No. 08-472

In the Supreme Court of the United States

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

v.

FRANK BUONO
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN JEWISH CONGRESS AND AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

MARC D. STERN
American Jewish Cong.
825 Third Avenue
New York, NY 10022
(212) 360-1545

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

KARA H. STEIN
American Jewish Comm.
165 East 56th Street
New York, NY 10022
(212) 891-6742

Counsel for Amici Curiae

QUESTIONS PRESENTED

1. Whether a plaintiff has standing to assert an Establishment Clause claim only if the plaintiff can demonstrate that his or her religious beliefs are offended by the particular religious symbol or practice involved in the challenged government action.

2. Whether the government may cure any Establishment Clause violation based upon government ownership and display of a religious symbol by transferring to a private party the government property involved, without regard to the particular circumstances surrounding the transfer and the nature of the government's retained interest in and continuing involvement with the property and symbol.

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INTEREST OF THE *AMICI CURIAE*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. Because those rights are dependent on a government that is scrupulously neutral about religion, AJCongress, since its founding, has devoted considerable attention to litigation enforcing the Establishment Clause.

The American Jewish Committee ("AJC"), a national organization of approximately 175,000 members and supporters and 26 regional offices, was founded in 1906 to protect the civil and religious rights of Jews. AJC has always strongly supported the constitutional principle of separation of religion and government embodied in the Establishment Clause, which it believes provides the most solid foundation for ensuring religious freedom for people of all faiths and of no faith. Accordingly, AJC has participated as *amicus* in a wide array of cases through the years in support of this vital principle.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

It has long been recognized that an individual has standing to assert a claim under the Establishment Clause challenging a government action that adversely affects the individual's use or enjoyment of a government park or other government

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this *amicus* brief have been filed with the Clerk's office.

facility. This Court has resolved on the merits a number of cases in which the plaintiffs' standing rested on this principle, and the lower courts have consistently upheld standing on this basis.

The government argues that this well-established principle is inapplicable here because respondent, who is Catholic, does not find crosses offensive as a matter of his own religious belief, and therefore cannot object to the government's ownership of the cross in Mojave National Preserve. But a religious person may conclude—either as a matter of religious doctrine or on other grounds—that government endorsement of her particular religion, and the resulting expropriation of her religion's symbols for government purposes, is just as offensive, or even more offensive, than government endorsement of another religion. If that offensiveness interferes with the individual's use and enjoyment of federal property, the individual has standing to sue. Indeed, the government has not pointed to a single case challenging government ownership of a religious symbol in which the plaintiff was found to lack standing because the symbol was an element of the plaintiff's own religious beliefs, and there are many such cases in which a plaintiff has been found to have standing.

The decision principally relied upon by the government—*Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982)—is entirely inapposite. It addressed a situation in which the plaintiffs lacked standing because they suffered no injury at all as a result of the challenged government action. Here, respondent did suffer injury—the adverse impact on his use and enjoyment of a federal park.

The government's argument on the merits—that the transfer of land to private ownership may cure any Establishment Clause violation—is not supported by this Court's precedents or lower court decisions. A fact-specific analysis is required to determine whether the transfer eliminates the factors that gave rise to the finding of an Establishment Clause violation. Here, the government's continuing involvement with the property and the likely continuing perception of government endorsement of religion make it impossible to conclude that the transfer vitiates the Establishment Clause violation.

ARGUMENT

I. RESPONDENT HAS STANDING TO CHALLENGE UNDER THE ESTABLISHMENT CLAUSE THE GOVERNMENT'S DISPLAY OF A LATIN CROSS.

Chief Judge Kozinski, writing for a unanimous panel below, concluded that respondent has standing to pursue the Establishment Clause claim in this case, squarely rejecting each of the arguments that the government renews before this Court. Pet. App. 104a-107a. Because the "inability to unreservedly use public land suffices as injury-in-fact" and respondent has shown that he is "unable to 'freely use[e]' the area of the [Mojave National] Preserve around the cross because of the government's allegedly unconstitutional actions"—the government's display of the cross (*id.* at 107a)—this Court should hold that respondent has established his standing to assert this claim.

A. An Individual Suffers An Injury Sufficient To Confer Standing When The Challenged Official Action Interferes with His Use Or Enjoyment Of Government Lands Or Facilities.

The government does not dispute the widely-recognized principle that an individual has standing to challenge under the Establishment Clause a government action that adversely affects the individual's use or enjoyment of a government park or other government facility. Nor could it, given the Establishment Clause cases resolved by this Court on the merits in which the plaintiffs' standing rested upon that precise type of injury.

