

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

RESPONDENT'S BRIEF

MICHAEL C. SMALL
2029 Century Park East, Suite 2200
Los Angeles, California 90067
(310) 229-1000

DANIEL MACH
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005
(202) 548-6604

WILLIAM B. RUBENSTEIN
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 496-7320

PETER J. ELIASBERG
Counsel of Record
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-5228

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Attorneys for Respondent

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COUNTERSTATEMENT OF THE CASE

1. A Christian cross¹ sits on a prominent rock outcropping on federal land in an area of California's Mojave National Preserve (the "Preserve") known as Sunrise Rock. Pet. App. 54a, 117a.² The cross is visible to vehicles about 100 yards away from Sunrise Rock. Pet. App. 118a.

In 2004, the court of appeals affirmed a district court final judgment holding that Respondent had standing to bring an Establishment Clause challenge to the presence of the cross on federal land and that the cross's presence there violates the Establishment Clause. The court of appeals also affirmed the district court's order permanently enjoining Petitioners from maintaining the cross on federal land. Petitioners did not seek this Court's review of that judgment, which Respondent will refer to as *Buono I*. Accordingly, at this juncture, not a single issue from the court of appeals' ruling in *Buono I* – not Respondent's standing to bring an Establishment Clause challenge to the presence of the cross on federal land, not the ruling that the presence of the cross on federal land violates the Establishment Clause, and not the

¹ The cross at issue is a Latin cross in that it has two arms, one vertical, one horizontal with the vertical arm being longer. Pet. App. 118a. It is between five and eight feet tall and is made of four-inch diameter pipes painted white. Pet. 55a. A Latin cross symbolizes Jesus's crucifixion. J.A. 89. It is both the preeminent symbol of Christianity and exclusively a Christian symbol, not venerated even by other monotheistic religions. *Id.*

² The Preserve encompasses 1.6 million acres of land in the Mojave Desert, over 90 percent of which is federally owned. Pet. App. 3a.

propriety of the permanent injunction – is before this Court.³

What is before this Court is the court of appeals' subsequent ruling affirming the district court's order in a collateral proceeding (which Respondent will refer to as *Buono II*) that Respondent brought to enforce the judgment in *Buono I*. In the latter proceeding, Petitioners argued that Congress had remedied the constitutional violation adjudicated in *Buono I* by passing a law authorizing the transfer of the land on which the cross sits to a private party. The court of appeals in *Buono II* rejected Petitioners' argument, held that the land transfer statute did not adequately remedy the constitutional violation, and enjoined the transfer. Given the procedural posture of this case, the only issues now properly before this Court arise from the enforcement order in *Buono II* – namely, whether the transfer completely remedies the constitutional violation and whether the transfer was properly enjoined.

2. In 1934, the Veterans of Foreign Wars (“VFW”), Death Valley Post 2884, first mounted a Christian cross on federal land at Sunrise Rock to honor Americans who had died in combat. Pet. App. 118a. Private parties have replaced the Christian cross several times in the intervening years. A private party, Henry Sandoz, erected the current version of the cross in approximately 1998. Pet. App.

³ See *infra* p. 13 (citing *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) (holding that the statutory deadline for seeking review in this Court is “mandatory and jurisdictional”).

4a.⁴ Neither the VFW nor Mr. Sandoz ever owned the land on which the cross is located. J.A. 71; Appendix to Respondent’s Brief 3a (“R. App.”).

There is no plaque or sign at or near the cross indicating that it is meant to be a memorial for Americans who died in combat. Pet. App. 118a. The cross has been deemed to have no historic significance: in 1999, the National Park Service (“NPS”), a division of the U.S. Department of the Interior that administers the Preserve, commissioned an historian to evaluate the cross for eligibility for the National Register of Historic Places: the historian concluded that the cross did not qualify. Pet. App. 119a-20a. The cross’s religious significance is unambiguous, however: religious adherents have held Easter Sunrise services at the Christian cross for more than 70 years. Pet. App. 119a.

3. There are no other religious displays (or secular ones) permitted in the vicinity of the cross. In 1999, the NPS denied an individual’s request to erect a Buddhist memorial (known as a “stupa”) in the area near the cross, stating that NPS’s “management policies and 36 Code of Federal Regulations 2.62(a) prohibits the installation of a monument, memorial, structure or other commemorative installation.” Pet. App. 56a-57a. The NPS further informed the applicant that “[a]ny

⁴ William James famously asked, “Is a knife whose handle and blade are changed the ‘same?’” WILLIAM JAMES, PRAGMATISM (1907). While philosophers might therefore debate whether the current version of the cross is the “same” as the original version, in fact, the only thing the two have in common with one another is that each was in the form of a Christian cross.

attempt to erect a stupa will be in violation of Federal Law and subject you to citation and or arrest.” Pet. App. 57a.

4. In the late summer of 2000, Respondent, through counsel, wrote to the NPS Director stating that the presence of a Christian cross in the Preserve in these circumstances violated the Establishment Clause. Pet. App. 119a.

Shortly thereafter, on December 15, 2000, Congress enacted, and the President signed, an appropriations bill, a section of which provided that no government funds could be used to remove the Christian cross. Pub. L. No. 106-554, § 113 (2000).

5. In March 2001, Respondent filed a lawsuit in the U.S. District Court for the Central District of California challenging the constitutionality of the government’s display of the cross.⁵

In January 2002, while that matter was pending in the district court, Congress passed Pub. L. No. 107-117, a section of which designated the Christian cross as a national memorial commemorating United States participation in World War I. *See* Pub. L. No. 107-117, § 8137 (2002). The law provided federal funds both to install a memorial plaque at the site of the cross and to acquire a replica of the cross that was originally on the site. *Id.* at § 8137(c).

On July 24, 2002, the district court held that Respondent had standing to pursue his Establishment Clause claim, Pet. App. 137a, and

⁵ Allen Schwartz, a co-plaintiff on the first amended complaint, died during the proceedings.

that the presence of the Christian cross on federal land in the Preserve violated the First Amendment. Pet. App. 137a-143a. The court entered a final judgment for Respondent, Pet. App. 145a-146a, stating, in pertinent part: “Defendants . . . are permanently enjoined from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve.” Pet. App. 146a. Petitioners appealed.

Three months after the district court’s judgment, Congress again banned the use of federal funds to remove the cross. Pub. L. No. 107-248, § 8065(b).

6. In September 2003, during the pendency of Petitioners’ appeal to the Ninth Circuit in *Buono I*, Congress passed Section 8121 of Public Law 108-87. Pet. App. G. This provision calls for the transfer of the property on which the Christian cross at Sunrise Rock sits. Section 8121’s authorized land transfer was not based on open bidding or any other competitive process. Rather, the statute directs that the land be transferred to the Veterans Home of California – Barstow, VFW Post 385E, in exchange for a parcel of land elsewhere in the Preserve that is owned (jointly with his wife) by Henry Sandoz, the private party who had erected the current Christian cross in 1998. Pet. App. 56a; 147a-149a. Although this law transfers the land to a private party, it nonetheless provides that the Secretary shall install the memorial plaque, as previously ordered by Section 8137. See Pub. L. No. 108-87, § 8121(a). Another provision of land transfer statute states that if the VFW no longer maintains the property “as a war memorial, the property shall revert to the ownership of the United States.” *Id.* at 8121(e).

7. On June 7, 2004, in a unanimous opinion by Judge Kozinski, a panel of the court of appeals affirmed the district court's holdings on standing and the Establishment Clause. Pet. App. 108a-113a. Petitioners argued that Section 8121, which was enacted during the pendency of their appeal, mooted the case. Relying on Petitioners' concession that the "land transfer could take as long as two years to complete," Pet. App. 103a, the court of appeals held that the case was not moot. *Id.* at 102a-104a. The court entered judgment, stating that the district court's judgment was "affirmed." R. App. 1a. The court of appeals did not remand the case for any further proceedings in the district court. *Id.*

Petitioners sought neither en banc review of *Buono I* nor review in this Court. Accordingly, the Ninth Circuit's judgment became final and unappealable on September 7, 2004, 90 days later. 28 U.S.C. § 2101(c).

8. On November 29, 2004, Respondent filed a motion in the district court to enforce, or, in the alternative, to modify, the permanent injunction by expressly prohibiting the land transfer authorized by Section 8121.⁶ This motion commenced the collateral enforcement proceeding (*Buono II*), now before the Court.

⁶ Petitioners' brief is imprecise when it states, "[o]n remand, respondent filed a motion to enforce or modify the district court's earlier permanent injunction." Pet. Br. 7 (emphasis added). The word "remand" does not appear in the court of appeals' judgment in *Buono I*. R. App. 1a; *see also* Pet. App. 113a.

In April 2005, the district court held that Section 8121's land transfer perpetuated, rather than remedied, the Establishment Clause violation. Pet. App. 86a-99a. The district court "applied the analytical framework" from *Freedom from Religion Foundation v. City of Marshfield, Wis.*, 203 F.3d 487 (7th Cir. 2000), and *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005), Pet. App. 90a-91a, and held 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 by Defendants." *Id.* at 97a. The district court barred Petitioners from implementing Section 8121 and ordered the government to comply with the court's existing final judgment and permanent injunction. Pet. App. 99a. Petitioners appealed.

9. In September 2007, the court of appeals affirmed. Adopting the reasoning of the Seventh Circuit in *Marshfield*, the court held that in evaluating whether a transfer of land to a private party has ended an Establishment Clause violation, a court should "examine both the form and substance of the transaction to determine whether the government action endorsing religion has actually ceased." Pet. App. 76a (citing *Marshfield*, 203 F.3d at 491). Analyzing the form and substance of Section 8121, the court of appeals concluded that the land transfer did not cure the violation. The court relied on the factors identified in the district court's decision: the continued designation of the cross as a national memorial, and the government's resulting ongoing statutory responsibility for "the supervision, management, and control of the cross;" the government's property interest in the land, in the

form of a reversionary interest; the actual method of the exchange; and the history of government efforts to preserve the cross. Pet. App. 77a-84a.

