No. 08-472

In The
Supreme Court of the United States

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

Petitioners,

v.

FRANK M. BUONO,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE AMERICAN MUSLIM ARMED FORCES AND VETERANS AFFAIRS COUNCIL, AND THE MUSLIM AMERICAN VETERANS ASSOCIATION, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

EUNICE HYON MIN RHO
131 Park Drive, #18
Boston, MA 02215
770-310-8489

DOUGLAS LAYCOCK
UNIV. OF MICHIGAN LAW SCHOOL
625 S. State St.
Ann Arbor, MI 48109-1215
734-647-9713
Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTEREST OF AMICI

The American Muslim Armed Forces and Veterans Council, and the Muslim American Veterans Association, are the two largest organizations comprised exclusively of Muslims who have served in the armed forces of the United States. These amici work actively to promote the welfare of Muslims in the armed forces and of Muslim veterans. They also seek to spread the word to all Americans that there is a patriotic community of Muslim Americans who love their country, and a proportionate share of young Muslim American men and women who serve their country in its military.

These amici are concerned about this case for the simple reason that a memorial to American veterans should be a memorial to all American veterans, not just to Christian veterans. The casual use of the Christian cross to honor our nation's war dead reflects the erroneous assumption that our military is comprised exclusively of Christians, or that the exceptions are not important enough to count. But Muslim soldiers, sailors, marines, and airmen risk their lives and sometimes die for their country, just as Christians do. The VFW can do what it chooses in a wholly private display. But the government cannot sponsor, promote, or facilitate a memorial that honors only Christian veterans. [1]

[1] No one other than the amici and their counsel authored this brief in whole or in part or made a monetary contribution toward its preparation or submission. This brief is filed with the consent of all parties.

SUMMARY OF ARGUMENT

American Muslims have fought in every American war, beginning with the Revolution. They have fought in substantial and increasing numbers in the wars of the last century, from World War I to Iraq and Afghanistan. Meanwhile, the Christian majority in the general population has declined to 76% in the largest surveys.

While the government does not formally argue the constitutionality of a government-sponsored cross, it repeatedly suggests that maybe there was no constitutional violation here. But a government-sponsored cross plainly takes sides between faiths. The cross symbolizes the central Christian story of Jesus's death and resurrection. The cross's secondary meaning to honor the Christian dead is directly derived from, and wholly dependent on, that primary religious meaning. The cross symbolizes a promise of eternal life to Christians, but also a threat of eternal punishment to non-Christians.

To hold that government cannot sponsor an isolated and freestanding cross does not imply the removal of all crosses from government cemeteries. Privately chosen religious symbols on individual headstones are plainly constitutional. Larger crosses would be constitutional if accompanied by comparably prominent symbols to honor deceased veterans of other faiths. And even without that, the symbols of other faiths on individual headstones make larger crosses in cemeteries potentially distinguishable from this case.

The government's obligation to be neutral between competing claims to religious truth is deeply rooted in the original understanding. A

narrow statement of the principle that drove decisions concerning disestablishment of religion is that government should stay out of religious controversies. What is religiously controversial has changed over time as religious diversity has increased.

Plaintiff's standing, and the unconstitutionality of the cross at Sunrise Rock as it has been displayed heretofore, are res judicata. Plaintiff's res judicata argument is further supported by all of this Court's cases on modification of injunctions. The civil-contempt exception to the collateral bar rule is not an exception to res judicata; the collateral bar rule is a separate doctrine, directed to interlocutory orders.

Quite apart from res judicata, plaintiff has standing. The government's argument that he does not is based on a tendentious misreading of his Declaration and on a misunderstanding of the Establishment Clause. Plaintiff's objection is to government sponsorship of a cross, not to the denial of third-party free-speech claims. His Declaration simply recognizes that a public forum would negate government sponsorship. There is a long tradition of Americans opposing government sponsorship of their own religion, going back to those who successfully demanded disestablishment.

Giving Congressional motivations every benefit of the doubt, Congress has attempted to remedy the constitutional violation in this case by privatizing the cross. But its effort is incomplete. Religious speech is private for Establishment Clause purposes only if government does nothing to promote it or prefer it. A remedy for the constitutional violation must completely eliminate the violation and its effects.

These principles mean that a remedy in this case must eliminate all vestiges of government sponsorship of the cross, eliminate preferential treatment for the VFW and the Sandozes, and make privatization unambiguously visible on the ground. The proposed Congressional remedy does none of these things. The injunction against implementing that remedy should be affirmed, so that on remand, either the cross can be removed or a complete and effectual privatization remedy can be implemented.

ARGUMENT

I. The Christian Cross Is Not a Memorial to All American Veterans.

A. The American Military Has Long Included Many Muslims and Other Non-Christians.

On October 19, 2008, General Colin Powell spoke on *Meet the Press* about the Presidential election. Addressing the persistent rumors that Senator Obama was Muslim, General Powell said the rumors were false, but that "the really right answer is, what if he is? Is there something wrong with being Muslim in this country? The answer's no, that's not America." And he continued:

> I feel strongly about this particular point because of a picture I saw in a magazine. It was a photo essay about troops who are serving in Iraq and Afghanistan. And one picture at the tail end of this photo essay was

> of a mother in Arlington Cemetery, and she had her head on the headstone of her son's grave. And as the picture focused in, you could see the writing on the headstone. And it gave his awards—Purple Heart, Bronze Star—showed that he died in Iraq, gave his date of birth, date of death. He was 20 years old. And then, at the very top of the headstone, it didn't have a Christian cross, it didn't have the Star of David, it had crescent and a star of the Islamic faith. And his name was Kareem Rashad Sultan Khan, and he was an American. He was born in New Jersey. He was 14 years old at the time of 9/11, and he waited until he can go serve his country, and he gave his life.

