No. 08-472

In the Supreme Court of the United States

KEN L. SALAZAR, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

FRANK BUONO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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I. RESPONDENT'S STANDING IS PROPERLY BEFORE THIS COURT

For the first time, respondent advances (Br. 11-18) the proposition that this Court cannot consider his standing to sue, because the United States is collaterally attacking the initial proceeding in *Buono* v. *Norton*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002), aff'd, 371 F.3d 543 (9th Cir. 2004) (*Buono I*). That argument is incorrect, no matter how one characterizes the successive proceeding in *Buono* v. *Norton*, 364 F. Supp. 2d 1175 (C.D. Cal. 2005), aff'd, 527 F.3d 758 (9th Cir. 2008) (*Buono II*). The correct characterization is that *Buono I* and *II* are successive stages of the same civil action, and thus this Court may consider questions determined in *Buono I*, including whether respondent had standing to challenge the display of the memorial and obtain an

injunction. Nevertheless, even assuming that *Buono II* were a new civil action, respondent still would have to demonstrate that he presently possesses standing to challenge the transfer of the memorial. And, finally, even if *Buono II* were an enforcement action, and the government's challenge to respondent's standing were a collateral attack on the earlier judgment, respondent has waived any objection based on issue preclusion—and preclusion would not even apply on the facts of this case.

A. The Proceedings In *Buono I* And *II* Are Part Of The Same Civil Action, And Thus This Court May Consider Respondent's Standing To Challenge The Display

1. Both of the proceedings—in *Buono I* and *II*—are part of the same civil action. In *Buono I*, after oral argument before the court of appeals, Congress enacted the 2004 Act, transferring Sunrise Rock to Post 385E of the Veterans of Foreign Wars (VFW). The court of appeals then ordered supplemental briefing on the effect of the 2004 Act. The government argued that Congress's decision to transfer the land rendered moot the question of whether the government's display of the cross violated the Establishment Clause. See 03-55032 Docket entry No. 41 (9th Cir. Dec. 12, 2003). Respondent argued not only that the case continued to present a live controversy, but also that the land transfer should be enjoined because it violated the Establishment Clause. See *id.* No. 48 (Dec. 31, 2003). In its decision in *Buono I*, the court of appeals held that the case was not moot. Pet. App. 102a-103a. It expressly declined to address, however, "whether a transfer completed under [S]ection 8121 [of the 2004 Act] would pass constitutional muster, * * * leav[ing] this question for another day." *Id.* at 104a.

Respondent proceeded to litigate that question in the district court before the same judge and under the same docket number. Respondent filed a motion to enforce or modify his existing injunction, and requested the same relief that he had previously requested from the court of appeals: a permanent injunction to prevent the government from implementing the 2004 Act. In those circumstances—where the court of appeals declines to address an argument that the party proceeds to raise in the district court, before the same judge and under the same docket number, as grounds for additional relief—the proceedings are most reasonably viewed as different stages of the same litigation.[1]

2. According to respondent (Br. 11-12), if the government wanted this Court to review his standing to challenge the display, it had to petition for a writ of certiorari to *Buono I*. But that was entirely unnecessary at the time. The government had no reason to ask this Court to evaluate respondent's standing to bring this lawsuit once Congress acted to require transfer of the memorial to a private party. The question of respondent's standing would have made no difference to the government had the lower courts allowed the transfer to take place—which is why the government litigated below the constitutionality of the transfer before seeking this Court's review of the standing question.

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[1] Contrary to respondent's assertion (Br. 12, 14-16), the present case is different from both *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399 (1923), and *Travelers Indemnity Co.* v. *Bailey*, 129 S. Ct. 2195 (2009). In each of those cases, the parties litigated to a judgment whose finality was undisputed, and then one of the parties brought collateral proceedings designed to undermine the earlier judgment. Here, the very question at issue is whether *Buono I* was a final judgment for preclusion purposes—a question that neither *Toledo Scale* nor *Travelers* had occasion to address.

Nor is respondent correct (Br. 12) that the government is time-barred under 28 U.S.C. 2101(c) by its failure to petition for review in *Buono I*. The government timely petitioned for review in *Buono II*. The question, once again, is whether *Buono I* and *II* are successive stages of the same civil action. Because they are, this Court's grant of certiorari exposed the entire case to review. See, *e.g.*, *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). As the Court has explained, "[it has] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *MLB Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). The Court therefore has authority to consider questions determined in *Buono I*, including whether respondent had standing to challenge the display and obtain an injunction.

