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 Courts of Appeals for the Ninth Circuit

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The International Municipal Lawyers Association (IMLA), previously known as the National Institute of Municipal Law Officers, is a non-profit, professional organization of over 2,500 local government attorneys, most of whom serve as corporate counsel for municipalities in the United States. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the development of municipal law, including by advocating the nationwide views of local government on legal issues. IMLA has appeared as a friend of the court on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

IMLA submits this brief to provide the Court with an understanding of the challenges faced by municipalities in reasonably addressing potential Establishment Clause violations without destroying a wealth of local landmarks, some of which are of great historical and sentimental value. This *amicus* brief sets forth information about public monuments representative of those in municipalities around the na-

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[1] Counsel for all parties received notice of the *amicus curiae's* intention to file this brief. This *amicus* brief is filed with the consent of the parties. Counsel for the Petitioners and Respondents have granted consent for the filing of this *amicus* brief in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amicus curiae* submitting this brief and its counsel hereby represent that no party to these cases nor their counsel authored this brief in whole or in part, and that no person other than *amicus* and their counsel paid for or made a monetary contribution toward the preparation and submission of this brief.

tion that could be at risk depending upon this Court's decision. This *amicus* brief also explains the importance to IMLA's members of this Court's recognition that municipalities must have reasonable alternatives in remedying Establishment Clause violations.

STATEMENT OF THE CASE

In 1934 the Veterans of Foreign Wars ("VFW") erected a wooden cross and signs near it which read "The Cross, Erected in Memory of the Dead of All Wars" and "Erected 1934 by Members of the Veterans of Foregin [sic] Wars, Death Valley post 2884" in a remote location of the Mojave National Preserve ("Preserve"). *Buono v. Kempthorne*, 527 F.3d 758, 769 (9th Cir. 2008). Over the course of the last seventy-five years, the memorial cross has been replaced several times by private parties. *Id*.

In 2001, Frank Buono, who rarely encounters the memorial and is not personally offended by the symbol, filed suit against the Secretary of the Department of the Interior and the Superintendent of the Preserve (collectively, "National Park Service" or "NPS") alleging that the presence of the cross on federal land was a violation of the Establishment Clause. *Id*. at 770. The District Court held that the presence of the cross on public land violated the Establishment Clause, and the court enjoined NPS from any further display of the cross. During the pendency of the District Court litigation, Congress passed laws designating the cross as a national memorial and preventing NPS from using federal funds to remove the cross. *Id*. at 770-71. In September 2003, while the case was pending before the Ninth Circuit, Congress, in an apparent attempt to remedy the Establishment Clause violation, passed another law directing NPS to affect a land exchange between

the Preserve and a private party, making the VFW the owner of the property on which the cross stood. *Id.* at 771. As part of the exchange, Congress included a reversionary clause that "[i]f the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." *Id*. There was no obligation to maintain the cross itself. *Id*. After the passage of this law, Buono moved to enjoin the land transfer. *Id*. at 773. The District Court determined that the land exchange was invalid and permanently enjoined NPS from proceeding with the land exchange. *Id*. NPS appealed the April 2005 injunction to the Ninth Circuit. *Id*. In September 2007, a panel of the Ninth Circuit affirmed the judgment ordering the injunction. *Id*. at 783.

In May 2008, the Ninth Circuit issued an Order Amending the Opinion and Amended Opinion (the "May 2008 Order"). *Id*. at 759. The May 2008 Order was notable in that it deleted text indicating overt disagreement with the Seventh Circuit's "presumption that 'a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion'" as announced in *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000). *Buono*, 527 F.3d at 759 (quoting *Marshfield*, 203 F.3d at 491).

SUMMARY OF THE ARGUMENT

The presumptive propriety of transferring land from public to private landholders as a means to remedy potential Establishment Clause violations is not only legally supported, it is a critical curative mechanism for governmental entities seeking a legitimate option short of razing historically significant memorials or displays. To effectively erase the pre-

sumption in favor of such land transfers, as the Ninth Circuit did in *Buono*, needlessly places countless monuments in jeopardy, their fates only determinable through a long, expensive, and burdensome litigation.

The presumption employed in *Marshfield* is appropriate under existing Establishment Clause jurisprudence because it properly recognizes that the core of any Establishment Clause violation is government, as opposed to purely private, action. Thus, a transfer of the land containing a display that violates, or may violate, the Establishment Clause terminates government entanglement with the display and should be a presumptively valid means of curing any Establishment Clause violation.