In May 2008, the court of appeals denied the government's petition for rehearing and suggestion for rehearing en banc. Pet. App. 35a-37a.⁷ Petitioners then filed a petition for certiorari, which this Court granted on February 23, 2009.

SUMMARY OF ARGUMENT

1. *Standing.* Petitioners' brief contests both Respondent's standing in *Buono I* to challenge the presence of a Christian cross on federal land and his capacity here in *Buono II* to bring the present motion to enforce the permanent injunction.

The former argument is both foreclosed and wrong. It is foreclosed because the lower courts held in *Buono I* that Respondent had standing to challenge the presence of the Christian cross on federal land, and Petitioners never sought certiorari review of that decision. This Court lacks jurisdiction to review a final judgment of a lower court when the petition for certiorari is not filed within the 90-day statutory period. Moreover, principles of res judicata prohibit Petitioners, in an enforcement action, from collaterally attacking the standing ruling that is embodied in the underlying final judgment. In any event, in *Buono I*, Respondent had standing under this Court's precedent because he is directly and personally affected by the religious symbol to which he objects.

⁷ Upon denial of rehearing, the court of appeals amended a footnote in its initial decision that discussed the *Marshfield* case. Pet. App. 35a-37a.

As to *Buono II*, Respondent is the proper party to enforce the permanent injunction entered in *Buono I* because, as the party-plaintiff in that initial action, he is the named beneficiary of the injunction. Respondent's right to enforce the injunction can also be stated in conventional standing terms: Respondent suffered an injury in fact when Congress enacted Section 8121 because he alleges that this statute interferes with the permanent injunction he secured in *Buono I*.

2. *Merits.* The district court entered the permanent injunction in *Buono I* as the remedy for the Establishment Clause violation arising from the government's display of the Christian cross on public land. The district court's holding and the permanent injunction are encompassed in its 2002 final judgment, which was affirmed on appeal in 2004. As it does with standing, *res judicata* bars any attempt to relitigate the merits of that final judgment.

Thus, the only merits issues now before this Court on the motion to enforce in *Buono II* are whether the land transfer remedies the Establishment Clause violation that necessitated the permanent injunction and, if it does not, whether its effectuation will nonetheless interfere with a full and complete remedy of the violation.

The land transfer does not completely remedy the violation for four independent reasons. *First*, the transfer of the land does nothing to end the federal government's continuing endorsement of the preeminent symbol of Christianity embodied in Congress' designation of that cross as a national memorial. The designation puts this Christian cross in the company of only 45 other designated national

memorials, including the Washington Monument, the Lincoln Memorial, the Vietnam Veterans Memorial, and Mount Rushmore. *Second*, the land transfer is not a real divestment of federal government ownership or oversight of the property. Under Section 8121, Petitioners retain an important property interest in the form of a reversionary clause, which provides that the land will revert to the government if it is not maintained as a World War I memorial. And, other federal statutes require that the government maintain oversight of the property. *Third*, in by-passing the normal government land transfer procedures and mandating to whom the property must be transferred, Section 8121 perpetuates the history of favoritism towards the cross and its sponsors that was a principal factor in the court of appeals' holding that the cross violated the Establishment Clause. *Fourth*, Petitioners' concession that the purpose of the transfer is to keep the cross in place demonstrates that Section 8121 continues the longstanding pattern of congressional legislation. That pattern features – a pair of restrictions on the use of federal funds to remove the cross (one of which was enacted *after* the district court's judgment in *Buono I*); the memorial designation; and now private transfer. Together, these measures aim to ensure the perpetuation of the Christian symbol in the same location. For all of these reasons, Section 8121 is no remedy.

Not only does Section 8121 fail to remedy the Establishment Clause violation, but permitting the transfer would also prevent Petitioners from remedying the violation. This is so because Petitioners will no longer have a present ownership

interest in the land and hence will be unable to remedy the violation, either by giving the cross to the VFW or Mr. Sandoz or by effectuating a transfer of the land on non-preferential terms. Accordingly, the lower courts acted well within their discretion in enjoining the transfer so that Petitioners could undertake such a remedy.

ARGUMENT

I. RESPONDENT'S STANDING IN *BUONO I* IS NOT PROPERLY BEFORE THIS COURT – ALTHOUGH HE CLEARLY HAD STANDING – AND RESPONDENT IS THE PROPER PARTY IN *BUONO II* TO SEEK ENFORCEMENT OF THE PERMANENT INJUNCTION

A. Standing In *Buono I*

1. *This Court Lacks Jurisdiction To Review Respondent's Standing In Buono I*

In *Buono I*, Petitioners contested Respondent's Article III standing. The district court rejected that argument. Pet. App. 130a-37a. That ruling is embodied in the district court's 2002 final judgment. Pet. App. 145a-46a. Invoking the court of appeal's jurisdiction under section 28 U.S.C. §1291 (authorizing appeals from final judgments), Petitioners sought review of the judgment in *Buono I*. Gov't C.A. Br. 1. The court of appeals affirmed the judgment in its entirety in June 2004. R. App. 1a; Pet. App. 113a. Petitioners had 90 days to seek review in this Court, 28 U.S.C. § 2101(c), and they chose not to do so.

By challenging Respondent's standing to sue in *Buono I* in this appeal, Petitioners are attempting to bring an issue before this Court years after the "mandatory and jurisdictional" deadline in 28 U.S.C. § 2101(c) has passed. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). Therefore, this Court lacks jurisdiction to consider Petitioners' attempt to seek review of Respondent's standing to bring his Establishment Clause claim in *Buono I*.

In their Petition for Certiorari – although not in their merits brief – Petitioners attempt to evade the 90-day deadline by relying on a passage from *MLB Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001), stating that this Court 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." Pet. 11 n.4. *Garvey* is inapposite, however, because the earlier judgment in that case was interlocutory, not final, as were all the earlier judgments in the cases *Garvey* cites.⁸

In *Toledo Scale Co. v. Computing Scale Co.*, this Court held it could not review issues encompassed in prior *final* judgments, even if the Court later granted certiorari on a subsequent judgment. 261 U.S. 399 (1923). Because the judgment in *Buono I* is final, not interlocutory, the issues resolved by that judgement could be brought before this Court only within 90 days of the court of appeals' June 2004 judgment. 28 U.S.C. § 2101(c).

⁸ See *Garvey*, 532 U.S. at 508 n.1 (citing *Mercer v. Theriot*, 377 U.S. 152 (1964) (*per curiam*); and *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916)).

They were not, and thus this Court lacks jurisdiction to review them during this subsequent proceeding.

2. *The Doctrine Of Res Judicata Bars Petitioners From Collaterally Attacking The Standing Ruling Embodied In The Buono I Final Judgment*

In addition to the 90-day jurisdictional bar, the doctrine of res judicata precludes Petitioners from mounting a collateral attack on the court of appeals' standing ruling in *Buono I*, which was actually litigated between these parties and necessary to the judgment there. See *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) (stating criteria for issue preclusion).⁹ Petitioners also attack the judgment in *Buono I* by invoking the doctrine of prudential standing. Pet. Br. 17-20. Although Petitioners did not raise prudential standing as a defense in *Buono I* they are nonetheless barred from presenting it here. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."). In sum, res judicata precludes Petitioners from contesting Respondent's standing in *Buono I* in this subsequent enforcement proceeding.¹⁰

⁹ The resolution of the issue was necessary to the judgment in *Buono I*, for if Respondent lacked Article III standing, the district court did not have jurisdiction. *Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 95 (1998).

¹⁰ The federal government is, just like any other party, precluded from relitigating in a subsequent proceeding an issue resolved against it in a final judgment entered in a prior

Just this past Term, in *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195 (2009), this Court reiterated the principle that, in proceedings to enforce an injunction embodied in a final judgment, res judicata bars collateral attack on jurisdictional determinations necessary to the judgment.¹¹ As part of the Johns-Manville asbestos bankruptcy, claims against its insurer, Travelers, were arguably enjoined as part of a final order entered by the bankruptcy court in 1986. Suits against Travelers nonetheless continued, and the bankruptcy court entered a subsequent clarifying order that the suits were barred by the 1986 injunction. On appeal, the Second Circuit held that the bankruptcy court lacked jurisdiction to have entered its 1986 final injunction. *Id.* at 2202. Reversing, this Court held:

[T]he 1986 Orders became final on direct review over two decades ago. . . . [W]hether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008 and is not properly before us. . . .

proceeding involving the same party. See *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 173 (1984); *Montana v. United States*, 440 U.S. 147, 164 (1979); *United States v. Munsingwear*, 340 U.S. 36, 41 (1950). To permit the government to relitigate in these circumstances would mean that no judgment against the government could ever be enforced without first being relitigated.

¹¹ Standing is treated no differently from subject matter jurisdiction for purposes of res judicata. See, e.g., *Cutler v. Hayes*, 818 F.2d 879, 888-89 (D.C. Cir. 1987) (rules of preclusion bar collateral attack on standing ruling that was part of a final judgment); 13B Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3531.15, at 355 (2008) (same); 18 MOORE'S FEDERAL PRACTICE § 132.03[5][d], at 132-35 (3d. ed. 2009).

[O]nce the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power), they became res judicata to the parties and those in privity with them. . . .

Those orders are not any the less preclusive because the attack is on the Bankruptcy Court's conformity with its subject-matter jurisdiction, *for even subject matter jurisdiction may not be attacked collaterally.*

Id. at 2203, 2205 (internal quotations omitted) (emphasis added).