Meet the Press Transcript for Oct. 19, 2008, at 2.[2]

Kareem Rashad Sultan Khan is one of many Muslim Americans who have served their country in the United States military. As of 2006, "some 3,500 Muslims ha[d] been deployed to Iraq and Afghanistan with the United States armed forces, military figures show. Seven of them ha[d] been killed, and 212 ha[d] been awarded Combat Action Ribbons." Andrea Elliott, *Sorting Out Life as Muslims and Marines*, N.Y. Times (Aug. 7, 2006).[3]

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[2] Available at www.msnbc.msn.com/id/27266223/page/2/. For the photograph, see *Portfolio by Platon, Service*, The New Yorker 48, 59 (Sept. 29, 2008), available at http://archives.newyorker.com/?i=2008-09-29#folio=058 (free to subscribers; for purchase by others). The individual photograph is available free at http://current.com/items/89427578_service-colin-powell-muslim-soldier-reference-on-meet-the-press.htm.

[3] Available on Westlaw at 2006 WLNR 13604946.

For accounts of other Muslim veterans of Iraq who are buried at Arlington, see Shahed Amanullah, *Crescents Among the Crosses at Arlington Cemetery* (May 30, 2005).[4]

Research on Muslims in the American military is scattered and incomplete, but the basic facts are common ground. The plaintiff, the government, and these amici all agree that Muslims serve in substantial numbers today and that they have served in every American war, beginning with the Revolution. As a State Department publication summarizes, "Muslim Americans have served with distinction in all U.S. wars." U.S. Dept. of State, Bureau of International Information Programs, *Being Muslim in America* 56 (2008).[5] The known part of the story begins with Peter Salem (or Saleem), a freed slave who fought "in the Battle of Bunker Hill and throughout the American Revolution." *Id.* Like many Africans brought to America as slaves, Salem was a Muslim.

A recent search of government records revealed additional Revolutionary soldiers with Muslim surnames, several in the War of 1812, and many more in the Civil War. Amir N. Muhammad, *Muslim Veterans of American Wars* 14–23 (2007). Muhammad found hundreds of Muslim surnames in the draft and enlistment records of World War I, *id.* at 24–62, and World War II, *id.* at 63–168. There are problems with the documentation and internal consistency of Muhammad's scholarship; he searched for only 99 surnames, so many Muslims would be omitted; and some of the names he searched for are

[4] Available at www.altmuslim.com/a/a/b/1986/.

[5] Available at www.america.gov/media/pdf/books/being-muslim-in-America.pdf.

not exclusively Muslim. So we do not rely on his research for specific numbers. But he provides illustrative detail for the government's more conclusory statement that Muslim Americans have fought in each of America's wars. And he found hundreds of men and women with Muslim surnames buried in national military cemeteries around the country. *Id.* at 169–222.

Thousands of Muslims serve in the American military today, but the precise number is unknown. Official figures are based on an optional question on enlistment forms, and many Muslims leave that question blank. The government reported 3,386 Muslims in 2006. Richard Whittle, *Uncle Sam Wants US Muslims to Serve*, Christian Science Monitor (Dec. 27, 2006).[6] But at about the same time, the military reported that more than that had served just in Iraq and Afghanistan. Elliott, *supra* at note 3. These amici believe the real number is substantially higher. The most commonly reported estimate is 15,000. *See, e.g.*, Whittle, *supra* at note 6; Amanullah, *supra* note at 4; Linda D. Kozaryn, *U.S. Air Force Capt. Muhammad: A Muslim American*, American Forces Press Service (Dec. 11, 2002).[7] But these amici and their counsel have not been able to discover the original basis for this estimate.

Whatever the real number, the military wants more. It has created Muslim prayer rooms at the

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[6] Available at www.csmonitor.com/2006/1227/p03s01-usmi.html. Whittle reports this as based on a "survey," but the precision of the number (3,386) suggests an individual count rather than a survey. Amici believe that this number is derived from the enlistment forms.

[7] Available at www.defenselink.mil/news/newsarticle.aspx?id=42398.

service academies and on military bases, appointed Muslim chaplains, accommodated Ramadan, and taken other steps to recruit Muslims. Whittle, *supra* at note 6. With wars in the Middle East and a battle for the hearts and minds of Muslims, the military needs more men and women who understand Muslim cultures, and more who speak Arabic and other Middle Eastern languages. *Id.*

Muslims are only one of many non-Christian religious minority groups comprising many millions of Americans. The best data on the population come from the American Religious Identification Survey, which surveyed enormous numbers of Americans in 1990,[8] 2001,[9] and 2008. Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey Summary Report* (2009).[10]

The 2008 survey interviewed 54,461 respondents, which reduces the statistical margin of error to less than 1/2 of 1%. *Id.* at 2. This survey found that only 76% of Americans now say that their religion is Christian or any more specific group identifiable as Christian. *Id.* at 3 tbl. 1.[11]

Of course 76% is a large supermajority. But 24% is a huge minority, especially for purposes of deciding about individual rights. The Census Bureau's current population estimate is approaching 307 million;[12] 24% of that number means that more

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[8] Barry A. Kosmin & Seymour P. Lachman, *One Nation Under God: Religion in Contemporary American Society* (1993).

[9] Barry A. Kosmin & Ariela Keysar, *Religion in a Free Market: Religious and Non-Religious Americans* (2006).

[10] Available at www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf.

[11] More detailed data are reported *id.* at 5 tbl. 3, 23 App. A.