In *Van Orden* v. *Perry*, 545 U.S. 677 (2005), this Court recognized that the basis for the plaintiff's challenge to the display of the Ten Commandments on the grounds of the Texas State Capitol was that he had "encountered the Ten Commandments monument during his frequent visits to the Capitol grounds." *Id*. at 682. The district court explained:

> Plaintiff Van Orden testified that since 1995 he has made frequent use of the Texas State Law Library located in the State Supreme Court Building just northwest of the Capitol. * * * These visits bring the Plaintiff into frequent, and according to him unwelcome, contact with the Ten Commandments monument. * * * The Plaintiff testified that these contacts are offensive to him.

Van Orden v. *Perry*, 2002 U.S. Dist. LEXIS 26709, at *7 (W.D. Tex. Oct. 2, 2002), aff'd, 351 F.3d 173 (5th Cir. 2003), aff'd, 545 U.S. 677 (2005).

The very same sort of injury was alleged in *McCreary County* v. *ACLU*, 545 U.S. 844 (2005), in which the district court had determined that the plaintiffs had standing "because they must come into contact with the display of the Ten Commandments whenever they enter the courthouse to conduct business" and that "direct contact" was "unwelcome" to the plaintiffs. *ACLU* v. *McCreary County*, 96 F. Supp. 2d 679, 682 (E.D. Ky. 2000), aff'd, 354 F.3d 438 (6th Cir. 2003), aff'd, 545 U.S. 844 (2005); accord, *ACLU* v. *Pulaski County*, 96 F. Supp. 2d 691, 694 (E.D. Ky. 2000), aff'd, 354 F.3d 438 (6th Cir. 2003), aff'd, 545 U.S. 844 (2005).

This principle is broadly applied by the lower courts. See, *e.g.*, *O'Connor* v. *Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005); *Books* v. *Elkhart County*, 401 F.3d 857, 861-862 (7th Cir. 2005); *ACLU of Ohio Found, Inc.* v. *Ashbrook*, 375 F.3d 484, 489-490 (6th Cir. 2004); *Separation of Church and State Comm.* v. *City of Eugene*, 93 F.3d 617, 619 n.2 (9th Cir. 1996) (citing *Ellis* v. *City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993)); *Washegesic* v. *Bloomingdale Pub. Sch.*, 33 F.3d 679, 682-683 (6th Cir. 1994).

In the context of challenges to federal land use determinations or environmental regulations, it is settled that "harm to the forest or the environment" that "in fact affects the recreational or even the mere esthetic interests of the plaintiff * * * will suffice" to confer standing to challenge the government action allegedly producing the harm. *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (citing *Sierra Club* v. *Morton*, 405 U. S. 727, 734–736 (1972)). So too, a plaintiff may challenge government action under the Establishment Clause that interferes with

his use and enjoyment of federal lands and other facilities.[2]

B. A Plaintiff May Assert An Establishment Clause Claim Even When His Religious Beliefs Are Not Offended By The Religious Symbol Or Practice Involved.

Unable to dispute the sufficiency for standing purposes of a plaintiff's diminished enjoyment and use of a federal park, the government instead focuses on the *reason* that the plaintiff is offended by the challenged government action and therefore is injured in his ability to use and enjoy the park. A plaintiff may assert an Establishment Clause claim, the Solicitor General says, only if the offensiveness to the plaintiff of the government action rests on the plaintiff's religious convictions: because the respondent here is a Roman Catholic and "does not 'find the cross, itself, offensive,'" he supposedly lacks standing to assert an Establishment Clause challenge. U.S. Br. 13 (citation omitted).

"The requisite elements" of the standing requirement "are familiar: 'A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by

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[2] The government raised in its certiorari petition (at 16-17) a supposed disagreement among the courts of appeals as to whether a plaintiff must alter his behavior in response to the existence of the religious display in order to establish an injury sufficient to confer standing. Any alleged conflict is irrelevant here, because respondent did in fact alter his conduct. See page 13, *infra*. Moreover, the cases requiring an alteration in conduct on which respondent relies all involve an Establishment Clause challenge to a local government seal or other symbol, not a challenge to the presence of a government religious display located on government property frequented by the plaintiff.

the requested relief.'" *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 333 (2006) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). The Solicitor General's newly-minted requirement is entirely disconnected from this standard.

To be sure, the Establishment Clause does limit the extent to which government may "prefer one religion over another." *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15 (1947). A claim in which the plaintiff's injury stems from government action alleged to discriminate against the plaintiff's religious beliefs therefore plainly is sufficient to confer standing.

But the Clause's preclusion of government endorsement of a particular religion also has as its purpose the protection of religion from government involvement as well as the prevention of government endorsement of religion. *Engel* v. *Vitale,* 370 U. S. 421, 431 (1962) (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").