Travelers reaffirmed two longstanding principles of preclusion. First, a party may not attack an earlier final judgment during proceedings to enforce that judgment. *See Sheet Metal Workers v. EEOC*, 478 U.S. 421, 441 n.21 (1986) (motion to enforce a judgment through a contempt proceeding “does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy”) (internal quotation omitted); *Maggio v. Zeitz*, 333 U.S. 56, 68 (1948) (when a case is “completed and terminated in a final order, it becomes res judicata and not subject to collateral attack in . . . contempt proceedings”); *Oriel v. Russell*, 278 U.S. 358, 363, 365 (1929) (same). Second, res judicata bars challenges to jurisdictional determinations embodied in an earlier final judgment. *See Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938) (“After a Federal court had decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact.”); *accord*,

Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982) (“A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment.”).

Travelers is indistinguishable from this case.¹² Like the insurer in *Travelers*, Respondent moved to enforce an injunction encompassed in a prior final judgment.¹³ Whether the district court lacked jurisdiction to enter that judgment cannot be relitigated in connection with this enforcement proceeding, just as the matter of the bankruptcy court’s jurisdiction to issue the final judgment in *Travelers* could not be relitigated in the enforcement proceedings there.¹⁴

¹² It is immaterial that the final judgment challenged collaterally in *Travelers* was several decades old – what matters for purposes of res judicata is the finality of the judgment not its age. See, e.g., *Oriel*, 278 U.S. at 363 (issues that were part of October 1926 final order could not be relitigated in March 1927 contempt proceeding).

¹³ The fact that Respondent filed the enforcement proceeding in the same court that issued the permanent injunction under the same case number does not alter the conclusion that it is a collateral proceeding. Enforcement proceedings typically occur before the judge who issued the initial final judgment, yet just as typically these proceedings do not permit the relitigation of the initial judgment precisely because that judgment is final. Moreover, the fact that Respondent moved to enforce, rather than selecting the more drastic option of a contempt motion, also does not alter the collateral nature of the proceedings. *Travelers* itself came to this Court on an enforcement proceeding, not a contempt proceeding. *Travelers*, 129 S.Ct. at 2200.

¹⁴ The fact that Respondent did not raise the jurisdictional bar and res judicata arguments at the certiorari stage does not

In sum, Petitioners made a calculated choice not to seek review in this Court of the standing ruling embodied in the *Buono I* final judgment. They are now bound by that choice. *See United States v. Munsingwear*, 340 U.S. 36, 41 (1950) (“The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly

preclude him from doing so now notwithstanding this Court’s S.Ct. Rule 15 (“Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court’s attention in the brief in opposition.”). First, the rule does not apply if the objections “go to jurisdiction,” as they do here. *Id.* Petitioners’ failure to seek review of *Buono I* within 90 days of the final judgment deprives this Court of jurisdiction over issues from that case. *See Jenkins*, 495 U.S. at 45. Respondent’s res judicata argument also is jurisdictional: it refutes Petitioners’ assertion that Respondent lacked standing, which is an attack on jurisdiction in *Buono I*.

Moreover, Respondent’s jurisdiction and res judicata arguments do not fall within Rule 15’s proscription because they are not arguments “based on what occurred in the proceedings below.” Sup. Ct. Rule 15. For purposes of Rule 15, the “proceedings below” are the proceedings from which certiorari was granted, *i.e.*, *Buono II*. Because Petitioners never raised *Buono I*s standing issues at any point in *Buono II*, there are no “proceedings below” on these issues.

Finally, a conclusion that Respondent waived his jurisdictional and res judicata arguments would excuse Petitioners from their failure to seek timely review in this Court of the standing ruling embodied in the final judgment in *Buono I*. Respect for the finality of judgments is a “rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts. . . .” *Moitie*, 452 U.S. at 401 (internal quotation omitted). That command should not be disregarded in favor of a discretionary waiver rule applicable to certiorari proceedings in this Court.

procedure it could have done for itself. The case illustrates not the hardship of *res judicata*, but the need for it in providing terminal points for litigation.”); *Moitie*, 452 U.S. at 400-01 (applying *res judicata* where parties “made a calculated choice to forgo their appeals”). A decision of this Court allowing Petitioners to relitigate Respondent’s Article III standing would unravel final judgments and thus undermine the values of consistency and conclusiveness that *res judicata* serves. *See Nevada v. United States*, 463 U.S. 110, 129 (1983).¹⁵

¹⁵ Petitioners did not seek relief from *Buono I* under FRCP 60(b)(4), nor could they have done so successfully. While that rule enables avoidance of “void” judgments, it has been interpreted to permit collateral attacks on the jurisdictional premise of a final judgment only when there is “no arguable basis” that the court that entered the judgment had jurisdiction. *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1346 (10th Cir. 2000) (internal quotations omitted). With both the district court and the court of appeals having carefully considered the question and found standing to exist, it cannot seriously be gainsaid that there was “no arguable basis” for standing in *Buono I*. In fact, as set forth more fully below in Section I(A)(3), Respondent plainly had standing.

Moreover, when litigants have forgone appeals, they are generally foreclosed from turning to FRCP 60. *See Ackermann v. United States*, 340 U.S. 193, 198 (1950) (denying relief under FRCP 60(b) because movants made a “free, calculated, deliberate choice[]” not to appeal judgment); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (relief from judgment under FRCP 60(b)(4) precluded where movant chose not to appeal the jurisdictional ruling of the court that entered the judgment).

3. *Respondent's Direct And Unwelcome Contact With A Religious Symbol On Government Land Gave Him Article III Injury To Bring His Establishment Clause Claim*

Even if the Court had jurisdiction to consider standing from *Buono I* and permitted Petitioners to wage their collateral attack, it would fail under this Court's precedents.

This Court has repeatedly recognized that persons who suffer noneconomic injuries may have Article III standing in Establishment Clause cases. *See Lee v. Weisman*, 505 U.S. 577, 584 (1992) (student had Article III standing to challenge religious invocation and benediction at public school graduation that she planned to attend); *Sch. Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 225 n.9 (1963) (“[S]chool children and their parents, who are directly affected by the laws and practices [mandating Bible readings in public school] against which their complaints are directed” have standing.). In such cases, the touchstone of Article III standing is direct and unwelcome contact with government action that is alleged to be impermissibly religious in nature. *Schempp*, 374 U.S. at 225 n.9. Thus, for example, a person who is subjected to unwelcome exposure to religious exercises, or who incurs burdens to avoid them, has suffered a cognizable Establishment Clause injury conferring Article III standing. *Id. Accord Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 n.22 (1982) (“The Plaintiffs in *Schempp* had standing . . . because impressionable schoolchildren were subjected to

unwelcome religious exercises or were forced to assume special burdens to avoid them.”).

Likewise, a person who experiences unwelcome direct contact with a religious symbol that sits on government property has Article III standing. This standing principle is implicit in cases such as *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005), where plaintiffs objected (on noneconomic grounds) to the presence on government property of Ten Commandments displays to which they were directly and personally exposed.¹⁶ This principle is explicit in myriad appeals court decisions involving noneconomic-based Establishment Clause challenges to religious symbols on government property. *See, e.g., Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997) (Wilkinson, C.J.); *ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772, 775 n.4 (8th Cir. 2005) (en banc); *Murray v. City of Austin*, 947 F.2d 147, 151-52 (5th Cir. 1991); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989); *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985).

Under this principle, Respondent had Article III standing to challenge the presence of the Christian cross on federal land in the Mojave Preserve. Undisputed facts in the record show that Respondent had direct and unwelcome contact with the cross and would incur burdens to avoid exposure

¹⁶ *See Sprint Communications Co., L.P. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2540-41 (2008) (citing cases in which standing was unaddressed, and thus assumed, as support for the proposition that persons bringing analogous suits have standing).

to it in the future. Specifically, as the district court found, Respondent is “deeply offended by the cross display . . . [and] will tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing, even though traveling down Cima Road is often the most convenient means of access to the Preserve.” Pet. App. 123a. On these facts, the lower courts correctly held that Respondent suffered a cognizable Article III injury and therefore had standing. *Id.* at 107a, 123a.

In collaterally attacking the lower courts’ standing rulings, Petitioners claim that Respondent’s objection to the cross in the Mojave Preserve rested on a “commitment to a certain constitutional view” regarding religious expression on government property. Pet. Br. 16. They argue that this objection is not a cognizable Article III injury under *Valley Forge* because it reflects the “psychological consequence . . . produced by observation of conduct with which [he] disagrees.” *Id.* (quoting *Valley Forge*, 454 U.S. at 485). Petitioners’ standing thesis is wrong on multiple levels.

First, Petitioners’ thesis is premised on an erroneous assumption. Petitioners claim Respondent has suffered no cognizable injury, but has merely incurred an offense to his “constitutional views,” because he is a practicing Catholic who “has no objection to Christian symbols on private property.” Pet. Br. 13.¹⁷ But, there is no logic to the assumption

¹⁷ Petitioners’ focus on Respondent’s lack of objection to religious symbols on *private property* is at odds with the Petitioners’ first question presented, which asks whether Respondent has standing “given that he has no objection to the *public display* of a cross.” Pet. Br. (I) (emphasis added).

that a person who takes no offense to a religious symbol on *private* property, therefore only has a non-cognizable objection to the placement of a sectarian religious symbol on *government-owned* property. Devout persons of all faiths – including Catholics – may welcome a diversity of private religious exercise and expression (in churches, temples, and homes, for example), while also objecting to governmental favoritism towards a particular religious sect. That such persons have no objection to private religious activity does not render their objection to government-sponsored or endorsed religious activity a mere “commitment to a constitutional view” that is insufficient to give them Article III standing.