[12] U.S. Census Bureau, *Population Clocks*, available on the Bureau's home page at www.census.gov.

than 73 million Americans do not describe themselves as Christians.[13]

B. The Christian Cross Is a Uniquely Sectarian Symbol that Cannot Memorialize Muslim Veterans.

The government has not presented the question whether the cross is constitutional if sponsored by the government, but the government repeatedly suggests that the Court consider the adequacy of the Congressional remedy on the assumption that the cross may have been constitutional all along.

Thus, the government says that many people view the cross "as a symbol of the sacrifices of fallen soldiers," contrasting this characterization with Mr. Buono's view that the cross is "a religious symbol." Pet. Br. 28. The government compares the cross to the Ten Commandments display in *Van Orden v. Perry*, 545 U.S. 677 (2005), and claims that the cross "communicates a secular message." Pet. Br. 29. The government even claims that the cross has "a *predominantly* secular message." *Id.* at 29 (emphasis added). The government contrasts the cross with the "patently religious" object of the ordinance in *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005), implying that the government's purpose in preferentially permitting erection of a Christian cross was somehow not patently religious. Pet. Br. 36.

These claims are false. There is no ambiguity about the primary meaning of a Christian cross. The

[13] The somewhat smaller absolute numbers reported in Kosmin and Keysar (2009) are the numbers of adults.

cross is *the* central symbol of *the* central theological claim of Christianity: that the son of God died on the cross to redeem the sins of human kind, that he rose from the dead, and that those who believe in him will also rise from the dead and have eternal life.

All the secondary meanings to which the Christian cross has been put are derived from, and dependent on, this primary meaning. The secondary meanings would make no sense without the primary meaning. Why does the cross honor deceased Christian soldiers? Because it symbolizes the promise that they will rise from the dead and live forever. To say that the cross honors the Christian dead is not to identify a secular meaning of the cross; it is merely to identify a common application of the religious meaning of the cross.

The cross is not at all like the Ten Commandments. The Ten Commandments are a sacred text, but this text contains prohibitions on murder, theft, perjury, and defamation—secular wrongs that are prohibited in the legal code of every civilization. "Thou shalt not kill" has intelligible secular meaning that does not depend upon the purely religious duties with which it is bracketed or the divine source to which it is attributed. *See Van Orden*, 545 U.S. at 690 (plurality opinion); *id.* at 701 (Breyer, J., concurring). But the Christian cross has no meaning not derived from its primary religious meaning.

Moreover, the Ten Commandments are sacred to all three of the Abrahamic religions. *McCreary County*, 545 U.S. at 894 (Scalia, J., dissenting). But the cross is sacred only to Christians; it is a symbol only of Christianity.

Justice Scalia has defended government sponsorship of religion as strongly as any Justice, and more strongly than most. Yet twice he has said that this support must be interfaith. It must be confined to what the three Abrahamic faiths have in common, *see id.* at 893–94; it must exclude "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)." *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting). Justice Thomas and Chief Justice Rehnquist joined each of these opinions.

The cross fails each of Justice Scalia's tests. It is unique to Christianity, not common to the three Abrahamic religions, let alone all monotheistic religions. Its power as a symbol, and the story it symbolizes, are entirely dependent on the divinity of Jesus. The divinity of Jesus is an explicit, central, and essential element of the Christian story of the cross. The promise of resurrection and eternal life is what makes the cross a symbol that honors deceased Christian soldiers, and that promise necessarily depends on the divinity of Jesus. But "our constitutional tradition" has "ruled out of order" such sectarian endorsements of religion. *Id.*

The cross and its story are not merely neutral or irrelevant to non-Christian soldiers; they are profoundly negative. These amici respect our Christian brothers in arms, and we respect their faith. But the inescapable fact is that Christianity and Islam make exclusive claims to truth, and these claims are mutually inconsistent. To Christians, the story of the cross offers an extraordinary promise: Christian soldiers will be "saved" (John 3:17, KJV) through the cross, resurrected from the dead, and

eternally rewarded. But to non-Christians, the cross offers an equally extraordinary threat. According to the central Christian claim that is symbolized by the cross, Muslim soldiers, and other non-Christians, outside the saving grace of the cross, will be eternally damned.

The promise to Christians is capsulized in a Bible verse much publicized by evangelical Christians:

> For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life.

John 3:16 (KJV). The negative pregnant in this promise is made explicit two verses later (and in many other New Testament passages):

> He that believeth on him is not condemned: but he that believeth not is condemned already, because he hath not believed in the name of the only begotten Son of God.

John 3:18 (KJV).

The threat of the cross is inseparable from the use of the cross to honor the Christian dead. The cross is an appropriate symbol for Christian dead because it promises resurrection and eternal life. But that promise is only to some, and it is paired with a threat of condemnation to all others. Christians have disagreed over the centuries about how this sorting process works—predestination, a "personal decision" for Jesus, faithful and sincere performance of sacramental obligations, and other theories—but those disagreements do not affect the

central point. On any version of Christian theology, some humans get the promise, and other humans get the threat.

To note these things about the cross is not to attack Christianity, but to take it seriously. Muslim teachings on reward and punishment in the afterlife are different in important ways, but similar in insisting on belief in religious truth. Islam predicts harsh consequences for those who do not believe in Islam, just as Christianity predicts harsh consequences for those who do not believe in Christianity. Adherents of the two faiths can be tolerant and respectful of each other in this world; they can share their common identity as Americans, or as proud members of the American military. But it is simply a fact that each faith predicts a bad end for adherents of the other.

Non-Christians do not *fear* the threat of the cross, because they do not believe the Christian story. But that does not justify government promotion of the principal symbol of both the promise and the threat. A government-sponsored cross inherently takes sides between competing claims to religious truth. It says that Christian teachings about the afterlife are true, and that Muslim and other teachings about the afterlife are therefore, necessarily, false.