B. Even If *Buono II* Is A Separate Civil Action, This Court Must Consider Respondent's Standing To Challenge The Transfer

1. Alternatively, if *Buono II* is a separate civil action, this Court still is required to consider whether respondent presently possesses standing. That is because *Buono II*, if not just the second part of a single action, should be viewed as an entirely new civil action, not simply an enforcement proceeding. Contrary to respondent's assertion (Br. 29-33), the courts below did not merely enforce the earlier injunction. By its terms, that injunction said nothing about transferring the cross. It provided that the government was "permanently restrained and enjoined from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve." Pet. App. 146a. Indeed, the district court could not possibly have addressed in *Buono I*

the propriety of transfer, because, at the time that the injunction was entered, Congress had yet to pass the 2004 Act.

To be sure, when respondent returned to the district court in *Buono II*, he styled his filing as a motion to enforce or modify his existing injunction. Pet. App. 86a. But respondent could not have been seeking enforcement. It is undisputed that, from *Buono I* to the present day, the government has not "permitt[ed] the display of the Latin cross in the area of Sunrise Rock." *Id.* at 146a. The government has complied with the terms of the injunction since it was entered. That is why respondent did not request, and could not have requested, an order to show cause why the government should not be held in contempt for violating the injunction. It is also why respondent requested in the alternative the relief that he actually desired: modification of his injunction.

That is the relief that the district court effectively ordered. It concluded "that the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." Pet. App. 97a. It therefore broadened the terms of the injunction to "permanently enjoin[]" the government "from implementing the provisions of Section 8121 of Public Law 108-87." *Id.* at 99a. Although the district court stated that it was enforcing the injunction, *id.* at 98a, in fact it modified the injunction to include an additional form of relief: a permanent prohibition on transfer of the memorial pursuant to the 2004 Act.

2. Respondent bears the burden of demonstrating that he has standing to seek that additional form of relief. See *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) ("[A plaintiff] bears the burden of showing that he has standing for each type of relief sought."); see also *Lewis* v.

Casey, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."). To obtain an injunction against the transfer, respondent must show that the transfer has caused him to suffer a legally cognizable injury.

Respondent therefore cannot evade his present obligation to demonstrate standing. "[I]t is well established that the [C]ourt has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers*, 129 S. Ct. at 1152; see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93 (1998). Nor has respondent's standing to contest the transfer of the memorial gone unchallenged by the government. The government has claimed that respondent lacks such standing—even if not in the most precise way, given the government's basic view that *Buono I* and *II* are parts of the same civil action.[2] And whether respondent has such standing is fairly included in the question presented of "[w]hether respondent has standing to maintain *this action*." Pet. I (emphasis added); see Sup. Ct. R. 14(a); Eugene Gressman et al., *Supreme Court Practice* § 6.25(g), at 457 (9th ed. 2007). Simply put, whether *Buono I* and *II* are the same action or separate ones, respondent cannot avoid his burden to demonstrate that he has standing to enjoin either the display or the transfer of the memorial at Sunrise Rock.

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[2] See Pet. 13 ("[R]espondent has disclaimed any spiritual injury stemming from the display or transfer of the cross."); see also Pet. Br. 9 ("Respondent lacks standing under the Establishment Clause to challenge Congress's land transfer."); *id.* at 14 (arguing that "respondent's statements * * * disclaim standing to challenge the transfer").

C. Even If The Government Is Collaterally Attacking *Buono I*, This Court Can And Should Consider Respondent's Standing To Challenge The Display

1. Finally, even if respondent were correct that *Buono II* is a mere enforcement action, that still would not help him. Respondent argues (Br. 13-18) that the government cannot relitigate the issue of whether he has standing to challenge the display in such an action. But respondent has waived this argument. Issue preclusion is not jurisdictional, and may therefore be waived. See 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4405, at 83-84 (2d ed. 2002) (*Wright*) ("[A] party entitled to demand preclusion is also entitled to waive it."); *id.* at 100 ("[T]here is no right to raise preclusion for the first time on appeal.").[3] Although the government presented in its petition (at I, 12-16) the question of respondent's standing to challenge the display, respondent concedes (Br. 16 n.14) that he did not raise issue preclusion in his brief in opposition. Because respondent did not timely raise issue preclusion, he has waived it. See Sup. Ct. R. 15.2; *Knowles* v. *Iowa*, 525 U.S. 113, 116 n.2 (1998) (finding that respondent had waived an issue preclusion argument not raised in its brief in opposition).[4]

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[3] Respondent claims that his "res judicata argument * * * is jurisdictional," because "it refutes [p]etitioners' assertion that [r]espondent lacked standing, which is an attack on jurisdiction in *Buono I*." Br. 17 n.14. Respondent cites nothing in support of the proposition that issue preclusion becomes jurisdictional whenever the underlying issue sought to be precluded—here, standing—is itself jurisdictional. Nor could he. Just as a party may assert preclusion of a previously litigated jurisdictional issue, *Durfee* v. *Duke*, 375 U.S. 106, 112 (1963), so too a party may waive such preclusion by failing to timely raise it.