Second, Petitioners’ reliance on the “psychological consequences” phrase wrenches it from its proper context in *Valley Forge*. Pet. Br. 15. In *Valley Forge*, shortly after using this phrase, the Court noted that the plaintiffs there were objecting to government action with respect to property located in Pennsylvania, although they lived in Maryland and Virginia; their headquarters were in Washington, D.C.; and they only learned of the action from reading a news release, not from any direct contact with the action. *Valley Forge*, 454 U.S. at 486-87. The Court then contrasted the circumstances of the *Schempp* plaintiffs: they had standing because they were enrolled in the very public schools that conducted religious exercises to which they objected, and thus they were “*directly affected* by the [actions] . . . against which their complaints are directed.” *Id.* at 486 n.22 (quoting *Schempp*, 374 U.S. at 224 n.9) (emphasis added). As Judge Kozinski recognized in holding that Respondent had Article III standing, *Valley Forge*

drew a distinction between abstract, generalized objections, which are insufficient for Article III standing, and concrete objections that may result from *direct contact* with the challenged display or practice, which are sufficient. Pet. App. 105a-106a.¹⁸ Here there is no dispute that Respondent had direct contact with the challenged cross.

Third, Petitioners appear to concede that direct exposure to “unwelcome religious *exercises*” is a sufficient Article III injury. Pet. Br. 15 (quoting *Valley Forge*, 454 U.S. at 486-87 n.22) (emphasis added). Yet, Petitioners offer no explanation (and there is none) for their proposition that direct and unwelcome exposure to religious *symbols* is an insufficient Article III injury. Any differences

¹⁸ The courts of appeal uniformly have interpreted *Valley Forge* in that fashion, not in the way that Petitioners construe it. See *Suhre*, 131 F.3d at 1087 (plaintiff who had regular contact with Ten Commandments display in county courthouse and was offended by it had standing, in contrast to plaintiffs in *Valley Forge* who “were denied standing. . . because they had absolutely no personal contact with the alleged establishment of religion.”); *ACLU Nebraska Found.*, 419 F.3d at 775 n.4 (en banc) (adopting the reasoning of the panel opinion, 358 F.3d 1020, 1029 (8th Cir. 2004), which held that plaintiff had standing under *Valley Forge* because he “personally and directly, ha[d] been subjected” to the action to which he objected, and thus had “suffered an injury of a nature and to a degree the *Valley Forge* plaintiffs did not”); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 268-69 (7th Cir. 1986) (plaintiffs who are offended by religious display that they have direct contact with, and, as a result, go out of their way to avoid it, have standing under *Valley Forge*). Accord *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466 (5th Cir. 2001); *Southside Fair Hous. Comm. v. City of New York*, 928 F.2d 1336, 1342 (2d Cir. 1991); *Foremaster*, 882 F.2d at 1490; *Hawley*, 773 F.2d at 739-40; *ACLU of Ga. v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1101 (11th Cir. 1983).

between religious exercises and religious symbols speak to the merits of the Establishment Clause claims, not to Article III standing. Compare *Weisman*, 505 U.S. at 599 (direct and unwelcome exposure to religious exercises in public school violated Establishment Clause), with *Van Orden*, 545 U.S. at 691-92 (plurality opinion) (direct and unwelcome exposure to Ten Commandments display did not violate Establishment Clause) and *id.* at 703-04 (Breyer, J., concurring in judgment).

Fourth, Petitioners interpret *Schempp* as suggesting that only plaintiffs with objections to government practices that are “contrary to the religious beliefs which they h[old]” have standing to challenge those practices.” Pet. Br. 14 (citing *Schempp*, 374 U.S. at 208). This Court’s precedents shatter the notion that the only persons who have Article III standing are those who object to government actions that are contrary to their own religious beliefs.

For example, in *Lee v. Weisman*, a Jewish plaintiff objected, as next friend of his daughter,¹⁹ to a rabbi’s delivery of a non-sectarian prayer at the daughter’s public school graduation ceremony. *Weisman*, 505 U.S. at 584; *Weisman* BIO A9-A10, ¶¶ 36, 43, 47 (Agreed Statement of Facts). In his affidavit, the plaintiff stated that he believed “inclusion of prayer in a public school graduation ceremony suggests government sponsorship of prayer and advances religion.” *Weisman* J.A. 1, Relevant

¹⁹ Daniel Weisman also objected on his own behalf as a municipal taxpayer, but the Court declared that it did not need to consider whether he satisfied the test for taxpayer standing. *Weisman*, 505 U.S. at 584.

Docket Entries, Docket for the District of Rhode Island, Case No. 89-0377B, *Weisman v. Lee*, 6/16/89 (Affidavit of Daniel Weisman, ¶13). The Court sustained plaintiffs’ standing to object to the religious practice, even though there was no evidence in the record that this practice was “contrary to the religious beliefs” that the Weismans held. In short, accepting Petitioners’ position would require this Court to overrule its standing holding in *Weisman*.

County of Allegheny v. ACLU, 492 U.S. 573 (1989) and *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005), are similar to *Weisman*. In *Allegheny*, the plaintiffs objected to the presence of a crèche in a county courthouse and menorah outside a municipal building. *Allegheny*, 492 U.S. at 578-79. One of the plaintiffs was a devout Catholic who had a crèche in her own home. *Allegheny*, J.A. 100-01. Other plaintiffs were Jewish and objected to the menorah’s display. *Allegheny*, 492 U.S. at 650-51 (Stevens, J., concurring in part and dissenting in part). No member of the Court suggested that the *Allegheny* plaintiffs lacked Article III standing because they objected to symbols of their own religions. Nor did any member of this Court challenge the district court’s holding in *McCreary County* that the plaintiffs there had Article III standing to challenge Ten Commandments displays in county courthouses and schools, 96 F.Supp.2d 679, 682-83 (E.D.Ky., 2000), even though plaintiffs did not phrase their objections to the displays as being “contrary to their religious beliefs.” *McCreary County*, J.A. 17 (district court docket, entry no. 63, Amended Complaint, ¶¶ 31-33).

The Court’s precedents are rooted in the history of the adoption of the Establishment Clause.

The framers of the Establishment Clause intended it not only to protect members of minority faiths from government action that is contrary to their religious beliefs, but also to protect members of majority faiths from government action that supports their religious beliefs. Indeed, the record of the adoption of the Establishment Clause reflects a strong concern that government favoritism of a particular religious sect actually would harm that sect, not benefit it. See James Madison, Memorial and Remonstrance against Religious Assessments, Paragraphs 6-7 (1785) (*available at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html*) (government support for the established religion will enervate it). In commenting on that history, this Court repeatedly has stated that the Establishment Clause’s “first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to *degrade religion*. . . .” *Engel v. Vitale*, 370 U.S. 421, 431-32 (1962) (citing Madison, Memorial and Remonstrance); *see also Weisman*, 505 U.S. at 590 (“A principal ground for [Madison’s opposition to establishment] was his view . . . [that]: ‘[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.”); *Lynch v. Donnelly*, 465 U.S. 668, 698 (1984) (O’Connor, J., concurring) (noting Framers’ concern regarding government action that favors religion but at the same time degrades it).

Finally, Petitioners’ argument that standing only resides with those who object to practices “contrary to the[ir] religious beliefs” is at odds with this Court’s recurring concern that judges not inquire

into whether a person's conduct or beliefs are religious in nature. *See, e.g., Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) ("Particularly in this sensitive area [of religious beliefs], it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."). *Accord Gillette v. United States*, 401 U.S. 437, 457 (1971). Petitioners' argument defies those teachings because it calls on judges to evaluate standing by ascertaining whether a belief is religious.

The wisdom of those teachings is demonstrated by the problems that would result were the Court to overrule its previous standing holdings and adopt Petitioners' approach. Under that approach, it is unclear whether an atheist who objected to a government sponsored prayer would have standing if she denied that atheism is a religion. Pet. Br. 14 (arguing that challenged practice must be contrary to plaintiff's "religious beliefs"). If plaintiff were a Jewish member of an organization committed to church-state separation, courts would have to determine whether his objection to a cross stemmed from his religious beliefs or his constitutional beliefs. What if a Christian and a Muslim, who shared the view that government misappropriates religious symbols and corrupts religion, challenged the presence on government property of a Christian cross? Would the Muslim, but not the Christian, have standing? These are not inquiries and distinctions that courts can, or should, make.

* * *

In sum, if this Court exercised jurisdiction and permitted Petitioners to reargue Respondent's Article III standing in *Buono I* at this late date, that argument would fail. Respondent suffered direct and concrete injury in fact through unwelcome exposure to the Christian cross, and Petitioners' attempts to escape this conclusion are unconvincing.

4. *The Prudential Standing Doctrine Is Inapplicable To Buono I Because Respondent Sought To Vindicate His Own Rights, Not The Rights Of Third Parties*

Petitioners argue in this Court – for the first time in either *Buono I* or *Buono II* – that *prudential* standing considerations should also have counseled against the exercise of jurisdiction over Respondent's Establishment Clause claim in *Buono I*. As demonstrated above, this Court lacks jurisdiction to hear, and Petitioners are precluded from making, a prudential standing argument at this juncture.

In any event, Petitioners' prudential standing argument rests on the mistaken assumption that Respondent sought to redress not his own injury, but the injuries of third parties who may wish to erect other religious displays at Sunrise Rock. Pet. Br. 18. The lower courts determined that Respondent was personally confronted with, and offended by, government promotion of a sectarian religious symbol and hence that he had standing. Pet. App. 107a; 137a. Nothing in these lower court determinations indicated in any way that he was suing to vindicate the rights of others.

