's unusual efforts to assist in that preservation. *Buono v. Kempthorne, supra*, 502 F.3d at 1085. However,

avoiding litigation is a legitimate purpose for the sale--a purpose not likely to be confused with advancing religion. *Mercier v. Fraternal Order of Eagles, supra,* 395 F.3d 693. It is also entirely reasonable, and in no way improper endorsement, to accommodate a buyer like VFW with long-standing ties and an important relationship to the monument. *Id*. at 703. As in *Mercier*, Congress rightfully considered the non-religious purpose for which the cross memorial had stood in place for decades. The government's extensive efforts to maintain the cross are reasonably understood in terms of its history, context, and purpose as a war memorial, rather than as an impermissible attempt to advance religion. *Id*. at 704. A reasonable observer, aware of the memorial purpose and history of the cross, would understand congressional efforts to maintain it through the sale to VFW.

Any lingering concerns about the reasonable observer's perception can be remedied through appropriate visual signals to distinguish VFW's land from public property in the vicinity and clarify any confusion as to the content of the message or its source. In *Mercier*, the new private owner (Eagles) erected a steel fence around the parcel and put up metal signs to educate observers: "PRIVATE PARK" and "THIS PROPERTY IS NOT OWNED OR MAINTAINED BY THE CITY OF LA CROSSE, NOR DOES THE CITY ENDORSE THE RELIGIOUS EXPRESSION THEREON." *Mercier v. Fraternal Order of Eagles, supra,* 395 F.3d at 697-698. The district court crafted a similar remedy upon remand in *Marshfield*. *Id*. at 700. Moreover, the Sunrise Rock cross, like the monument in *Mercier*, is not situated in a prominent location close to a governmental building

where local residents are forced to observe it when conducting civic business. *Id*. at 703. Indeed, if there is any residual potential for misunderstanding about the ownership and message of the cross after its transfer to VFW, it can be readily cured by steps similar to those taken in *Mercier* and *Marshfield*.

CONCLUSION

This case is before the Court under a tenuous construction of standing requirements. It appears contrived to create a vicious circle where no one can win: the government either has violated the free speech rights of a third party who is not here to assert them--or it has breached the "wall" of church-state separation. Even if Buono does have standing, there is no Establishment Clause violation to correct. The cross has historically been used by the military as a symbol of sacrifice, and no reasonably informed observer would perceive it as endorsing religion. Affirming the Ninth Circuit would have onerous repercussions for war memorials across America, silencing the memory of the many veterans who have given their lives on the battlefield to protect liberties guaranteed by the Constitution and foreclosing even the reasonable compromise attempted by Congress in selling the land to a private organization that is not bound by the Establishment Clause.

Respectfully Submitted,

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