[4] Respondent also claims (Br. 17 n.14) that his issue preclusion argument does not fall within Supreme Court Rule 15 because it is not

2. Even putting waiver aside, respondent's preclusion argument should be rejected. The general rule in favor of affording preclusive effect to a prior judgment is outweighed by competing considerations in the context of this case. See 13D *Wright* § 3536, at 11 (3d ed. 2008). As relevant here, issue preclusion does not apply when "[t]here is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest * * * , (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of * * * special circumstances, did not have adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." Restatement (Second) of Judgments § 28(5) (1982) (Restatement).

Although any of those conditions would suffice to overcome preclusion, all are present here. As an initial matter, Congress's passage of the 2004 Act altered the "potential adverse impact" of the standing decision in *Buono I* "on the public interest." See 18 *Wright* § 4424, at 641 (2d ed. 2002). Not a mere use of public land, but the validity of a federal statute, now depends in part on that decision. Moreover, as described above, Congress's passage of the 2004 Act elimi-

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"based on what occurred in the proceedings below." Sup. Ct. R. 15.2. If that were correct, no respondent would ever need to raise any form of preclusion in a brief in opposition, because by definition claim and issue preclusion concern the preclusive effect of previous litigation. In any event, Rule 15's use of the phrase "the proceedings below" reasonably means the entirety of the proceedings between the parties in the same or a related civil action. Interpreting the phrase more narrowly would defeat the Rule's purpose: to ensure that a brief in opposition "address[es] any perceived misstatement of fact or law in the petition *that bears on what issues properly would be before the Court* if certiorari were granted." *Ibid.* (emphasis added).

nated any need or reason for the government to seek this Court's review of *Buono I*; and the government could not reasonably foresee that the lower courts would interpret the injunction issued in *Buono I* to require invalidation of the 2004 Act. See pp. 4-5, *supra*. In those circumstances, affording preclusive effect to the standing decision in *Buono I* would work an injustice and disserve the public interest. See 18 *Wright* § 4426, at 683 (2d. ed. 2002).[5] Accordingly, this Court can and should reach the question of whether respondent has standing.

II. RESPONDENT LACKS STANDING UNDER THE ESTABLISHMENT CLAUSE

A. Respondent Lacks Constitutional Standing Because He Lacks The Requisite Personal Injury

1. Respondent acknowledges (Br. 21-22) before this Court, as he did before the lower courts, that he has no objection to religious symbols or imagery on private property. Rather, respondent objects to the display of a religious symbol on public property. J.A. 50. That should be the beginning and end of the standing analysis, because the government has eliminated the basis for respondent's objection by transferring the land on which the cross sits to a private party. It is no answer for respondent to say (Br. 31 n.21) that his "statement was made years before Congress' enactment of Section 8121." In electing to continue an existing civil action rather than to commence a new one, see pp. 2-3, *supra*, respondent elected to stand on an injury that is no longer attributable to the government.

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[5] For the same reasons, preclusion should be denied because "[t]he issue is one of law and * * * a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." Restatement § 28(2)(b).

Respondent contends, however, that Congress has not eliminated the basis for his objection because "the federal government will continue to retain significant interests in the land and the symbol, thereby failing to fully 'privatize' the cross." Br. 31. According to respondent, "[t]his objection to the transfer articulates an injury in fact for standing purposes." *Ibid.* If that is respondent's theory, his alleged injury in fact has not changed at all from *Buono I* to *Buono II*: it remains the absence of an open forum on land that, according to respondent, is under government control. And in that case, he lacks standing to challenge the transfer for the same reasons—both constitutional and prudential—that the government previously argued he lacked standing to challenge the display.

2. Respondent claims, as to the constitutional part of that analysis, that "the touchstone of Article III standing is direct and unwelcome contact with government action that is alleged to be impermissibly religious in nature." Br. 19. Respondent misses the key question, however, which is *why* such contact is unwelcome. In the cases on which respondent relies (Br. 19, 24-25), the contact with government action gave rise to standing either because it coerced the plaintiffs to observe a religious orthodoxy, violated their religious or spiritual beliefs, or caused them to feel like outsiders to the community.