Petitioners misapprehend the relevance of Respondent's reference to their refusal to allow persons to erect other symbols in the area of the cross. The treatment of third parties spoke to the merits of Respondent's claim in *Buono I*, not to his standing to bring it. The government's preferential treatment of the cross reflected impermissible favoritism of one religious sect over others in violation of the most basic Establishment Clause command. *See Larson v. Valente*, 456 U.S. 228, 244-245 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion) (giving sectarian private religious speech preferential access to government land would violate the Establishment Clause).

Because Respondent vindicated his own rights, and argued facts about others only to support the merits of his own claim, this Court's prudential standing limitations are irrelevant. *See APCC*, 128 S. Ct. at 2544.

B. In *Buono II*, Respondent Is The Proper Party To Enforce The Judgment Entered In *Buono I*

In addition to their untimely, collateral attack on Respondent's standing in *Buono I*, Petitioners contend that Respondent lacks standing to challenge the land transfer in *Buono II*. Pet. Br. 9-10, 14. Their argument misframes the nature of the proceedings in *Buono II*: Respondent's motion sought to enforce the permanent injunction he had secured as final relief in *Buono I* and his ability to

bring such a motion turned on whether he was a proper party to enforce that judgment – which he clearly was.²⁰

Respondent secured a permanent injunction in *Buono I*. Petitioners argue that Congress enacted Section 8121 in an attempt to remedy the violation found there. Respondent initiated *Buono II* by bringing a motion to enforce *Buono I*'s permanent injunction, arguing that Section 8121 failed to remedy the violation. As the party who secured the permanent injunction, Respondent is the proper party to pursue a judicial interpretation of whether Congress' enactment did in fact remedy the violation. See 11A WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE § 2960 (“ . . . [P]roceedings to enforce a civil remedy . . . should be instituted by the parties aggrieved.”). So indisputable is this premise that a party may enforce its own judgment that the only issue addressed in detail in the relevant rules and cases is whether *non-parties* can enforce judgments. See, e.g., Fed. R. Civ. P. 71 (identifying when a nonparty may enforce a judgment in “*the same [way] as for a party*”) (emphasis added); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975) (“[A] consent decree is not enforceable directly or in collateral proceedings

²⁰ In his motion to enforce, Respondent also argued that the land transfer was itself unconstitutional, but neither court below addressed this argument. It is therefore not before this Court. Nonetheless, his allegation that the land transfer interfered with his permanent injunction made him a proper party to pursue that constitutional claim, just as it made him the proper party to pursue the narrower claim decided by the courts below that the land transfer was not a sufficient remedy to *Buono I*'s constitutional violation. See *infra*.

by those who are not parties to it. . . .”); 12 FEDERAL PRACTICE AND PROCEDURE § 3032 (discussing circumstances in which *non-parties* may enforce judgments). Indeed, Respondent is not aware of any case where a court has held that a plaintiff who had obtained a permanent injunction in his favor was an improper party, or lacked standing, to enforce that injunction.

Petitioners frame the issue as one of “standing” not “proper party to enforce,” but this framing is to no avail for two reasons. First, Petitioners’ argument makes no sense. They quote Respondent’s statement in *Buono I* that he “has no objection to Christian symbols on private property,” Br. at 14, and argue that since Section 8121 transfers the cross to private land, Respondent therefore lacks “standing” to object to the transfer. *Id.* But, as argued below, Respondent contends that the federal government will continue to retain significant interests in the land and the symbol, thereby failing fully to “privatize” the cross and perpetuating an impermissible government endorsement of religion. This objection to the transfer articulates an injury in fact for standing purposes and refutes the logic of Petitioners’ contention that Respondent lacks standing.²¹ Moreover, Respondent clearly has standing because in arguing that Section 8121 does not remedy the violation in *Buono I* and interferes with the

²¹ Petitioners’ reliance on Respondent’s statement is illogical for another reason: it was made in 2002, J.A. 64-65, prior to both the entry of *Buono I*’s judgment and the enactment of Section 8121. Because Respondent’s statement was made years before Congress’ enactment of Section 8121, it cannot be used as evidence that Respondent has no objection to that statute.

permanent injunction he secured there, he articulates a concrete injury in fact from that enactment.

This Court's recent decision in *Horne v. Flores*, 129 S. Ct. 2579 (2009), provides two distinct analogous situations supporting Respondent's position that he has standing to enforce the *Buono I* judgment. The petitioner in *Horne* brought a Rule 60 motion seeking relief from a final judgment against him. In holding that he had standing to bring that motion, this Court stated that:

[Petitioner] is a named defendant in the case[,] the Declaratory Judgment held him to be in violation of [a federal law], and the current injunction runs against him. For these reasons alone, he has alleged a sufficiently personal stake in the outcome of the controversy to support standing.

Id. at 2592 (internal quotations omitted). If the defendant in *Horne* had standing to seek relief from a judgment entered *against him*, Respondent similarly has standing to enforce a judgment entered *for him*: as did the defendant in *Horne*, Respondent alleges a "personal stake" in the outcome of this controversy.

Further, in a portion of the court of appeals decision in *Horne* not upset by this Court, the court of appeals sustained plaintiff's standing to argue that an Arizona law (HB 2064) enacted in reaction to a judgment in her favor did not remedy the violation found in the judgment:

HB 2064 holds itself out as a remedy for Flores and was presented to the court by Arizona and by the [defendants] as such. Whether or not

Flores would have had standing to challenge HB 2064 in the first instance, *she certainly has standing to argue that a purported remedy will not satisfy a judgment in her favor.*

Flores v. Arizona, 516 F.3d 1140, 1164 (9th Cir. 2008) (emphasis added), *rev'd on other grounds*, *Horne v. Flores*, 129 S. Ct. 2579 (2009). *See also Allen v. Wright*, 468 U.S. 737, 763 (1984) (beneficiary of an injunction has standing to enforce it). Likewise here, Respondent certainly has standing to argue that Section 8121, Congress's purported remedy, does not "satisfy [the] judgment in [his] favor."

II. THE STATUTORY LAND TRANSFER FAILS TO REMEDY THE ADJUDICATED ESTABLISHMENT CLAUSE VIOLATION AND WAS PROPERLY ENJOINED

In *Buono I*, the court of appeals held that the presence of a Christian cross on federal land violated the Establishment Clause because the display of the cross, and the government's favoritism towards private parties who wanted to erect the cross, constituted an impermissible endorsement of Christianity. Pet. App. 108a-112a. That holding is embodied in the final judgment in *Buono I* that was never appealed to this Court, and hence its propriety is not before this Court for the same reason that Respondent's standing in *Buono I* is not properly at issue. *See* Section I(A)(1)-(2), *supra*.

Also not before this Court is the question of whether the land transfer statute is unconstitutional. Neither the district court nor the court of appeals held that the transfer violated the

Constitution.²² They merely held that the statute did not cure the Establishment Clause violation adjudicated in *Buono I*. Pet. App. 84a-85a; 97-98a. It is this issue – whether Section 8121 cures the Establishment Clause violation – that is before this Court.²³

Whether a measure proposed to remedy a constitutional violation is sufficient depends on the nature and extent of the violation, *Milliken v. Bradley*, 418 U.S. 717, 744 (1974), and whether the measure will “eliminate so far as possible” the effects of the violation and bar it from recurring, *United States v. Virginia*, 518 U.S. 515, 547 (1996) (internal quotations omitted). Under this standard, the land transfer is an insufficient remedy for any of four independent reasons, as explained in the four sections that follow in Part A, below:

1. the government’s endorsement of the Christian cross is not remedied because, by Act of Congress, the cross remains designated a national memorial;

2. the government’s endorsement of the Christian cross is not remedied because Petitioners maintain a reversionary interest in, and continued supervisory duties over, the land on which the cross is located;

3. the government’s endorsement of the Christian cross is not remedied because the structure

²² See *supra* note 20.

²³ Because the lower courts did not adjudicate the constitutionality of the land transfer statute, Petitioners’ argument that it had a valid secular purpose under the *Lemon* test is irrelevant. Pet. Br. 34.

of the transfer perpetuates the government's longstanding favoritism towards the cross;

4. the government's endorsement of the Christian cross is not remedied because Congress' conceded purpose, and the history of congressional enactments concerning the land, demonstrate that the transfer was designed to ensure that the Christian cross remained in the very same location on Sunrise Rock.

Because Section 8121 fails to remedy the Establishment Clause violation that was adjudicated in *Buono I*, the court of appeals was correct to enjoin the transfer from going forward. If the land were transferred from the government to private parties, Petitioners no longer could take all the steps necessary to remedy the violation and comply with the district court's injunction. For example, because Petitioners would no longer own the land, they could not effectuate a *bona fide* transfer, one that did not show favoritism to the cross and to the entities who want it maintained in its current location. Nor would the court be able to exercise its inherent authority to enforce its injunction, if necessary. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 690 (1978) (courts have inherent authority to enforce their orders).²⁴

²⁴ Petitioners create a false dichotomy, arguing that the government's two alternatives in the wake of the injunction were to destroy the cross or give up ownership of the land. Pet. Br. 20, 28. The district court's permanent injunction did not require that the government destroy the cross if it chose to keep the land. Petitioners could simply have removed the cross and returned it to Mr. Sandoz, or given it to the VFW, without "destroying it" or demonstrating any disrespect for Christianity or veterans.