While the amended Ninth Circuit decision in *Buono* purports not to conflict with the Seventh Circuit's *Marshfield* test, in practice the decision deviates markedly. Rather than approaching the land transfer at issue in this case with a presumption that such transfer constituted a legitimate means of curing an Establishment Clause violation, as the Seventh Circuit would have done under *Marshfield*, the Ninth Circuit engaged in an exacting review of the government's underlying intent, erecting an improper hurdle for any similar transfer. *Buono*, 527 F.3d at 779, 781-83. This intent-based analysis is not only at odds with the Seventh Circuit's approach in *Marshfield*, it is inconsistent with existing Establishment Clause jurisprudence. Practically, it creates a presumption against curative transfers: governmental intent to preserve a monument with religious symbols by transferring it to a private party undoubtedly would be suspect under this inappropriate approach.

In applying the *Marshfield* test in *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 701-02 (7th Cir. 2005), the Seventh Circuit specifically declined to hold that a governmental entity's land transfer intended to keep an offending monument in place invalidates the transaction as violative of the Constitution. The Ninth Circuit's focus on the intent of the land transfer ignores the key fact that a legally valid transfer of land to a private entity terminates government action with respect to any display constituting an Establishment Clause violation, thereby eliminating any excessive government entanglement with religion. In addition, by focusing on the intent of the governmental entity involved in the transfer, the Ninth Circuit effectively ensures that any attempt to cure an apparent Establishment Clause violation via a legitimate land transfer will only serve to further embroil the governmental entity in additional Establishment Clause litigation.

Municipalities across the country contain memorial displays, many of which have religious references or symbols. If this Court were to adopt the Ninth Circuit's fact-specific, intent-based analysis of land transfers as a means of curing Establishment Clause violations, these municipalities will be left with no reasonable means of avoiding litigation based on these monuments and displays. A municipality that owns public land upon which such a memorial display exists logically will be left only with one of three costly and unappealing choices. First, the municipality could allow the monument to remain in place and be forced to risk eventually defending an Establishment Clause suit seeking removal. Second, the municipality could engage in a land transfer and be forced to risk defending an Establishment Clause suit involving a burdensome, fact-specific inquiry into the

municipality's intent in engaging in the land transfer. Third, the municipality could raze the monument or display, destroying a piece of American history while still being potentially burdened with the cost of defending a suit alleging that the municipality's action constituted governmental hostility toward the religion at issue. The Establishment Clause simply cannot require that municipalities be put in such an untenable position.

More importantly, an intent-based standard as applied to a governmental entity presumes unanimity, or at least a consensus, of action. In this case, some members of Congress may well have intended to preserve a Christian icon, but the President may have intended to simply avoid further litigation. Similarly, at the local government level, members of councils, mayors, executives, and other elected officials can, as this Court does, coalesce in a result for many reasons. As such, attributing intent to such bodies is not appropriate. The Court should weigh only the result, and, in this case, devolution of the monument resolves the Establishment Clause problem.

This Court should adopt the Seventh Circuit's *Marshfield* analysis, establishing the presumptive validity of land transfers as a means of curing Establishment Clause violations.

ARGUMENT

I. LAND TRANSFERS TO CURE APPARENT ESTABLISHMENT CLAUSE VIOLATIONS SHOULD BE PRESUMPTIVELY VALID.

"Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Freedom*

From Religion Found, Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000); *see Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 701 (7th Cir. 2005). This analysis comports with existing Establishment Clause jurisprudence and provides a practical means for a government to extricate itself from involvement with a display that potentially violates the Establishment Clause while allowing the historical benefit of the display to remain.

This Court has long recognized that an Establishment Clause violation can only occur when the conduct at issue involves governmental, as opposed to purely private, endorsement of religion. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring) ("[A]n Establishment Clause violation must be moored in government action of some sort."); *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."). Thus, when government involvement with a violation of the Establishment Clause ceases, any Establishment Clause concern is also necessarily extinguished.

In reaching its conclusion that a land transfer is a constitutionally effective remedy to an Establishment Clause violation, the Seventh Circuit in *Marshfield* properly acknowledged the distinct difference in treatment between public speech and private speech, noting that the expression is imputed onto the entity holding legal title over the property:

> Because of the dramatic difference in the treatment of private religious expression and govern-

> ment religious expression, we 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. Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion.