The government dismisses the primary meaning of the cross as irrelevant, on the ground that any monument can be interpreted "in a variety of ways." Pet. Br. 39, quoting *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1135 (2009). No doubt an ambiguous text or symbol can be subject to more than one interpretation. But surely the Court in *Summum* did not commit itself to a post-modernist world in which no text or symbol has any core

meaning and any text can mean any thing. When a symbol has a primary meaning so fundamental, of such longstanding, and so universally known, as the Christian cross, government cannot display the symbol and plausibly disclaim the primary meaning. When the allegedly secular secondary meaning is wholly derivative from the primary religious meaning, government cannot embrace the secondary meaning without embracing the primary meaning on which the secondary meaning depends. If government can sponsor a Christian cross and deny that it has done anything religious, then words and symbols have no meaning and the Court has consigned the Establishment Clause to the world of *Alice in Wonderland*.

If a Christian cross has sufficient secular meaning to fall outside the Establishment Clause, then so might a sectarian prayer. Some might interpret the prayer as a meditation, some as a prose poem, and still others as a metaphor, and some might view the prayer as "[r]eligious symbolism . . . with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges." *United States v. Ballard*, 322 U.S. 78, 94 (1944) (Jackson, J. dissenting). Especially if the prayer includes some secular message or request, there is no limit under the government's theory. If the message of the cross is "predominantly secular," why not "Jesus save the United States and this Honorable Court"? The Court would disserve both religion and the Constitution if it accepted the government's argument that even the most profoundly religious symbols can be treated as secular.

Congress has been inconsistent about who or what the cross is supposed to memorialize. The original plaque said the cross was "Erected in Memory of the Dead of All Wars." Pet. App. 56a. Federal legislation directs that this plaque should be restored. Pub. L. No. 107–117, §8137(c), Jt. App. 44. But the same Act says that the cross and surrounding land "are a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." *Id.* at §8137(a).

Whether it is all veterans or only those who died, and whether it is all wars or only World War I, the group to be honored and commemorated includes Muslims, believers in many other faiths, and people who believe in no religion. But the symbol chosen commemorates only Christians. When this Court considers whether the adjudicated constitutional violation in this case has been completely remedied, its analysis should not be distorted by the government's efforts to minimize the violation.

C. The Unconstitutionality of the Cross at Sunrise Rock Does Not Imply the Unconstitutionality of Every Cross in Every Government Cemetery.

A recurring argument in defense of government promoting religious viewpoints is the claim that government has always done it. We are often told that political rhetoric in the founding generation invoked God, and in this case, amicus briefs supporting the government offer pictures of crosses (several of them entirely foreign) in military cemeteries.

Some of these crosses are constitutionally unobjectionable, even praiseworthy. The crosses on the headstones, or used as headstones, on military graves in government cemeteries are chosen by individual veterans or their families, and the government offers a wide range of symbols for use by veterans of other faiths. These privately selected religious symbols on individual graves are best understood as the private speech of each veteran.

Whether in such a cemetery there can also be a large, dominant cross in honor of Christian veterans collectively is a harder question, but one not presented by this case. The government might say that such a cross honors the majority of veterans, and that the veterans of religious minority groups are sufficiently honored by symbols of their own choice on individual headstones. These amici believe that such a freestanding cross for Christian veterans collectively should be accompanied by equally prominent collective monuments for adherents of other faiths. But the Court need not decide that question here.

Either way, the unconstitutionality of the cross on Sunrise Rock does not logically lead to the removal of all crosses from all government cemeteries. One important function of religion is to address the inevitability of death, and a cemetery is an appropriate place to express the religious faiths of those buried there. Without some such ability to express their faith, many Americans would find government cemeteries unusable. These amici do not object to religious symbols in cemeteries, but to the inequality of singling out only Christians for collective memorialization.

Sunrise Rock is not a cemetery, there are no individual headstones with symbols of many faiths, and the government has refused to permit the symbols of any faith other than Christianity. Pet. App. 4a-5a. There is no way this display can be understood as a neutral recognition of veterans of all faiths.

What is at issue in this case is a large, permanent, and freestanding cross, isolated from the symbol of any other faith and from any secular symbol. For government to sponsor such a cross is for government to promote the Christian story of the cross. And that is inconsistent with the core principles of the Establishment Clause, as this Court unanimously recognized in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). *See id.* at 599 (opinion of the Court) (even a temporary cross at Easter on the grand staircase of the courthouse would convey "endorsement of Christianity"); *id.* at 661 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and White and Scalia, JJ.) ("the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall").

II. Government's Obligation to Remain Neutral Between Competing Religious Claims Is Deeply Rooted in the Original Understanding.

Many of the colonies, and some of the states, had formally established churches, all of which were disestablished over a sixty-year period from the 1770s to 1833. The federal Establishment Clause was the consequence of this movement, not the cause; those who sought disestablishment in their

own states also wanted to prevent any establishment at the federal level. For a detailed historical review of this process of disestablishment, see Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. Rev. 1385.

The nation was overwhelmingly Protestant in this period, so the debate over disestablishment focused on issues that were controversial among Protestants. First and foremost was how to finance the church. The established churches depended on tax support and sought to keep it. The dissenting churches opposed tax support for churches, and they continued to oppose it even when the established churches offered tax support to all denominations equally, as in the general assessment bill in Virginia. *See, e.g.*, Thomas E. Buckley, *Church and State in Revolutionary Virginia 1776–1787*, at 143, 175 (1977). As the dissenting churches won this battle in state after state, it became settled that government should not financially support the church.