Petitioners would like to pretermite this whole analysis on the grounds that a transfer to private parties removes state action and hence removes the necessity for judicial scrutiny. Pet. Br. 21 (“It is a fundamental tenet of this Court’s jurisprudence that private action is immune from the strictures of the First and Fourteenth Amendments. . .”) (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974)). Petitioners essentially argue not that the ends justify the means, but that the ends eliminate their need to justify the means. But this argument obviously fails: the means the government employs to achieve their ends of privatizing the property – the land transfer statute – itself constitutes state action and hence must comply with the permanent injunction specifically and the Constitution more generally. *See Mercier*, 395 F.3d at 704 (analyzing whether government transfer of land to private parties was permissible under the Establishment Clause).

Moreover, the ends Petitioners tout here are less pure than they would have it: this land transfer does not remove all state action for the reasons identified below. Petitioners’ argument would suggest that a cross unconstitutionally placed on city hall steps could be remedied by selling a few of the stairs to private parties. But obviously the Establishment Clause would no more tolerate such an outcome as a cure than it would permit the government to create such a display in the first instance, given the sectarian favoritism that both reflect. *See, e.g., Allegheny*, 492 U.S. at 611 (“[T]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof

of city hall.”) (Kennedy, J., concurring in part and dissenting in part).²⁵

A. Section 8121 Fails To Remedy The Adjudicated Establishment Clause Violation Because It Perpetuates Government Favoritism Of A Sectarian Religious Symbol

1. *By Act Of Congress, The Cross Remains Designated A National Memorial*

The Christian cross at Sunrise Rock will

²⁵ Short of escaping having to justify their means at all, Petitioners’ fall-back position is that their means should enjoy a presumption of validity. Pet. Br. at 24. On the contrary, when the government argues that constitutional violations have been remedied, the burden rests with it to demonstrate the legitimacy of the cure. See *Friends of the Earth, Inc. v. Laidlaw Environ. Serv. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (burden on government to demonstrate mootness); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) (burden on government to demonstrate changed circumstances justifying relief from judgment under Fed. R. Civ. P. 60(b)(5)). Nothing in *Marshfield* or *Mercier*, the cases upon which Petitioners’ “presumptive remedy” notion rests, supports such a reversal of the normal approach to evaluating proposed remedies in the constitutional context. Equally misguided is Petitioners’ contention that because the land transfer is an Act of Congress, it is a “presumptively permissible” remedy. Pet. Br. 24 (citing *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004)). In fact, *Favish* says nothing about whether an Act of Congress addressing an already-adjudicated constitutional violation should be presumed to be a permissible remedy. Petitioners cite no other case to support deference to Congress in a constitutionally remedial context and Respondent is aware of none. In any event, regardless of where the burden lies, Respondent’s arguments demonstrate the failure of the transfer to remedy the constitutional violation.

remain designated a national memorial even after the transfer because the land transfer statute (Section 8121) does not alter the law that designates the cross as a national memorial (Section 8137). That designation undermines the purported curative effect of the land transfer.

As a national memorial, the cross is in a select group. There are only 45 other national memorials in the United States, and the list features some of the nation's most significant and iconic symbols, including the Washington Monument, the Jefferson Memorial, the Lincoln Memorial, the Vietnam Veterans Memorial, the United States Marine Corps Memorial, the Flight 93 Memorial, and Mount Rushmore. See 16 U.S.C. § 431 note. As one of the few displays that Congress has designated a national memorial, the cross necessarily will reflect continued government association with the preeminent symbol of Christianity. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 792 (1995) (Souter, J., concurring in part and concurring in the judgment) (“the Latin cross . . . is the principal symbol of Christianity around the world, and display of the cross alone could not reasonably be taken to have any secular point”). See also *Harris v. City of Zion*, 927 F.2d 1401, 1412 (7th Cir. 1991) (“a Latin cross . . . endorses or promotes a particular religious faith. It expresses an unambiguous choice in favor of Christianity”); *ACLU of Ga. v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1103 (11th Cir. 1982) (“the [L]atin cross is a universally recognized symbol of Christianity”); Eerdman's Handbook to the World's Religions 340 (R. Pierce Beaver et al. eds., 1982) (“The cross has rightly become the symbol of Christianity”); J.A. 89 (“[T]he

Latin Cross is a sectarian Christian religious symbol.”) (Siker Declaration ¶ 15).

The transfer therefore cannot remedy the Establishment Clause violation because it leaves in place the designation of Christianity’s preeminent symbol as a national memorial. There has long been a consensus among Justices of this Court that there is no greater offense to the Establishment Clause than government favoritism of one religion over another. *See Allegheny*, 492 U.S. at 603 (“[N]ot even the ‘unique history’ of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief.”); *Larson*, 456 U.S. at 244-245 (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”); *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (“The [Establishment] Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.”); *McCreary County*, 544 U.S. at 909 (Scalia, J., dissenting) (symbol on government land does not violate Establishment Clause if it is “not so closely associated with a single religious belief that [its] display can reasonably be understood as preferring one religious sect over another”); *Weisman*, 505 U.S. at 641 (Scalia, J. dissenting) (“[O]ur constitutional tradition . . . rule[s] out of order government-sponsored endorsement of religion – even when no legal coercion is present, and indeed even when no ersatz, ‘peer-pressure’ psycho-coercion is present – where the endorsement is sectarian, *in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler*

of the world are known to differ (for example, the divinity of Christ).”) (emphasis added) (citation omitted); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 42 (2004) (O’Connor, J., concurring) (“While general acknowledgments of religion need not be viewed by reasonable observers as denigrating the nonreligious . . . no religious acknowledgment could claim to be an instance of ceremonial deism if it explicitly favored one particular religious belief system over another.”).

Because the cross is sectarian and specifies the divinity of Christ, its continuing designation as a national memorial renders the mere privatization of the land upon which it sits an insufficient remedy for the Establishment Clause violation adjudicated in *Buono I*. Regardless of who owns the land on which the cross sits, its continuing designation as a national memorial excludes the contribution and sacrifice of hundreds of thousands of non-Christian World War I veterans and their families.²⁶ Indeed, the court of appeals concluded that the war memorial designation might lead “observers to believe that the [government] ha[d] chosen to honor only Christian veterans.” Pet. App. 110a n.5 (quoting *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996) (O’Scannlain, J., concurring)).²⁷

²⁶ For example, about 250,000 Jews served in the United States Army in World War I, and approximately 3,500 were killed in action or died of wounds. See *Jewish-American History and Culture: An Encyclopedia*, at 397 (Garland Publishing 1992).

²⁷ If this Court affirms the judgment in *Buono II*, Petitioners will be required to abide by *Buono I*’s permanent injunction. If Petitioners chose to comply with the injunction by removing the cross from Sunrise Rock and giving it to either the VFW or the

Petitioners present no credible defense of how the continuing designation of the cross as a national memorial is consistent with a valid remedy of the constitutional violation. Petitioners claim that when a display is on private land, observers will *generally* attribute that display to the private owner. But in none of the cases that Petitioners cite for this proposition, Pet. Br. at 23-25 & n.3, had a government designated the privately-owned symbol at issue to be a public memorial. When the government has done so, as here it has designated the Christian cross a national memorial, observers will surely presume that the symbol expresses the government's message.

Petitioners also contend that “if the Constitution permits the government to *display* a longstanding memorial with a predominantly secular message . . . *a fortiori* it permits the government to *transfer* such a memorial to a bona fide private recipient.” Pet. Br. at 29 (citing *Van Orden*, 545 U.S. at 691-92 (plurality); *id.* at 603-04 (Breyer, J., concurring in the judgment)). This syllogism fails. To hold that the government may transfer something it is *permitted to display* says absolutely nothing about whether the government remedies a constitutional violation by transferring something *it has been ordered not to display*, such as the sectarian religious symbol held to be unconstitutional in *Buono I*.

Sandozes, that action would essentially nullify the designation of the cross as a national memorial because the designation applies only to the cross at Sunrise Rock. See Pub. L. No. 107-117, § 8137(a),(b).

2. *Petitioners Maintain A Reversionary Interest In, And Continued Supervisory Duties Over, The Land On Which The Cross Is Located*

Petitioners' core argument concerning the land transfer is that reasonable observers will presume that a religious monument reflects the views of the owner of the property. Thus, they argue, if the land on which the cross is located is owned by the VFW, the constitutional violation adjudicated in *Buono I* will end. Pet. Br. 21-23. This argument is unavailing. Because a number of statutory provisions will have the effect of continuing the government's association with the cross, the land transfer will not result in the cross' reflecting only the message of a private party.

First, Section 8121 includes a reversionary clause providing that if the VFW fails to maintain the land as a memorial to American veterans of World War I, it will revert to the government. The reversionary clause leaves an important part of ownership of the property in the government's hands. As the court of appeals noted, it is well-established that reversionary clauses in government land transfer provisions constitute a form of continuing government control over the property. Pet. App. 80a (citing cases). These cases conform with the basic legal tenet that a reversionary interest is an ownership interest in real property. *See, e.g.*, RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 1.4 (1983).

Moreover, the reversionary clause is directly tied to Petitioners' conceded interest in ensuring that

the sectarian religious symbol at the heart of this case remain in place at Sunrise Rock.²⁸ This is so because the reversionary clause will likely influence the VFW's decision about how it uses its property; for if the VFW takes the cross down, that action will raise the question of whether the land is being maintained as a war memorial. The VFW can most easily avoid this question simply by maintaining the cross. By contrast, the reversionary clause in *Marshfield* was entirely unrelated to the religious symbol on the land that was transferred. *Marshfield*, 203 F.3d at 490 (deed contained a covenant running with land transferred to private party, the only effect of which was to restrict use of the parcel to public park purposes). And in *Mercier*, the government did not retain any future interest in the transferred land. 395 F.3d at 705.