In *School District* v. *Schempp*, 374 U.S. 203 (1963), for instance, schoolchildren were subjected to Biblical readings "which were contrary to the religious beliefs which they held and to their familial teaching." *Id.* at 208 (quoting *Schempp* v. *School Dist.*, 177 F. Supp. 398, 400 (E.D. Pa. 1959)). And in *Lee* v. *Weisman*, 505 U.S. 577 (1992), a middle school student was "being forced by the State to pray in a manner her conscience [would] not allow." *Id.* at 593. No party questioned, and the Court did not address, standing

in those cases, because the schoolchildren at issue had been coerced to observe a religious orthodoxy that ran counter to their own beliefs.[6]

Respondent does not present that sort of injury. Indeed, he has expressly disclaimed any personal injury—including direct or indirect coercion, impingement on religious beliefs, or feelings of exclusion—from observation of the cross itself. What injures respondent is not the presence of the cross but the absence of other symbols atop Sunrise Rock. Or, more precisely, what injures respondent (because no one knows if anyone currently wishes to place other symbols in this desolate spot) is the abstract knowledge that other symbols may not be displayed atop Sunrise Rock. But this alleged injury is nothing more than contact with a governmental action that violates respondent's constitutional (as opposed to religious) views. He cannot point to any decision of this Court holding that such contact gives rise to standing under the Establishment Clause.[7]

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[6] Respondent also relies (Br. 20, 25) on this Court's decisions in *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989), *Van Orden* v. *Perry*, 545 U.S. 677 (2005), and *McCreary County* v. *ACLU*, 545 U.S. 844 (2005). None of those cases addresses standing. See, *e.g.*, *Steel Co.*, 523 U.S. at 91 ("[D]rive-by jurisdictional rulings of this sort * * * have no precedential effect."). But as far as the records reveal, plaintiffs in those cases objected to governmental displays that violated their own religious beliefs. See *ACLU* v. *McCreary County*, 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000) (holding that an organization's members had standing because the displays were "a serious insu[l]t to [their] religious sensibilities"); ACLU Br. 7, *Allegheny* (No. 87-2050) (stating that plaintiffs included "a Unitarian minister" and "a Moslem whose religion views tangible depictions of the deity as a profanity").

[7] Respondent falls back on lower court decisions that he says support his test for standing. But in some of those decisions, it is not clear whether the government actions at issue violated the plaintiffs' religious beliefs. See *Foremaster* v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989), cert. denied, 495 U.S. 910 (1990); *Hawley* v. *City of Cleveland*,

3. Indeed, respondent's approach is irreconcilable with *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (*Valley Forge*). In that case, plaintiffs sought to challenge a transfer of public land in Pennsylvania to a religiously-affiliated private institution. *Id.* at 468. The Court held that the plaintiffs lacked standing, because they had not identified a personal injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. The Court took pains to explain that "abstract injury in nonobservance of the Constitution" or mere disagreement "phrased in constitutional terms" does not constitute a cognizable injury under the Establishment Clause. *Id.* at 482, 485-486 (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974)).

Respondent contends that the plaintiffs in *Valley Forge* lacked standing because, as residents of Maryland and Virginia, they lacked "any direct contact with the action." Br. 22. The Court, however, expressly rejected that view. It noted that one of the plaintiff-organizations "claims that it has certain unidentified members who reside in Pennsylvania." *Valley Forge*, 454 U.S. at 487 n.23. The Court deemed that fact irrelevant: "[Plaintiff] does not explain * * * how this fact establishes a cognizable injury where none existed before. [Plaintiff] is still obligated to allege facts sufficient to establish that one or more of its members

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773 F.2d 736 (6th Cir. 1985), cert. denied, 475 U.S. 1047 (1986). Even assuming, however, that they did not, the government recognized in its petition (at 16-18) that the courts of appeals have not taken a uniform approach to the concept of injury for standing purposes in Establishment Clause cases. To the extent lower courts require nothing more than contact with a governmental action allegedly violating the Establishment Clause, those courts have misconstrued *Valley Forge*.

has suffered, or is threatened with, *an injury other than their belief that the transfer violated the Constitution*." *Ibid.* (emphasis added). *Valley Forge* thus makes plain that "unwelcome direct contact with a religious symbol that sits on government property" does not suffice to confer standing, Resp. Br. 20, if the contact is unwelcome only because it conflicts with the plaintiff's views of the Establishment Clause.[8]

A contrary rule would permit a plaintiff who suffers only this kind of harm—a belief that governmental action violates the Constitution—to bootstrap himself into standing simply by making sure to subject himself to the display or practice. And that rule would ignore the essence of respondent's complaint, which alleges injury from contact with the display only because he believes that it violates the Constitution. In the end, respondent's injury is no different from that of others who are aware of this litigation and share his view of the Establishment Clause: the harm that flows from the government's taking action to which one objects on constitutional grounds.[9]

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[8] Contrary to respondent's assertion (Br. 23-24), the government does not draw any distinction for standing purposes between exposure to religious exercises and exposure to religious symbols. With respect to either religious exercises or symbols, the question for standing purposes is whether the plaintiff's exposure gives rise to any personal injury apart from the "psychological consequence" of observing "conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485.