A debate over the government's role in religious doctrine was closely related to the debate over funding. The equality of all denominations implied not only that government should not tax to support its preferred denomination, but also that government should not choose a preferred denomination in the first place.

This much seems to have been universally accepted. The *narrowest* proposals for what became the Establishment Clause would have prohibited establishing "one religious sect or society in preference to others," "any particular denomination of religion in preference to another," or "articles of

faith or a mode of worship." Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 880–81 (1986). And after tax support for churches had been repealed, dissenters continued to object to any sign of government preference for the formerly tax-supported churches. Baptists and Presbyterians denounced the Virginia law incorporating the Episcopal Church as giving that church "Peculiar distinctions" and "the particular sanction of and Direction of your Honourable House." Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 Val. L. Rev. 37, 43–44 (1991).

What religions should teach, and what individuals should believe, was to be left to churches and individual conscience. The religious dissenters who demanded disestablishment emphasized that true religious faith must be voluntary, not directed by the state. Professor Esbeck summarizes their principle as voluntaryism, a word that was in use at the time. Esbeck, 2004 BYU L. Rev. at 1395–96 & n.24.

But the early generations were slow to apply these principles to generic nonfinancial support of Protestant Christianity. So we find the oft-cited religious rhetoric in the speeches of political leaders. This proves little, because these leaders were of course free to speak in their individual as well as their governmental capacities. Far more telling, we find Protestant religious instruction in the public schools. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297–305 (2001). In the mid-nineteenth century, we find Catholic children

beaten, or expelled from school, for refusing to read the Protestant translation of the Bible. *Donahoe v. Richards*, 38 Me. 376 (1854); *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Boston Police Ct. 1859). We find blasphemy prosecutions surviving well past the period of formal disestablishment. *See Commonwealth v. Kneeland*, 37 Mass. 206 (1838); *State v. Chandler*, 2 Harr. (Del.) 553 (1837); *Updegraph v. Commonwealth*, 11 Serg. & Rawl. 394 (Pa. 1824); *People v. Ruggles*, 8 Johns (N.Y.) 290 (1811). The de facto principle was neither nonpreferentialism nor noncoercion. The de facto principle was that if a practice was not controversial among Protestants, it was not a problem.

There are multiple ways to view this history. One is to abandon any search for principle and simply say that if early American generations did it, it must be constitutional. This would allow Christians to prosecute Muslims for blasphemy and punish Muslim school children for refusing to recite the Christian catechism.

But if we search for principle, what is the principle? Focusing on voluntaryism as the principle, Professor Esbeck says that "practice lagged behind principle," but that "over a century and a half the practice would mature and fill out to meet the principle." Esbeck, 2004 BYU L. Rev. at 1400. That is an accurate characterization.

A narrower statement of the principle is that government should stay out of religious controversies. This principle better fits the practice of the founding era, when government was excluded from anything that was religiously controversial among Americans. But the only significant religious controversies among Americans in that period were

controversies among Protestants. Other faiths were simply not numerous enough, or important enough, to create a controversy that would be taken seriously. Laycock, 27 Wm. & Mary. L. Rev. at 917–18.

This narrower principle has remained the same, but the facts to which the principle applies have changed. The large Catholic immigration, beginning in the second quarter of the nineteenth century, created an enormous controversy over religious instruction in the public schools. Jeffries & Ryan, 100 Mich. L. Rev. at 299–305; Laycock, 26 Val. L. Rev. at 50–53. This controversy produced mob violence and church burnings in Eastern cities, a proposed constitutional amendment, and a major political issue that recurred for decades. *Id.* at 51–52 (collecting sources). Under changed social conditions, religious instruction in the public schools inflicted precisely "those consequences which the Framers deeply feared." *School District v. Schempp*, 374 U.S. 203, 236 (1963) (Brennan, J., concurring). The principle of keeping government out of religious controversies now meant that government should not teach religion in the public schools.

Deeply rooted anti-Catholicism meant that it took a long time for Americans to recognize this new application of their constitutional principle. But very slowly, beginning in the late nineteenth century, state courts and local boards of education began removing religious observances from the public schools. *See State ex rel. Weiss v. District Board*, 44 N.W. 967 (Wis. 1890); *Board of Education v. Minor*, 23 Ohio St. 211 (1872).

The Catholic immigration was followed by Jewish immigration, Muslim immigration, and other

immigration streams from around the world, and now by a large increase in the number of Americans with no religion. Things that were uncontroversial in a world dominated by Protestants, or by Christians, become controversial when a quarter of the population is no longer Christian. But the principle remains the same: government should not take sides in religious controversies

The cross takes sides in one of the most fundamental of religious controversies. The cross makes no sense as a way of honoring the dead unless Christianity is true. We can understand historically why the government might have erected crosses after World War I, when the de facto Protestant establishment still prevailed, when Jews were largely confined to urban slums, and when Muslims were a small and largely invisible minority. But the apparent lack of controversy was illusory, reflecting disregard of religious minorities too small, too poor, and too weak to make themselves heard.

When this Court says that government should be neutral towards religion, and when the most conservative Justices agree that government should be neutral with respect to those points on which the three Abrahamic religions disagree, the Court and its members are invoking the founding principle that government should stay neutral in religious controversies. That principle applies to the cross on Sunrise Rock. Either the cross must be removed, or it must be fully and effectively privatized, or government must provide equal access for non-Christians.

III. The Surrounding Law of Injunctions Gives Additional Support to the Rules That Prevent the Government from Relitigating Issues Determined in *Buono I*.