Petitioners' attempts to diminish the significance of the government's continuing ownership interest in the land on which the cross is located are unsuccessful. It is of no moment here that "reversionary clauses are common in land transfers." Pet. Br. 43. Common or not, this clause, which relates to the maintenance of the symbol, stands in the way of the complete transfer of ownership that is necessary in this case to a remedy that "so far as possible" cures the violation. *United States v. Virginia*, 518 U.S. at 547.²⁹ Nor is it

²⁸ See Section II(A)(4), *infra*.

²⁹ An issue posed by *Marshfield* – whether a reversionary clause that is *unrelated* to the display that has been held to violate the Constitution would be permissible – is not posed by the facts of this case.

important whether the reversionary interest constitutes state action. Pet. Br. 42-43. It is enough that the clause constitutes an ownership interest in the property relating directly to the unconstitutional display and influences the VFW's actions.

A second federal statute, 18 U.S.C. §1369,³⁰ also belies the argument that the transfer will disassociate the government from the cross. That statute makes it a federal crime to harm or destroy a war memorial on land that is under the jurisdiction of the federal government.³¹ Thus, the federal

³⁰ 18 U.S.C. §1369 states:

(a) Whoever, in a circumstance described in subsection (b), willfully injures or destroys, or attempts to injure or destroy, any structure, plaque, statue, or other monument on public property commemorating the service of any person or persons in the armed forces of the United States shall be fined under this title, imprisoned not more than 10 years, or both.

(b) A circumstance described in this subsection is that - (1) in committing the offense described in subsection (a), the defendant travels or causes another to travel in interstate or foreign commerce, or uses the mail or an instrumentality of interstate or foreign commerce; or (2) the structure, plaque, statue, or other monument described in subsection (a) is located on property owned by, or under the jurisdiction of, the Federal Government.

³¹ Given the cross's designation as a national memorial by Congress, and the fact that 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" for purposes of Section 1369. *See* 16 U.S.C. §§ 410aaa-42, 410aaa-43 (providing for the transfer of approximately 1.4 million acres in the boundary of the Mojave National Preserve from the BLM to the "administrative jurisdiction" of the Director of the NPS). Land within the boundary of the Preserve includes privately owned land. *See* 16 U.S.C. § 410aaa-56

government is committed to policing the display even if it were owned by the VFW. Moreover, this statute arguably prevents the VFW from dismantling the display lest it be accused of destroying a war memorial. While courts may generally impute expression on private land to its private owner, that understanding would not hold where the private owner is likely *required* by federal law to maintain the expression.

Petitioners contend that 18 U.S.C. § 1369(b) does not bar the VFW from removing the cross because “[t]he Park Service will be able to regulate Sunrise Rock only insofar as activities on those inholdings affect the purposes of federally owned lands.” Pet. Br. 42. They defend this narrow reading of the relevant statutes on the grounds that such a saving construction helps avoid “casting constitutional doubt on Congress’s transfer the land.” Pet. Br. at 42 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). While Petitioners are correct that the obvious reading of the statutory framework does raise constitutional concern (specifically, that reading undermines the contention that the land transfer remedies the constitutional violation), they are incorrect that a saving construction is available here. *See Pennsylvania Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998)

(permitting the Secretary to acquire privately owned lands “within the boundary of the [Mojave National P]reserve”); *Free Enter. Canoe Renters Ass’n v. Watt*, 711 F.2d 852, 856 (8th Cir. 1983) (observing that the phrase “within the boundaries” of the Ozark National Scenic Riverways “incorporate[s] federal, state, and private land, and . . . makes no distinctions on the basis of ownership”).

(saving construction of a statute only available if reasonable). There is no reasonable interpretation of §1369(b) that would exclude from its scope war memorials located on land that is within the “administrative jurisdiction” of a federal agency. Any interpretation that limited the scope of 18 U.S.C. § 1369(b)(2) to land owned by the federal government would violate a basic rule of statutory interpretation by nullifying the phrase “under the jurisdiction of the federal government.” See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (internal quotations omitted).

Third, wholly apart from the reversionary clause and 18 U.S.C. § 1369, a set of statutory provisions provide that the NPS necessarily will continue to exercise regulatory and supervisory duties over the land on which the cross is located because the cross is to remain a national memorial post-transfer and the land is within the boundaries of the Mojave National Preserve. For example, Title 16 U.S.C. § 1 provides that NPS “shall promote and regulate the use of Federal areas known as national parks, monuments, and reservations . . .” National memorials were explicitly included within the definition of the national park system in 67 Stat. 496 (1953) and thus under the NPS’ regulatory authority. That regulatory authority was maintained in Pub. L. 91-383, § 2(a) (1970), now codified in 16 U.S.C. § 1(c). The director of the NPS also has “the supervision, management, and control” over the memorial under 16 U.S.C. § 2. Furthermore, the land transferred by Section 8121 will remain within the boundaries of the Preserve, and thus under the jurisdiction of the

NPS. See 16 U.S.C. §§ 410aaa-42 and 410aaa-43; 16 U.S.C. § 2. See also 16 U.S.C. § 1; Pet. App. 78a-79a.

The government exercised no such regulatory authority or “supervision, management, and control” following the land transfers in *Marshfield* or *Mercier*. Indeed, a prime example offered by the Seventh Circuit of “unusual circumstances” that would raise a fact-specific question about whether a land transfer cured an Establishment Clause violation was a sale that “left the [government] with continuing power to exercise the duties of ownership.” *Mercier*, 395 F.3d at 702. And in *Marshfield*, it was precisely the government’s cessation of ownership duties over the land on which the religious symbol rested that led the Seventh Circuit to conclude that the transfer did not violate the Establishment Clause. *Marshfield*, 203 F.3d at 493.

Petitioners’ only response to the NPS’ ongoing statutory management and supervision duties over the cross is unpersuasive. Petitioners state that the designation as a national memorial “has no legal significance [because] [s]uch a declaration standing alone does not transfer any regulatory authority over private property to the federal government.” Pet. Br. 41. However, 16 U.S.C. § 1, provides that NPS “shall promote and regulate the use of Federal *areas* known as national parks, monuments, and reservations. . . .” *Id.* (emphasis added).³² In other words, national

³² Petitioners did not contest below, or in their Petition to this Court, that the NPS’ duties with respect to national monuments applied also to national memorials. They argued only that the NPS’ duties of “supervision, management, and control” applied to national memorials on federal land, not private land. Pet. 27.

monuments are “Federal areas” under 16 U.S.C. Section 1, regardless of whether they are on federal or private land.³³ If Congress had wanted to limit the NPS’ jurisdiction to national monuments or memorials on federal lands, it could have done so, as it has done in other statutes. *Compare* 7 U.S.C. § 2814 (requiring federal agencies to “develop and coordinate an undesirable plants management program for control of undesirable plants on Federal lands under the agency’s jurisdiction.”). Under statutory construction principles, Congress’s failure to use the term “federal lands” in 16 U.S.C. § 1 means that the provision should be interpreted to extend to “federal areas” that are not located on “federal land.” *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 & n.2 (1987) (discussing statutory construction implications of Congress’s use of a term in one statute that it failed to use in a second statute).

Thus, the land transfer does not fully remedy the constitutional violation because of the numerous ways Petitioners will continue to have an ownership interest in, and control over, the Christian cross and the land on which it is located.

³³ Other provisions of federal law also demonstrate that national monuments may be located on private land. For example, 16 U.S.C. § 431 provides that the President may designate national monuments and that “when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract . . . *may be* relinquished to the government.” (emphasis added). If the tract on which the national monument rests is not relinquished to the government (and it does not have to be under Section 431), then the tract would remain in private hands, notwithstanding the presence of a national monument on it.

3. *The Structure Of The Transfer
Perpetuates The Government's
Longstanding Favoritism
Towards The Cross*

Section 8121's method of transfer underscores that the statute is an insufficient remedy to the Establishment Clause violation. A valid remedy responds to the specific nature of the violation. See *Milliken*, 418 U.S. at 744. The government's favoritism for Mr. Sandoz and the sectarian religious symbol he erected on public land, and its exclusion of another private party who wanted to erect a different religious symbol, were principal reasons for the court of appeals' Establishment Clause holding. Pet. App. 112a-113a. Accordingly, eliminating that favoritism and exclusion "so far as possible" is essential to a valid remedy. *United States v. Virginia*, 518 U.S. at 547. Here, the method of transfer perpetuates this favoritism and exclusion by permitting only the Sandozes and the VFW to participate in the transfer of the land on which the sectarian religious symbol rests.

Section 8121's perpetuation of favoritism and exclusion is manifested in the unusual method of transfer that Congress employed in the statute, a method of transfer that bypassed the normal statutory channels. Specifically, there is a general land transfer statute that provides for the Secretary of Interior to exchange federal land for non-federal land. Petitioners did not use it. There is a second statute that addresses land exchanges within the Preserve. Petitioners did not use it either. Pet. App. 81a-82a (citing statutory provisions governing land

exchanges by the Secretary of Interior and in the Mojave Preserve). Instead, Congress enacted a special provision in an appropriations bill, essentially a private bill benefitting a particular association (the VFW) and particular individuals (the Sandozes).

This circumvention of the ordinary channels for transferring land implicates the concern for sectarian favoritism that this Court warned about in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). In *Kiryas Joel*, this Court held that New York violated the Establishment Clause when it devised, through a special Act of the legislature” rather than through the “State’s general laws,” a school district whose boundaries were coextensive with the boundaries of a devoutly religious village. *Id.* at 700-01. The Court grounded its decision in the abnormal circumstances surrounding the creation of the district, which raised concerns that the state had not, and would not, exercise its school district reorganization “authority in a religiously neutral way,” as the Establishment Clause requires. *Id.* at 703. Here, too, the abnormal circumstances surrounding the method of land transfer further undermines the remedial legitimacy of Section 8121.