[9] Some of respondent's amici propose a slightly different formulation of the standing inquiry: a plaintiff has standing to challenge any governmental action that interferes with his use or enjoyment of public property. American Jewish Congress Amicus Br. 4-5; Americans United for Separation of Church and State Amicus Br. 24-25. But once again, the only reason that the display of the cross interferes with respondent's use or enjoyment of Sunrise Rock is that he finds the presence of the cross at odds with his view of the Establishment Clause.

4. Respondent argues that courts should "not inquire into whether a person's conduct or beliefs are religious in nature." Br. 26-27. But there is no dispute on that score: the government agrees. The government is not asking this Court to inquire into the nature of respondent's beliefs. The government is simply asking this Court to take respondent at his word. Respondent has testified in this litigation that the display of the cross, whether on public or private property, does not violate his religious beliefs. J.A. 64, 85. He has never claimed that the display or transfer of the cross directly or indirectly coerces him. See *Weisman*, 505 U.S. at 592. Neither has he asserted that the cross makes him feel like an outsider rather than a full member of the political community. See *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring in part and concurring in the judgment). Based on his own pleadings, respondent's action is founded on an abstract and generalized view of the Establishment Clause, rather than on a concrete and personal injury from the alleged establishment. In those circumstances, respondent is no different from any other citizen who believes that the Constitution compels a different course of conduct. Because respondent has not pointed to "an injury other than [his] belief that the [display or] transfer violate[s] the Constitution," *Valley Forge*, 454 U.S. at 487 n.23, he lacks standing to challenge either action.

B. Respondent Lacks Prudential Standing Because He Asserts The Rights Of Third Parties

Respondent barely contests (Br. 28-29) the government's assertion that he lacks prudential standing. Respon-

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Nor is amici's test capable of more general application to other Establishment Clause cases that do not involve the use of government lands or facilities.

dent argues that "[he] was personally confronted with, and offended by, government promotion of a sectarian religious symbol." Br. 28. But that argument misses the point: respondent testified that he is offended only because other persons have not been permitted in the past to display their own symbols atop Sunrise Rock. J.A. 50, 64. Respondent himself has never expressed any desire to erect an additional display atop Sunrise Rock, asserting instead only the rights of others to do so. In those circumstances, for the reasons stated in the government's opening brief (at 17-20), the Court should refrain from adjudicating the matter. The doctrine of prudential standing exists to allow judges to avoid deciding cases like this one, where the validity of an Act of Congress rests on a purely hypothetical dispute concerning the putative rights of unknown third parties.

III. CONGRESS'S TRANSFER OF THE LAND TO A PRIVATE PARTY WILL ELIMINATE THE ESTABLISHMENT CLAUSE VIOLATION

A. Congress's Transfer Of The Land To Eliminate The Establishment Clause Violation Should Be Presumed Valid

Respondent asserts that the district court had "discretion" to enjoin the transfer as an insufficient remedy for the violation that the court had found. Br. 54. But the court's injunction against display of the cross did not give the court discretion to set aside a subsequent Act of Congress transferring the land, pursuant to Congress's plenary power "to dispose of * * * Property belonging to the United States." U.S. Const., Art. IV, § 3, Cl. 2; *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 201 (1987). The only question before this Court is whether the transfer itself or the government's alleged exercise of authority over Sunrise Rock following the transfer violates the Establishment Clause.

That question, as the parties agreed below, is subject to de novo review. Pet. Br. 31 n.4.

In answering that question, this Court should presume that the 2004 Act removes the predicate for the previous constitutional violation—public ownership of Sunrise Rock. As a general matter, this Court imputes to Congress an intent to pass legislation that is consistent with the Constitution. See, *e.g.*, *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994); *Yates* v. *United States*, 354 U.S. 298, 319 (1957). Here, that stance requires respecting Congress's intent, when faced with an injunction that prevented display of the cross, to enact legislation effecting a bona fide divestment of the property. There is, indeed, no evidence to the contrary. Pet. Br. 24-26; *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000). Respondent offers several theories of how the government retains surreptitious control of the memorial. But none withstands the slightest scrutiny, let alone overcomes the presumption of validity that should attach to congressional action designed to eliminate a constitutional violation.

B. Congress's Efforts To Preserve Sunrise Rock As A War Memorial Do Not Undermine The Transfer's Validity

1. Respondent asserts that the transfer will not sufficiently disassociate the government from the cross, because "[a]s one of the few displays that Congress has designated a national memorial, the cross necessarily will reflect continued government association." Br. 38. Respondent cites nothing in support of that assertion, nor could he. There are a host of congressionally designated national memorials on nonfederal land.[10] Congress typically designates a pri-

[10] Such memorials include the Benjamin Franklin Memorial Hall, which is a portion of the Franklin Institute Science Museum in Philadel-

vately owned site as a national memorial in order to recognize its cultural or historical significance. Such a designation neither subjects the memorial to governmental control nor converts the owner's conduct into state action for purposes of the Establishment Clause.