As explained in plaintiff's brief, plaintiff's standing and the constitutionality of government sponsorship of the cross at Sunrise Rock were determined by a final judgment in 2004. *Buono I*, Pet. App. 100a. Those issues cannot be relitigated now, either on Mr. Buono's motion to enforce the injunction or on the government's implicit motion to modify the injunction on the ground that Congress has provided a complete alternative remedy. Relitigation of either issue is *jurisdictionally* barred by the long-expired time limit on petitions for certiorari, and *substantively* barred by res judicata. See Resp. Br. 11–18, 33 and cases cited; *see also United States v. Rylander*, 460 U.S. 752, 756–57 (1983).

In addition to these explicit applications of res judicata in injunction cases, the Court unanimously applied res judicata to a permanent injunction entered by consent in *Frew v. Hawkins*, 540 U.S. 431 (2004). Defendants argued that the Eleventh Amendment barred enforcement of the injunction to the extent that it required more than the underlying statutory right on which the injunction was based, and therefore, that they were entitled to relitigate the meaning of their statutory obligation on plaintiff's motion to enforce. The Court disagreed. The Court focused on the Eleventh Amendment and did not mention res judicata, but the res judicata effect of the consent decree was the obvious premise of the opinion. Like the more explicit res judicata

cases cited in plaintiff's brief, *Frew* holds that a final judgment of injunction cannot be relitigated on a motion to enforce it.

In addition, all the cases on modification of permanent injunctions are based on the premise that a permanent injunction is res judicata. If permanent injunctions were not res judicata, they could be modified at will. It is only because permanent injunctions *are* res judicata that some change in law or fact is required to support their modification under Rule 60(b)(5). "Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests . . ." *Horne v. Flores*, 129 S.Ct. 2579, 2593 (2009). "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making." *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932). "A motion for relief from judgment under Rule 60(b) . . . does not toll the time for appeal from, or affect the finality of, the original judgment." *Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n.7 (1978).

Rather than a chance to relitigate, Rule 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Horne*, 129 S.Ct. at 2593, quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992); *accord*, *Agostini v. Felton*, 521 U.S. 203, 215 (1997); *id.* at 257 (Ginsburg, J., dissenting) ("relitigation of the legal or factual claims underlying the original judgment is not permitted in a Rule 60(b) motion or an appeal therefrom.")

The government's argument here is functionally equivalent to a motion to modify the injunction in *Buono I*, which prohibits it from "permitting the display of the Latin cross in the area of Sunrise Rock . . ." Pet App. 146a. On such a motion, "[t]he party seeking relief bears the burden of establishing that changed circumstances warrant relief." *Horne*, 129 S.Ct. at 2593. The only alleged change is Congress's attempt to privatize the cross.

The question whether that attempt is a sufficient change to justify modifying the original injunction resolves into the question whether Congress has actually remedied the adjudicated constitutional violation. As the Court said in *Horne*, "If petitioners are ultimately granted relief from the judgment, it will be because they have shown that the Nogales School District is doing exactly what this statute requires." 129 S.Ct. at 2607. Similarly here, if Congress has done "exactly what" the Establishment Clause requires, the original injunction can be vacated or modified. But if Congress has not completely remedied the original violation, then the government is not yet entitled to relief from the judgment.

Finally, to avoid any risk of confusion, we should explain how the res judicata effect of injunctions fits with the collateral bar rule. "[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947). Consequently, one cannot defend against a charge of criminal contempt by arguing that the injunction was erroneously issued. This rule has come to be known as the collateral bar rule. *See Tory*

v. Cochran, 544 U.S. 734, 739 (2005); 1 Dan B. Dobbs, *Law of Remedies* §2.8(6) at 213–18 (2d. ed. 1993); Douglas Laycock, *Modern American Remedies* 812–28 (3d ed. 2002).

The domain of the collateral bar rule is injunctions still subject to appeal. *See Walker v. Birmingham*, 388 U.S. 307, 309, 319 (1967) (temporary injunction without notice); *In re Green*, 369 U.S. 689, 690 (1962) (restraining order without notice); *Mine Workers*, 330 U.S. at 266–67 (temporary restraining order without notice). Because the judgments in such cases are not final, res judicata does not apply, and the collateral bar rule has been thought necessary to protect the court's authority to prevent irreparable injury pending further litigation. Once an injunction becomes completely final, res judicata prevents relitigation, and the collateral bar rule becomes unnecessary, either inapplicable or redundant.[14]

Distinguishing res judicata from the collateral bar rule matters, because the collateral bar rule does not apply to civil contempt. The Court was quite clear about this in *Mine Workers*, 330 U.S. at 294–95. This statement, in the context of a leading case about the collateral bar rule, applies only to that rule. It does not limit this Court's many holdings, before and since, that a final judgment of permanent

[14] In *Howat v. Kansas*, 258 U.S. 181 (1922), the Kansas court had applied the collateral bar rule to a permanent injunction. The facts are not clear, but the time for appeal may have elapsed. *See State v. Howat*, 198 P. 686, 688 (Kan. 1921) (complaint filed in April 1920, permanent injunction issued on date not stated, injunction violated in February 1921). If the time for appeal had elapsed, the collateral bar rule was redundant with the rule of res judicata.

injunction is res judicata in subsequent civil proceedings to enforce it.

The relevant rules in this case are res judicata and lack of jurisdiction, not the collateral bar rule. Plaintiff seeks to enforce a final judgment, affirmed on appeal in 2004, with respect to which the time for certiorari or rehearing has long since expired. No one should be confused by the more limited reach of the collateral bar rule, which applies to quite different circumstances. The government is barred from relitigating either plaintiff's standing or the unconstitutionality of a government-sponsored cross at Sunrise Rock.