Petitioners respond that selling the land to the VFW is permissible because the VFW has a longstanding relationship with the memorial and is the “logical purchaser.” Pet. Br. at 46 (quoting *Mercier*, 395 F.3d at 705). But the transfer statute was meant to remedy a constitutional violation based in part on unconstitutional favoritism toward the symbol originally erected by this very group, and so a transfer specially directed to this group does not

remedy the Establishment Clause problem. It would be logical for the government to return the cross to the VFW or the Sandozes. But it is not logical for the government to sell a parcel of government-owned land in a National Preserve to the VFW just because the cross is on it, particularly since neither the VFW or the Sandozes ever owned the land on which the cross sits. J.A. 71; R. App. 3a.

Where a constitutional violation is based in part on impermissible favoritism, eliminating that favoritism as much as possible so that the parties return to the situation they would have been in absent the favoritism is essential to a proper remedy. See *United States v. Virginia*, 518 U.S. at 547. To satisfy that standard here, the government would either have to keep the land and return the cross to the VFW or the Sandozes, or sell the land according to its usual processes or in some other neutral fashion.

4. *The Conceded Purpose Of Section 8121, And The History Of Other Relevant Statutes, Demonstrate That The Transfer Was Designed To Ensure That The Christian Cross Remained In The Very Same Location On Sunrise Rock*

The final judgment in *Buono I* permanently enjoins the Petitioners from displaying the Christian cross on Sunrise Rock. Petitioners concede that one of the primary purposes of Section 8121 is to ensure that the Christian cross will continue to be displayed at Sunrise Rock. Pet. Br. 28. While they state that Congress' intent was to preserve "a longstanding war

memorial,” *id.*, that war memorial *is* the cross. Pub. L. 107-117, § 8137(a) (designating cross in Mojave Preserve as a national memorial to World War I veterans).

The structure of the transfer and the government’s previous efforts to preserve the cross are all consistent with the government’s conceded purpose of ensuring the cross remains displayed at Sunrise Rock, albeit on land that would be primarily owned by the VFW. For example, Section 8121 provides for the Sandozes to give land to the government in exchange for the government’s giving the land on which the cross is located to the VFW. Because Mr. Sandoz erected the current cross and has stated both his unwillingness to take the cross down and his commitment to putting it back up if the NPS took it down, Pet. App. 120a, his linchpin role in the transfer makes clear that Congress structured the transfer to ensure that the cross remains standing in its current location. Indeed, Petitioners concede that the transaction is structured to increase the likelihood that the cross will remain in place, and the VFW has declared that it intends to maintain the cross “in perpetuity.” Pet. Br. 28, 48; VFW Reply On Motion to Intervene at 3.

In addition, Congress twice forbade the NPS from spending any funds to take the cross down, once after the initial letter on behalf of Respondent to the NPS, and again *after* the district court had already entered its 2002 judgment encompassing the permanent injunction. Public Law 107-248, § 8065(b) states: “[n]one of the funds in this or any other Act may be used to dismantle *national memorials* commemorating United States participation in World War I.” (emphasis added).

Petitioners claim that the purpose of that provision was to prevent the destruction of *other* World War I memorials on federal land. Pet. Br. 38. There are, however, no other *national memorials* commemorating United States participation in World War I on federal land, other than the Christian cross at issue here. *See* 16 USC § 431 note. In other words, the sole purpose and effect of that congressional act was to prevent the NPS from taking steps to obey the district court's injunction.

If the principal effect of displaying a Christian cross on government property is impermissibly to advance a sectarian religious message, then a series of government acts, including the land transfer provision, that have the purpose and effect of ensuring that the *same* sectarian display remains standing in the *same* location with ongoing government involvement and endorsement constitutes an insufficient remedy to the adjudicated violation. Petitioners' position is that so long as the eventual owner of the religious symbol is not the government, there is no constitutional problem with the government's structuring the transaction to ensure an entity committed to keeping the symbol up is selected; were the Court to endorse this position, it "would tempt [] public bod[ies] to contract out [their] establishment of the religious, by encouraging the private enterprise of religion to exhibit what the government could not itself display." *Pinette*, 515 U.S. at 792 (Souter, J., concurring in part and concurring in the judgment). Petitioners' position also is inconsistent with longstanding precedent. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492-93 (1989) (plurality opinion) (government may not use private parties to accomplish what it is

forbidden to achieve); *accord, Norwood v. Harrison*, 413 U.S. 455, 465 (1973).

B. The Land Transfer Statute Was Properly Enjoined Because It Will Interfere With Both Petitioners' Ability To Effectuate A Complete Remedy And The District Courts' Power To Enforce Its Judgment

As explained above, the land transfer is an incomplete remedy to the adjudicated constitutional violation. Not only does the land transfer fail to remedy the Establishment Clause violation, however, but permitting it to go into effect would actually prevent Petitioners from remedying the violation. Specifically, if the NPS no longer has the current ownership interest in the land, then neither it nor Congress can arrange for a neutral sale. In addition, if the transfer were effectuated, it would interfere with the district court's inherent authority to enforce its judgment. *See Hutto*, 437 U.S. at 690. As a result, the lower courts acted well within their discretion in enjoining the transfer.

Petitioners are incorrect in arguing that, upon concluding that Section 8121 is an insufficient remedy, the court of appeals should have remanded with instructions that the district court order Petitioners to place disclaimers and fencing at Sunrise Rock, instead of enjoining the transfer. Pet. Br. 51-52 (citing *Marshfield*, 203 F.3d at 495, 497). In this case, only a neutral transfer to a private party can undo the favoritism that was a core component of the court of appeals' final judgment. *See* Section II(A)(3), *supra*. Even were disclaimers and fencing posted at Sunrise Rock, the

unconstitutional favoritism would linger as a result of Section 8121's method of transfer.

Finally, Petitioners contend that the court of appeals had no authority to evaluate whether Section 8121 remedies the Establishment Clause violation and enjoin the transfer because judges may not "divest Congress of its 'authority to alter the prospective effect of previously entered injunctions.'" Pet. Br. 30 (quoting *Miller v. French*, 530 U.S. 327, 344 (2000)). Petitioners are wrong because the principle on which they rely is inapposite.

The principle applies in the specific circumstance when Congress changes the legal basis on which a previously entered injunction rests. For example, *Miller* addressed the Prison Litigation Reform Act of 1995 ("PLRA"), which had the effect of altering the legal basis -- namely, 42 U.S.C. § 1983 -- for previously entered injunctions in prison conditions cases by setting new standards for the continuation of such injunctions. 530 U.S. at 333-34. *Miller* has no bearing here for two reasons. *First*, Section 8121 does not change the legal rule on which the injunction in this case rests. Unlike the PLRA, Section 8121 does not establish a new standard by which the district court is to evaluate whether the injunction should continue in effect. *See also Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851) (Congress could alter effect of previous injunction against bridge, granted because it was an unlawful obstruction under old congressional statute, by new law declaring the bridge a lawful structure). Indeed, Petitioners do not claim otherwise. They merely assert that Section 8121 is an adequate remedy for the already adjudicated constitutional violation. *See, e.g.*, Pet.

Br. 21.

Second, the principle applied in *Miller* does not speak to the authority of a court to evaluate whether an Act of Congress remedies a previously adjudicated constitutional violation and enjoin that statute if the court concludes that it is an invalid remedy that would interfere with the effectuation of a valid remedy. Unlike Section 8121, which Petitioners claim remedies the Establishment Clause violation adjudicated in *Buono I*, the PLRA was not justified in *Miller* as a remedy for constitutional violations.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

Peter J. Eliasberg
Counsel of Record
ACLU Foundation of
Southern California
1313 West 8th Street
Los Angeles, CA 90017
(213) 977-9500

Steven R. Shapiro
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Michael C. Small
2029 Century Park East
Suite 2400
Los Angeles, CA 90067
(310) 229-1000

Daniel Mach
American Civil Liberties
Union Foundation
915 15th Street, NW
Washington, D.C. 20005
(202) 548-6604

William B. Rubenstein
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-7320

Dated: July 2009

APPENDIX A

APPENDIX B

1 UNITED STATES DISTRICT COURT
2 FOR THE CENTRAL DISTRICT OF CALIFORNIA
3
4 FRANK BUONO; ALLEN SCHWARTZ,)
5 Plaintiffs,) Case No. EDVC
6 vs.) 01-216-RT (SGLx)
7 GALE NORTON, Secretary of the)
Interior, in her official capacity; JOHN J.)
8 REYNOLDS, Regional Director, Pacific)
9 West Region of the Department of) **COPY**
Interior, in his official capacity; MARY)
10 MARTIN, Superintendent of the Mojave)
11 National Preserve, in her official capacity,)
12)
13 Defendants.)

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DEPOSITION OF FRANK BUONO
Taken in behalf of the Defendants
December 27, 2001

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1 step, which was to transition them – give them six
2 months breathing time, a diminutive time in which to
3 produce and propose new plans.

4 Q Does the Park Service also have the
5 ability to work out some arrangement to work with
6 local citizens concerning the issue of the cross, and
7 see if some time period can be worked out before the
8 cross is removed?

9 A The case of mining claims is readily
10 distinguishable. The mining claims were valid,
11 existing rights established pursuant to federal law.
12 The cross, on the other hand, was placed by citizens
13 without any approval or authority that we know of, in
14 trespass on federal land.

15 Q Well, you don't really know when the cross
16 was first erected then?

17 A Except we do know that lands have been
18 federal since 1848. And I don't think it predates
19 that.

20 Q Are you familiar with the BLM procedures
21 for permitting on BLM lands?

22 A Vaguely.

23 Q And you can say with confidence there was
24 no authorization or permit issued with respect to the
25 erection of the cross?