203 F.3d at 491. The Seventh Circuit's inquiry into the validity of a land transfer as a means to cure an apparent Establishment Clause violation thus presumed, in the absence of facts evincing a sham transaction, that the transaction itself was valid and not subject to a constitutional analysis because the land in question was no longer under the control of the government.[2] This presumption of validity comports with the treatment of Establishment Clause concerns by courts in similar contexts. *See, e.g., Utah Gospel Mission v. Salt Lake City Corp*., 425 F.3d 1249, 1259-60 (10th Cir. 2005) (holding that the government cured a First Amendment issue by selling land that had previously been a public forum to a church).

As a measure to avoid "manipulation" of this presumption in favor of the validity of land transfers, and to ensure that any governmental action has ceased and that the land transfer is not merely a sham transaction, the Seventh Circuit recognized the need to examine whether the sale of the land from the state to a private organization demonstrates "continuing and excessive involvement between the government and private citizens" such that the

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[2] This reading of the rule allows municipalities and other governmental entities to affect a land transfer at the point at which they receive viable information or complaints that the structure in question poses an Establishment Clause violation.

transaction was a mere sham which itself constituted a separate Establishment Clause violation. *Marshfield*, 203 F.3d at 492. Specifically, the court noted the sorts of improprieties that would typically be sufficient to warrant disregard of a purported land transfer transaction, including: whether the sale was in accordance with applicable state laws, whether the sale was for fair market value, and whether the transaction involved a mere straw purchaser while the government continued to exercise all of the duties of ownership. *Id*.

In a subsequent decision applying the *Marshfield* test, the Seventh Circuit in *Mercier* specifically rebuffed the assertion that "because the [government] knew that the sale would keep the Monument in its challenged location, the sale itself favored the religious purpose of the Monument, and thus that act was unconstitutional." *Mercier*, 395 F.3d at 702. The Seventh Circuit stated:

> The desire to keep the Monument in place cannot automatically be labeled a constitutional violation. Removal is always an option, but as *Marshfield* holds, it is not a necessary solution to a First Amendment challenge. The court in *Marshfield* approved the sale when removal was obviously an option . . . .

Id.

Thus, in *Marshfield*, the Seventh Circuit ultimately held that the transfer of 0.15 acres of city park property on which a statue of Christ stood was a valid termination of a public endorsement of religion because the sale complied with applicable state laws, was a sale for fair market value, and the municipality no longer exercised any duties of ownership. 203

F.3d at 492. The presumption of the validity of a land transfer to cure an apparent Establishment Clause violation was similarly reiterated in *Mercier*, where the court found the land transfer valid after analyzing the validity of the sale, location of the monument, purchaser, and efforts made to distinguish the private from the public land. 395 F.3d at 702-04.

In crafting the *Marshfield* test, the Seventh Circuit adhered to existing Establishment Clause jurisprudence while also providing governments with the flexibility to cure apparent Establishment Clause violations without wide-spread destruction of long-standing, historically significant memorials and displays that incorporate religious symbols or references. For, as this Court has long held, the Establishment Clause does not require hostility toward religion. *Van Orden v. Perry*, 545 U.S. 677, 683-84 (2005) (plurality opinion); *id*. at 698-99, 704 (Breyer, J., concurring in the judgment); *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952). Similarly, the Establishment Clause cannot possibly require the wholesale destruction of this country's historically significant memorials and displays when a simple land transfer can easily eliminate any excessive government entanglement with an apparent endorsement of religion resulting from the retention of such memorials and displays on public lands.

II. THE NINTH CIRCUIT'S APPROACH IN *BUONO* IS NOT WARRANTED BY THE ESTABLISHMENT CLAUSE AND HAS PROFOUND IMPLICATIONS FOR THE COUNTRY'S HISTORIC MEMORIALS AND DISPLAYS.

The Ninth Circuit in *Buono* fundamentally misapplied the *Marshfield* test and effectively eviscerated

any presumption of the validity of a bona fide land transfer as a means of curing an Establishment Clause violation. Instead of such a presumption in favor of curative land transfers, the Ninth Circuit approach essentially presumes the opposite: that any land transfer resulting in the retention of a religious symbol on once public land is a sham transaction. The Ninth Circuit's approach to analyzing curative land transfers (1) is inconsistent with the Seventh Circuit's approach and is not warranted by existing Establishment Clause jurisprudence and (2) effectively requires the destruction of any now publicly-owned display that violates the Establishment Clause.