The best evidence of Congress's purpose in designating a national memorial, whether on public or private property, is the particular statute establishing the memorial. Here, Congress designated a national memorial "commemorating United States participation in World War I and honoring the American veterans of that war." J.A. 44. That purpose, needless to say, is legitimate. Nor does a purpose of this kind become suspect because the memorial in question has religious meaning to some citizens. For instance, Congress designated the Father Marquette National Memorial on nonfederal land in St. Ignace, Michigan, "to commemorate the advent and history of Father Marquette * * * , including his establishment of a mission at Saint Ignace in 1671, and his historic exploration * * * of the Mississippi River in 1673." Act of Dec. 20, 1975, Pub. L. No. 94-160, 89 Stat.

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phia, Pennsylvania, Act of Oct. 25, 1972, Pub. L. No. 92-551, 86 Stat. 1164; the David Berger Memorial, which is a sculpture located on the grounds of a Jewish community center in Cleveland Heights, Ohio that commemorates Israeli athletes killed at the Munich Olympic Games, National Parks and Recreation Act of 1978, Pub. L. No. 96-199, § 116, 94 Stat. 71; the Red Hill Patrick Henry National Memorial, which is the Revolutionary leader's privately operated home in Charlotte County, Virginia, Act of May 12, 1986, Pub. L. No. 99-296, 100 Stat. 429; the AIDS Memorial Grove, which is a portion of a state park in San Francisco, California, Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, § 516, 110 Stat. 4170; and America's National World War I Museum, which is a privately financed and operated museum in Kansas City, Missouri, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Subtit. D, § 1031, 118 Stat. 2044.

848. That some may regard this memorial as honoring the Society of Jesus does not render the government's action a violation of the First Amendment.

2. Respondent also asserts (Br. 51-53) that the government's earlier actions involving the memorial effectively taint the transfer. But the 2001 and 2002 Acts themselves had legitimate secular purposes—designation of the site as a national memorial and prevention of that memorial's destruction during the pendency of this litigation. Pet. Br. 36-39.[11] Neither provides any evidence of a course of impermissible conduct, and respondent does not seriously attempt to demonstrate otherwise. In any event, those Acts are irrelevant because an intervening event—the district court's entry of an injunction—reshaped Congress's purpose. Faced with that injunction, Congress legislated a bona fide divestment of the property to eliminate the violation. Respondent cannot cast suspicion on that action by pointing to earlier legislative enactments that responded to entirely different factual circumstances.

3. Respondent asserts repeatedly (Br. 38, 40, 49) in attacking Congress's designation of the site as a national memorial that the Sunrise Rock cross communicates only a single, sectarian message. He does not discuss this Court's recent decision in *Pleasant Grove City* v. *Sum-*

[11] Congress twice prohibited the spending of any federal funds to remove the memorial. Pet. Br. 36-38. Respondent contends that because the latter enactment followed the district court's injunction, see Department of Defense Appropriations Act, 2003 (2003 Act), Pub. L. No. 107-248, § 8065(b), 116 Stat. 1551, its "sole purpose and effect" was to prevent the Park Service from complying with that injunction. Resp. Br. 53. But the Park Service could comply with both the 2003 Act and the injunction as it always has: by covering the cross. The evident purpose of the 2003 Act was to forestall the memorial's destruction while Congress considered alternative measures, like the transfer of the memorial to a private party.

mum, 129 S. Ct. 1125 (2009), recognizing that "it frequently is not possible to identify a single 'message' that is conveyed by an object or structure." *Id.* at 1136. Here, at the very least, the World War I veterans who erected the cross in 1934 believed that they were commemorating "the Dead of All Wars," even if through the use of a religious symbol. Pet. App. 56a.[12] In any event, respondent's contrary assertion does not undermine the *transfer* at issue here. If the 2004 Act validly transfers the memorial into private hands (and it does), then the message no longer comes from the government, but from the VFW. From now on, the VFW can convey that message—or, by replacing the current memorial with another, can change that message—as it wishes.