IV. The Plaintiff Has Standing.

A. The Government's Standing Argument Is Based on a Tendentious Distortion of Plaintiff's Declaration.

Plaintiff's sworn Declaration states:

> I am a Roman Catholic, attend mass, and obviously have no objection to Christian symbols on private property. However, I do strongly object to the government allowing a symbol of one religion on government property that is not open to others to place freestanding signs or symbols that express their views or beliefs. The presence of the cross on federally owned land in the Preserve deeply offends me and impairs my enjoyment of the Preserve.

Declaration of Frank Buono, ¶20 (Mar. 13, 2002), Jt. App. 64–65.

First, Buono's statement that he does not object to Christian symbols on private property does not deprive him of standing; the central issue to be decided at this stage of the litigation is whether the land has been sufficiently privatized.

Second, he does *not* say that violation of other people's free speech rights offends him; he says "the presence of the cross on federally owned land in the Preserve deeply offends me." His objection to government "allowing a symbol of one religion on government property that is not open to others" is simply a recognition of the facts of this case and of the meaning of government sponsorship. Government did not itself place the cross; government allowed private citizens to place the cross and it refused to allow other private citizens to place symbols of other faiths. Pet. App. 4a-5a. This preferential treatment is a form of government sponsorship of the cross. If the government had allowed all faiths to place their religious symbols at Sunrise Rock, there would have been a limited public forum instead of a government-sponsored cross. On any reasonable reading of his Declaration, Buono objects to the government-sponsored cross.

B. The Government's Standing Argument Is Inconsistent with the History and Purpose of the Establishment Clause.

Plaintiff does not lack standing either because he is objecting to a symbol of his own faith or because he is objecting to government sponsorship. It is enough that he sincerely objects to a government-sponsored religious symbol to which he is personally exposed. The government's argument to the contrary

misunderstands the Establishment Clause. *One* purpose of the Establishment Clause is to protect people from government imposition of other people's religions. But that was never the exclusive purpose. It was an equally important purpose to protect each person's own religion from the corrosive effects of government sponsorship.

The principal political forces demanding disestablishment were evangelical Christians opposed to government sponsorship of Christianity. *See, e.g.*, Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 343–47 (1996) (collecting sources); Esbeck, 2004 BYU L. Rev. at 1432–48, 1498–1524 (detailing the persistent work of the Baptist leaders Isaac Backus and John Leland). Of course they were opposed to government supporting Christian denominations other than their own. But when the defenders of establishment offered tax support to the evangelicals too, most prominently in the Virginia general assessment bill, the dissenters emphatically said no to government support of their own churches. It was evangelical petitions, with far more signers than Madison's *Memorial and Remonstrance*, and evangelical votes in the legislature, that swamped the general assessment bill. Buckley, cited *supra* at page 18, at 143, 175.

It was a central part of the dissenters' argument for disestablishment that government sponsorship corrupts and enervates religion. Roger Williams had argued in the seventeenth century for a "wall of Separation between the Garden of the Church and the Wildernes[s] of the World." Roger Williams, *Mr. Cotton's Letter, Lately Printed, Examined and Answered* (1644), in 1 *The Complete Writings of*

Roger Williams 313, 392 (Narragansett Edition, 1963 reprint). Dissenting religious leaders in the eighteenth century continued the argument on similar terms. After exhaustively reviewing the process of disestablishment, Professor Esbeck identifies at least eight related arguments:

> The arguments supportive of disestablishment, both by prominent religious figures as well as those more devoted to the guidance of reason, were: (1) that to be genuine in one's faith, religious belief and practice must be voluntary; (2) that establishment subordinates the church to the state, thus yielding jurisdiction over religious doctrine and governance for which the civil state is wholly without competence; (3) that establishment has a corrupting effect on the church and its clerics; (4) that as an institution that mediates between the state and the people, the churches presume to sit in judgment over, and thereby help limit, the state and its authoritarian pretensions; (5) that only a free and independent church will successfully exercise its prophetic voice and critique the state, a role important to limiting the state; (6) that a civil government that treats religions unequally will cause jealousy and resentments within the body politic; (7) that religion, if vibrant and respected, can help temper selfish passions and oppressive tendencies and thus protect against harmful swings in popular sentiment to which republics are vulnerable; and (8) that religion, when perverted into a civil religion, collapses

> two very different and very powerful allegiances, risking a dangerous confounding of God and country, faith and nationalism.

Esbeck, 2004 BYU L. Rev. at 1581. Each of these arguments is fully applicable to government support of one's own faith. Of course Islam has taken a different view in the countries where it is numerically predominant, with very different results. But these were the arguments of the American Christians who successfully worked for disestablishment. The argument developed in this way because the last offer from the supporters of establishment was some form of nonpreferential aid that would include, or could be argued to include, all forms of Christianity. *See* Laycock, 27 Wm. & Mary L. Rev. at 895–902 (reviewing proposals for nonpreferential aid in Virginia, Maryland, Georgia, and South Carolina, and local option systems, presented as fair to all denominations, in Massachusetts, Connecticut, New Hampshire, and Vermont). But that last ditch offer failed, because the opponents of establishment were opposed to the establishment of any religion, including their own.

This fear that government support will corrupt religion has motivated religious opponents of establishment throughout American history. So it is no surprise that Establishment Clause plaintiffs often object to support of their own religion. *See* Resp. Br. 24–25 and cases cited; *see also Santa Fe Independent School District v. Doe*, 530 U.S. 290, 294–95 (2000) (Catholic and Mormon families challenged "overtly Christian prayers").

V. Congress Has Not Remedied the Constitutional Violation, Because It Has Not Fully Privatized the Cross.

Putting the best possible face on the legislation in this case, the government says that Congress attempted to remedy the constitutional violation by directing that the cross and an acre of surrounding land be conveyed to the local VFW. Pet. Br. 20. The government also relies on the settled principle that private speech promoting religion is protected by the Free Speech and Free Exercise Clauses. *Id.* at 21.