A. The Ninth Circuit's Approach Is Inconsistent With Existing Establishment Clause Jurisprudence.

Although the Ninth Circuit opinion purports to examine only whether there is a continuing Establishment Clause violation, there is plainly another element in play. Only slightly beneath the surface is the Ninth Circuit's substantial concern about whether the government was "seeking to circumvent the injunction in this case" by maintaining the memorial cross. *Buono*, 527 F.3d at 782. The Ninth Circuit endorsed the District Court's seeming reproof of the government's Herculean efforts to preserve the memorial cross. *Id*. Under this analysis, a governmental body's substantial efforts to preserve a memorial by removing it from government control are themselves effectively an endorsement of religion and necessarily a formula for the destruction of the memorial.

Improperly focusing on the intent of the governmental entity—as opposed to whether the First

Amendment violation is remedied by the transfer—is directly at odds with the Seventh Circuit's approach and is inconsistent with Establishment Clause jurisprudence.[3]

The line between an analysis under the Establishment Clause and the Free Speech and Free Exercise Clauses is wholly dependent on who has title of the land. *See Marshfield*, 203 F.3d at 491; *see also Buono*, 527 F.3d at 762 (O'Scannlain, J., dissenting from denial of rehearing *en banc*) (finding that, under Supreme Court precedent, "the only relevant issue is whether there is a continuing state action, absent which the government's intent or any atypical circumstances are of no consequence"). Accordingly, unless the land transfer from a public entity to a private entity was fundamentally a sham, the transaction is presumptively valid and does not require a

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[3] Though the Ninth Circuit's basis for focusing on the government's intent in engaging in a land transfer transaction is not clear from the face of the *Buono* opinion, the court may have drawn upon the "secular purpose" element of the Establishment Clause test articulated by this Court in *Lemon v. Kurtzman*. 403 U.S. 602, 612-13 (1971). Making one element of *Lemon* arguably dispositive in testing government action specifically meant to remove any potential sponsorship of religion is, however, baseless. *See Hunt v. McNair*, 413 U.S. 734, 741 (1973) (noting that the factors identified in *Lemon* are "no more than helpful signposts"); *see, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983) (not applying the *Lemon* test); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (same). It is also worthy of note that the *Lemon* test is only one of several approaches the Court has taken in Establishment Clause cases. *See generally Van Orden*, 545 U.S. at 684-85 (plurality opinion) (discussing the varied history of the *Lemon* test in Establishment Clause cases). In any event, governmental efforts to preserve established memorials, regardless of any religious underpinnings, are certainly consistent with a secular purpose.

more searching analysis. *See, e.g., Marshfield*, 203 F.3d at 491 ("Because of the difference in the way we treat private speech and public speech, the determination of whom we should impute speech onto is critical."). This result is reasonable under existing Establishment Clause jurisprudence and is demanded by the Free Exercise and Free Speech Clauses because a refusal to recognize a private citizen's purchase of land at fair market value based on the purchaser's desire to retain a religious symbol on the land would diminish that person's legal rights based on his or her desire to express his or her religious views.[4]

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[4] This Court has long held that discrimination against a private individual or entity based on that individual's or entity's religious expressions or beliefs violates the First Amendment. For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court struck down city ordinances barring ritual animal sacrifice as violative of the Free Exercise Clause because the ordinances targeted religious conduct for distinctive treatment. *See* 508 U.S. 520 (1993). In *Lamb's Chapel v. Center Moriches Union Free School District*, the Court ruled that a school district could not exclude religious organizations from displaying after school films based solely upon the religious nature of the films in question. *See* 508 U.S. 384 (1993). Similarly, in *Rosenberger v. University of Virginia*, the Court held that a university's refusal to fund a student publication because of that publication's religious perspective violated the First Amendment. *See* 515 U.S. 819 (1995). Thus, under the First Amendment, it cannot possibly be permissible for a court to invalidate a land purchase by a private purchaser, such as the VFW, based on that purchaser's desire to retain a religious symbol on the land. Such a holding would amount to court sanctioned discrimination against the purchaser based solely on the purchaser's religious convictions, which is anathema to the First Amendment and contrary to existing First Amendment jurisprudence.