C. Congress Did Not Reserve Continuing Control Over Sunrise Rock

1. Respondent contends that the reversionary clause leaves the government with an "ownership interest" in the transferred land. Br. 42. Certainly it does: that is the very purpose of such a clause. Congress intended the transferred land always to bear a memorial demonstrating respect for fallen service members, and to ensure the accomplishment of that secular purpose it provided the government with a reversionary interest. The court of appeals held that the reversionary clause "results in ongoing government control over the subject property," Pet. App. 80a,

[12] Respondent does not say what should happen to the "many monuments on public land that use the cross to commemorate the sacrifice of fallen soldiers, particularly those in World War I." Pet. App. 47a n.6. On respondent's view, presumably each of those monuments violates the Establishment Clause—and the government cannot even eliminate the putative violation by transferring the monument to private ownership, at least in any way that preserves the monument as a war memorial. See p. 22, *infra*.

but respondent does not even attempt to defend that proposition. He formerly speculated that the VFW might be required to maintain the cross at Sunrise Rock, Br. in Opp. 23, but now concedes that the VFW is only required "to maintain *the land* as a memorial to American veterans of World War I." Resp. Br. 42 (emphasis added). How the VFW elects to maintain the land as a memorial is up to the VFW, not the government.[13]

2. Respondent asserts that because "the land on which the cross is located is within the boundaries of the Mojave Preserve, the cross remains 'under the jurisdiction of the federal government.'" Br. 44 n.31. Respondent fails to appreciate the limited nature of the Park Service's authority over private inholdings at the Preserve. The National Park Service Organic Act, 16 U.S.C. 1 *et seq.*, permits the Park Service to regulate nonfederal property within the Preserve only to the extent that activities on those inholdings affect park property. Pet. Br. 41.[14] Respondent correctly does not argue that the Park Service's limited and incidental authority over inholdings would allow it to re-

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[13] Elsewhere in his brief, respondent backtracks, stating that the reversionary clause "relates to the maintenance of the symbol," Br. 43, or that the "war memorial *is* the cross," Br. 52. But as the government has explained, see Pet. Br. 33, Congress carefully required only that the VFW maintain the "parcel of real property" as a war memorial. § 8121(a), 117 Stat. 1100; see § 8121(e), 117 Stat. 1100. Respondent does not address Congress's considered phrasing.

[14] Respondent cites (Br. 44 n.31) statutes that establish the Preserve, see 16 U.S.C 410aaa-42 and 410aaa-43, and that authorize the Secretary to acquire private inholdings within the Preserve, see 16 U.S.C. 410aaa-56. But unless and until private inholdings within the Preserve are so acquired, they may be regulated only to the extent that activities on those inholdings affect park property. Pet. Br. 41.

quire the VFW to display the cross (or any other symbol) on the VFW's land.[15]

Respondent also asserts (Br. 46-47) that, as a national memorial, Sunrise Rock will remain part of the National Park System and therefore be subject to the Park Service's plenary authority even after the transfer. For that proposition, respondent relies on a provision, Act of Aug. 8, 1953, ch. 382, § 2(a), 67 Stat. 496, that was repealed in 1970. See Act of Aug. 18, 1970, Pub. L. No. 91-383, § 2(b), 84 Stat. 82 (16 U.S.C. 1c(a)). National memorials are not automatically included within the National Park System; rather, they may exist on either public or private land, and are included within the National Park System only if administered by the Park Service pursuant to some other source of law. *Ibid.* Because the Sunrise Rock memorial will be privately owned following the transfer, the Park Service will neither administer it nor have any other authority to require display of the cross. In the end, respondent does not point to any federal statute or regulation that will afford the government any relevant control over Sunrise Rock following the transfer.

D. Congress's Method Of Transferring Sunrise Rock Does Not Undermine The Transfer's Validity

1. Respondent argues that the land transfer is invalid because Congress "bypassed the normal statutory channels." Br. 49. It is hard to know what respondent

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[15] Respondent points (Br. 44-45) to 18 U.S.C. 1369(a), which criminalizes the willful injury or destruction of any veterans' display "on public property." But following the transfer, Sunrise Rock will not be on public property. In any event, given that the 2004 Act requires only that the VFW maintain the parcel of property as a war memorial, replacing the cross with another type of structure would not "injure" or "destroy" the memorial within the meaning of Section 1369(a).

means: Congress often enacts statutes involving specific federal property, and nothing prevents it from doing so in an appropriations bill. Pet. Br. 48-49. Respondent cites (Br. 50) a single case, *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687 (1994) (*Kiryas Joel*), in which this Court held unconstitutional under the Establishment Clause a state statute creating a separate school district for a religious sect. *Id.* at 705. But *Kiryas Joel* surely did not prohibit a legislature from acting directly to address an Establishment Clause *violation*. Judicial findings of constitutional violations appropriately may command the legislature's attention. See *id.* at 726 (Kennedy, J., concurring in the judgment) ("It is normal for legislatures to respond to problems as they arise—no less so when the issue is religious accommodation.").