But for religious speech to be private under that principle, government must do nothing to promote or prefer it. "[G]iving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause." *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion of Scalia, J.). Chief Justice Rehnquist, and Justices Kennedy and Thomas, joined this opinion.

This Court has decided several cases in which government maneuvered to promote or arrange for religious speech while attempting to create an appearance of privatization. The Court has rejected all such efforts. A school board does not successfully privatize prayers by delegating the decision to a student election and an elected student speaker, even if the elected speaker can choose whether to pray. *Santa Fe*, 530 U.S. at 302–05. It does not privatize prayer by inviting student volunteers to lead the prayer, *Treen v. Karen B.*, 455 U.S. 913 (1982), or by inviting a clergyman, *Lee v. Weisman*, 505 U.S. at 587–88. A state does not privatize

religious displays by inviting citizens to donate copies of the Ten Commandments. *Stone v. Graham*, 449 U.S. 39, 42 (1980). There was a private speaker in each of these cases, but the dispositive facts were that government encouraged or arranged for the religious speech or gave preferential treatment to the private religious speaker.

The test is not who owns the property, but whether the government plays any role in promoting the religious speech. Privately initiated religious speech that gets no preferential treatment is private for Establishment Clause purposes even on government property. *Good News Club v. Milford Central School*, 533 U.S. 98, 112–20 (2001); *Pinette*, 515 U.S. at 761–70; *Board of Education v. Mergens*, 496 U.S. 226, 247–53 (1990). The test is the government's role in promoting or arranging for the religious speech, and preferential use of government property is only one way to promote religious speech.

Here, we have continuing government sponsorship; we also have an adjudicated constitutional violation. Plaintiff is entitled to a remedy that eliminates the violation and all its consequences, and restores as nearly as possible the situation that would have existed if the violation had never occurred. *United States v. Virginia*, 518 U.S. 515, 547 (1996). As Chief Justice Burger said in a discrimination case, "The remedy is necessarily designed, *as all remedies are*, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (emphasis added). "[W]e must continue to . . . afford remedies that eliminate not only the discrimination but its identified consequences." *Freeman v. Pitts*,

503 U.S. 467, 506 (1992) (Scalia, J., concurring). "The judicial remedy for a proven violation of law will often include commands that the law does not impose" in the absence of a violation. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309 n.22 (1986).

The violation here includes discrimination—preferential access for the Christian message of the cross and for the VFW and the Sandozes. The violation includes the reality and perception that government is sponsoring the sectarian message of the cross by this preferential treatment. The remedy must end the discrimination and end both the reality and perception of government sponsorship. The remedy must end any residual uncertainty about who sponsors the cross, both because such uncertainty sustains the perception of government sponsorship and because such uncertainty is a consequence of the past violation.

A complete remedy therefore requires several elements:

1) The national memorial designation must be repealed or invalidated. It is not just the site, but the cross itself that has been designated as a national memorial. "The five-foot-tall white cross [described by history and location] as well as a limited amount of adjoining Preserve property to be designated by the Secretary of the Interior, is hereby designated as a national memorial." Pub. L. 107–117, §8137(a), Jt. App. 44. The memorial has been named the "White Cross World War I Memorial." 16 U.S.C. §431 note (2006). The government cannot continue to sponsor a national memorial that honors only Christian veterans.

2) The reverter clause must be repealed or invalidated. Even though the reverter clause does not explicitly require a cross, it limits the use of the land to a narrow category that includes the existing cross. By eliminating most other options, it creates pressure to retain the cross. Together with the national memorial designation and the name of the memorial, the reverter clause serves as an obvious signal about the intended use of the land. The VFW would not feel entirely free to remove the white cross from the "White Cross World War I Memorial."

The reverter clause, and the name of the Memorial, are like the restrictions on the student speaker in *Santa Fe*, which did not explicitly require prayer but sharply limited the speaker's options and pressed in the direction of prayer. *See Santa Fe*, 530 U.S. at 306–07. Government cannot press for a religious display, especially when it is responsible for curing an adjudicated violation.

3) The transfer of the cross must be made visible on the ground. Fencing and signage must make it readily apparent to all observers that the government's sponsorship of the cross has ended. Signage indicating that the cross is privately owned must be visible on Cima Road to drivers in each direction; these drivers are the primary audience for this cross. A plaque at the base of the cross helps little; it will be visible only to those few persons who park and brave a steep ascent on bare rock to reach the cross. *See* Brief of Amici Curiae Veterans of Foreign Wars *et al.*, App. 13a (photograph of Sunrise Rock showing both the relative inaccessibility and the high visibility of the cross).

4) Any other interested persons must be given a fair opportunity to acquire the land in

open bidding. A preferential sale to the VFW and the Sandozes, even at appraised value, is no remedy at all for the longstanding preferential access given to the VFW and the Sandozes.

The judgment below, enjoining transfer of the property on the terms enacted by Congress, is necessary to make possible the fourth element of this remedy. The other three parts of an effective remedy could be implemented on remand, or on further motion in the district court, even if the land were transferred in the meantime.

CONCLUSION

The judgment below should be affirmed. The case should be remanded to the district court for implementation and enforcement of a complete remedy, either by removing the cross or by completely, publicly, and visibly privatizing the cross.

Respectfully submitted,

Eunice Hyon Min Rho
131 Park Drive, #18
Boston, MA 02215
770-310-8489

Douglas Laycock
Univ. of Michigan Law School
625 S. State St.
Ann Arbor, MI 48109-1215
734-647-9713

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