Removing government entanglement with religion and endorsement thereof is sufficient to cure any concerns under the Establishment Clause because permitting religious symbols to be displayed on privately owned land is not offensive to the First Amendment. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974); *see generally City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Mergens*, 496 U.S. at 250 (plurality opinion)); *Capitol Square Review & Advisory Bd.*, 515 U.S. at 779 (O'Connor, J., concurring) ("[O]ur Establishment Clause jurisprudence must seek to identify the point at which the government becomes responsible, whether due to favoritism toward or disregard for the evident effect of religious speech, for the injection of religion into the political life of the citizenry."). Searching the government's intent in a land transfer is irrelevant absent an independent violation of the Establishment Clause.

B. Adoption of the Ninth Circuit's Intent-Based Approach Leaves Governmental Entities in an Untenable Position Regarding Displays That May Violate the Establishment Clause.

Should the Court adopt the Ninth Circuit's approach, municipalities seeking to divest themselves of displays that potentially constitute Establishment Clause violations would be subjected to precisely the type of judicial "bait-and-switch" of which the dissenting judges warned in the *Buono* denial of rehearing *en banc*. *See* 527 F.3d at 767.

If the Ninth Circuit's analysis of land transfers is adopted, municipalities with war memorials having any potential religious markers will find themselves

in the pernicious position of deciding whether to raze the memorial and become subject to a lawsuit alleging they are inhibiting religion or speech, to maintain the memorial and become subject to a lawsuit alleging they are endorsing religion, or to attempt to cure the possible Establishment Clause violation by transferring the land to a private entity and nonetheless find themselves litigating the matter on a transaction-by-transaction basis. At its core, the Ninth Circuit's approach prevents municipalities from curing any Establishment Clause violation by means of a land transfer by voiding the underlying sale precisely because the sale was entered into to alleviate the violation.

In addition, there is a fundamental fallacy in inquiring into "the intent" of any governmental entity because such an inquiry presumes unanimity or consensus of purpose. In this case, each member of Congress may have had his or her own intent in passing the statute in question while the President may have had yet another intent in signing the statute into law. Similarly, at the local government level, members of councils, mayors, executives, and other elected officials can, as this Court does, coalesce in a result for many reasons. Divining the subjective motivation of a legislature in enacting a statute is "almost always an impossible task" because "[t]he number of possible motivations, to begin with, is not binary, or indeed even finite." *Edwards v. Aguillard*, 482 U.S. 578, 637-38 (1987) (Scalia, J., dissenting). Thus, "[t]o look for the sole purpose of even a single legislator is probably to look for something that does not exist." *Id*. at 638 (Scalia, J., dissenting). In a case such as this, the Court should weigh only the result and not attempt to speculate as to the motivation by which

that result was reached.[5] In this case, devolution of the monument resolves the Establishment Clause problem which properly concludes the inquiry.

Thus, it is clear that the Ninth Circuit simply ignored the legitimate rights of other governmental bodies to craft remedies to perceived Establishment Clause violations. This Court should adopt the Seventh Circuit's analysis and application in *Marshfield* and hold that "absent unusual circumstances," which in themselves are independent Establishment Clause violations, land transfers affected to end or avoid Establishment Clause violations are presumptively valid. In this way, municipalities can both operate in accordance with the Constitution and avoid needless re-litigation of these matters.

III. THE NINTH CIRCUIT'S HOLDING PRESENTS EXTENSIVE PRACTICAL PROBLEMS FOR LOCAL GOVERNMENTS AND MUNICIPALITIES.

The practical implications of the Ninth Circuit's holding for governments and municipalities across the United States are extensive. Local governments—most of which operate on modest budgets—are ill-equipped to handle the flood of expensive litigation which would likely result if the Ninth Circuit's holding becomes the law of the land. Allowing a government to remedy an Establishment Clause violation with a bona fide land transfer is not only consistent with fundamental First Amendment jurisprudence

[5] Indeed, contrary to the Ninth Circuit's speculation in this case, there is no evidence that Congress had any purpose in ordering the land transfer other than to preserve a historic war memorial.

but also provides a bright-line practical solution that will allow local governments to avoid costly litigation.

According to the United States Census Bureau's 2007 Census of Federal, State, and Local Governments, there were 89,527 governments counted in the United States in 2007, of which 89,476 were local governments.[6] U.S. Census Bureau, Governments Division, 2007 Census of Governments (2008), http://www.census.gov/govs/www/cog2007.html.