2. Respondent also claims (Br. 50-51) that although it is "logical for the government to return the cross to the VFW" or even "[to] sell the land" to the VFW as part of an open bidding process, "it is not logical for the government to sell [the land] to the VFW just because the cross is on it." Br. 51. According to respondent, that is explicable only by reference to "favoritism." *Ibid.* But the government's action is "illogical" only if it may not take a legitimate interest in preserving a war memorial at Sunrise Rock. If that is a legitimate government interest, then it is perfectly sensible to transfer the land to an entity that cares about such matters. Pet. Br. 48. In urging this Court to destroy long-standing memorials across this Nation or else place them on the auction block, respondent seeks not neutrality, but hostility, toward religion.[16]

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[16] Even assuming that the land transfer does not extinguish the Establishment Clause violation, respondent agrees that "[a] valid remedy responds to the specific nature of the violation." Br. 49. A far more tailored remedy in these circumstances would be to require fencing or

IV. THIS CASE WAS NOT MOOT BEFORE THE COURT OF APPEALS

Respondent abandons his argument that this case is moot, but some of his amici do not. Public Employees for Environmental Responsibility and the Western Lands Project Amici Br. 4-6 (Amici). Those amici claim (*id.* at 3, 17-18) that the court of appeals lacked jurisdiction because VFW Post 385's charter was temporarily revoked for administrative reasons, and thus that this Court must vacate and remand for further proceedings. Amici thus want to replay the current round of litigation—which has taken four years—when no one disputes that VFW Post 385 stands ready to receive the land if the present injunction is lifted. This Court is not required to endorse that senseless result, because amici have not carried their "heavy burden" of establishing that this case was once moot on appeal. *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1983).

Notably, amici do not contest that when Post 385's charter was revoked, the Department of California VFW assumed ownership of and responsibility for Post 385's property as its successor in interest pursuant to the VFW's bylaws. Amici also do not contest that dissolution of an organization does not render a case moot when, as in this case, the lawsuit could affect the rights of the dissolved organization's successor in interest. *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 674 (1944). That should be the beginning and end of the mootness analysis: because the California VFW would have taken possession of the land, this case continued to present a live controversy.

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additional signage rather than to invalidate wholesale an Act of Congress. Pet. Br. 51-52. Respondent makes no effort to explain why such measures would not sufficiently disassociate the government from the memorial following the transfer.

Amici contend (at 6-7), however, that the 2004 Act's requirements for joint appraisals and a cash equalization payment are conditions precedent to the land transfer; and, further, that because the injunction against the transfer prevented the government from performing those conditions before Post 385's charter was revoked, Post 385 did not have any property interest to pass on to the California VFW. For the proposition that the appraisals and cash equalization payment are conditions precedent, amici cite three decisions of this Court involving the Act of Sept. 27, 1950 (Donation Act), ch. 76, 9 Stat. 496, which granted lands to Oregon settlers who resided on and cultivated those lands for four years. See *Hall* v. *Russell*, 101 U.S. 503, 510 (1880); *Vance* v. *Burbank*, 101 U.S. 514, 521 (1880); *Maynard* v. *Hill*, 125 U.S. 190, 214-215 (1888). Those decisions depended, however, on the particular language of the Donation Act. See *Hall*, 101 U.S. at 510. The more general rule is that "[e]very interest in lands," including an interest granted by federal statute, "is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary." *Smelting Co.* v. *Kemp*, 104 U.S. 636, 651 (1880); see, *e.g.*, *McCune* v. *Essig*, 199 U.S. 382, 389 (1905). The question remains the intent of Congress, in light of the text, structure and purpose of the entire conveyance, see *Missouri, Kan., & Tex. Ry.* v. *Kansas Pac. Ry.*, 97 U.S. 491, 497 (1876), and here Congress clearly intended to direct a land exchange in order to restore the memorial to the VFW.[17]

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[17] Amici point (at 12-14) to the interpretive principle that public grants are to be construed in favor of the government, but that principle applies when it is unclear what property the government intended to convey. See, *e.g.*, *Caldwell* v. *United States*, 250 U.S. 14, 398 (1919). There is no such lack of clarity here. Likewise, amici point (at 10-12) to Section 206 of the Federal Land Policy and Management Act of 1976,

Finally, even assuming both that the case was formerly moot and that such a defect was not cured by the reinstatement of Post 385, "[t]he established practice * * * is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Contrary to amici's assertion (at 17-18), they cannot preserve the district court's favorable judgment which the government—through no fault of its own—would have been prevented from challenging. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997) ("Vacatur clears the path for future relitigation by eliminating a judgment the loser was stopped from opposing on direct review.") (internal quotation marks and citation omitted). Nothing in law or logic, however, requires the replay of the current litigation that would result from vacatur of the district court's judgment.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and this case remanded with instructions to dismiss.

Respectfully submitted.

ELENA KAGAN
Solicitor General

AUGUST 2009

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43 U.S.C. 1716, and various regulations, which do not apply to lands administered by the National Park Service. See 43 U.S.C. 1702(e); see also 43 C.F.R. 2200.0-5(i).