With thousands of monuments in the United States (many of which are situated in small municipalities), local governments face the daunting prospect of spending enormous portions of their already strained budgets on litigation—as opposed to schools, infrastructure, and public safety.[7]

By way of example, Wentzville, Missouri houses one of the first Vietnam Veterans memorials in the United States, which was originally dedicated in December 1967. *See* Michele Viehman, Vietnam Veterans Memorial, Wentzville, Missouri, http://www.vietvet.org/momem2.htm (last visited June 3, 2009). As it stands today, the memorial consists of a single column of red Missouri granite, topped by the carved figure of an eagle. *Id*. Inscribed on the column's base is: "Whither thou goest I will go. Ruth 1:16." *Id*. The

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[6] A census of governments is taken at 5-year intervals pursuant to 13 U.S.C. Section 161. According to the 2002 Census of Federal, State, and Local Governments, only 87,525 local governments existed in 2002. U.S. Census Bureau, Governments Division, 2002 Census of Governments (2002), http://www.census.gov/govs/www/cog2002.html.

[7] Not to mention the costs—both economic and emotional—of being forced to obliterate many of the country's oldest and most-cherished monuments.

city of Wentzville's population as of the 2000 census was 6,896.[8] Though the Census Bureau projects that Wentzville's population grew to 22,478 as of 2007, Wentzville's total budget revenues for 2009 are only $68,031,106, with no more than $260,000 budgeted for all court expenses. City of Wentzville, 2009 Annual Budget (2008), http:// www.wentzvillemo.org/ city_budget/budget_2009.pdf. Litigation over the monument might not be an acceptable financial option for the community. Wentzville, like so many other communities, must have reasonable alternatives.

The ramifications of burdening bona fide transfers would also fall upon large municipalities which, are home to some of the nation's most renowned possessions. The Liberty Bell, unquestionably one of the most recognized symbols of American history, is owned by the City of Philadelphia[9] and is cared for by the National Park Service under a Memorandum of Agreement. While the bell was placed in service in 1753, the bell was not bestowed the name "Liberty Bell" until 1835 when abolitionists named the bell and adopted it as their symbol because of its inscription, which reads: "Proclaim Liberty throughout all the Land unto all the Inhabitants thereof. Lev. XXV

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[8] U.S. Census Bureau, Missouri by Place, GCT-PH1. Population, Housing Units, Area, and Density: 2000, http:// factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000 US29&-_box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1 _U&-_lang=en&-redoLog=false&-format=ST-7&-mt_name=DEC _2000_SF1_U_GCTPH1_ST7&-_sse=on (last visited June 3, 2009).

[9] The City of Philadelphia's 2009 Estimated General Fund Revenues are approximately $3.88 billion, with only $16 million allocated to the "Law Department." City of Philadelphia, The Mayor's Operating Budget Summary for Fiscal Year 2009 (2008), http://www.phila.gov/reports/pdfs/Adopted_Budget_in_Brief. pdf

X."[10] It is difficult to conceive that any court would find Philadelphia's ownership and open display of this monument, prominently inscribed with a scripture verse, violative of the Establishment Clause.[11] If, however, public ownership was found to be an Establishment Clause violation, the Ninth Circuit's reasoning might well conclude that transferring the bell to a private owner was impermissible. After all, Philadelphia's intent in the transfer undoubtedly would be, in some degree, to preserve The Liberty Bell for public viewing. Such an alarming result would have no foundation in established jurisprudence—which highlights the flaws in the Ninth Circuit's analysis.

The Ninth Circuit's holding—that a bona fide land transfer is not a remedy for an alleged Establishment Clause violation—deprives local governments of a sensible and fiscally responsible solution.

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[10] The quote is taken from Leviticus chapter 25, verse 10 of the King James version of the Bible. *See* U.S. National Park Service, Independence National Historic Park - Liberty Bell Center (Mar. 27, 2008), http://www.nps.gov/inde/liberty-bell-center.htm.

[11] Demonstrating a violation of the Establishment Clause is made easier by the Ninth Circuit's holding that the only showing a potential plaintiff must make to demonstrate standing is offense to the presence of a religious symbol on federal land.

CONCLUSION

For the foregoing reasons cited herein, the Court should reverse the ruling of the Ninth Circuit.

Respectfully submitted,

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