The Solicitor General is therefore wrong in her apparent belief that a Catholic could not claim an injury cognizable under the Establishment Clause from a government preference of Catholicism over other religions. A religious person may conclude—either as a matter of religious doctrine[3] or on other

[3] Some religions have as one of their beliefs the principle that government should not be involved with any aspect of the religion. Thus, the Governing Board of the National Council of Churches of Christ in the U.S.A. explained to the Court in its *amicus* brief in *County of Allegheny* v. *Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), that "'government acceptance of a creche on public property . . . secularizes and degrades a sacred symbol of Christianity.'" *Id.* at 651 n.8 (Stevens, J., dissenting)

grounds—that government endorsement of her particular religion, and the resulting expropriation of her religion's symbols for government purposes, is just as offensive, or even more offensive, than government endorsement of another religion. And if that offensiveness interferes with an individual's use and enjoyment of federal property, the individual has standing to sue.

This Court's cases recognize as much. For example, as respondent explains (Resp. Br. 24-25), the plaintiff in *Lee* v. *Weisman*, 505 U.S. 577 (1992), who objected to a rabbi's delivery of a prayer at the high school graduation ceremony was himself Jewish. Under the Solicitor General's approach, he would have lacked standing to challenge the prayer.

Finally, the Establishment Clause also limits the extent to which government may prefer religion over non-religion. *Wallace* v. *Jaffree*, 472 U.S. 38, 52-53 (1985); *Tex. Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989); *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961) (violates the Constitution to "pass laws or impose requirements which aid all religions as against non-believers"). A plaintiff whose claim of injury rests on the alleged government endorsement of any particular religion also would therefore have standing to sue.

The Solicitor General's restrictive standard for Establishment Clause standing is flawed for another reason. "Repeatedly and in many different contexts, [this Court has] warned that courts must not pre-

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(citation omitted); see also A. Adams & C. Emmerich, *A Nation Dedicated to Religious Liberty* 3 (1990) ("[f]rom [Roger] Williams, John Clarke, and William Penn, the Founders learned that state control of religion corrupted faith").

sume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Employment Div.* v. *Smith*, 494 U.S. 872, 887 (1990). By tying a plaintiff's standing exclusively to the plaintiff's religious beliefs, the government's test would embroil courts in difficult and intrusive determinations regarding an individual's religious beliefs. Each court hearing an Establishment Clause claim would be obliged to decide if the plaintiff's objection in fact stemmed from her religious beliefs, an inquiry that would necessarily begin with a judicial determination of the precise nature of those beliefs.

The government does not—and cannot—point to a single case in which this Court has held that a plaintiff's standing to assert a claim under the Establishment Clause turned upon whether the plaintiff's objection to the government action was grounded in the plaintiff's own religious beliefs. Indeed, one of the two cases on which the government principally relies—*School District* v. *Schempp*, 374 U.S. 203 (1963)—specifically rejects that approach. Discussing the plaintiffs' standing to challenge the mandatory elementary school prayer, the Court stated simply that "[t]he parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain." 374 U.S. at 224 n.9 (citation omitted).

The Solicitor General tries to create the impression that *Schempp* required a religion-based objection by pairing the "directly affected" phrase just quoted with a snippet from the Court's description of the facts of one of the two cases before the Court in *Schempp* (some 16 pages earlier in the opinion) indi-

cating that the mandated prayers were contrary to the plaintiffs' religious beliefs. See U.S. Br. 14. But the plaintiffs in the other case before the Court—not mentioned by the Solicitor General—were "professed atheists" (*Schempp*, 374 U.S. at 211) offended by government endorsement of religion, and their standing too was upheld by this Court.

Far from supporting the Solicitor General's "religion-based objection" requirement, therefore, *Schempp* confirms that all that is required for standing is an injury stemming from an objection resting on *any* of the interests protected by the Establishment Clause.

The other case relied upon by the government—*Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982)—is entirely inapposite. It addressed a situation in which the plaintiffs lacked standing because they suffered no injury at all as a result of the challenged government action. As Judge Kozinski pointed out for the panel below, *Valley Forge* "reminds the federal courts that only concrete, personalized injury—not an abstract, generalized grievance—suffices to confer standing." Pet. App. 105a-106a.

The plaintiffs in *Valley Forge* sought standing primarily on the basis of their status as taxpayers. After concluding that the plaintiffs were "plainly without standing to sue as taxpayers," the Court considered the court of appeals' conclusion that "the mere allegation of a legal right" conferred by the Establishment Clause was "sufficient to confer standing." 454 U.S. at 482-483.

Relying on its prior decisions in *United States* v. *Richardson*, 418 U.S. 166 (1974), and *Schlesinger* v.

Reservists Committee To Stop the War, 418 U.S. 208 (1974), the Court observed:

> Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. * * * It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Valley Forge, 454 U.S. at 485-486.

The Court went on—in the very next paragraph—to emphasize that it was not "retreat[ing] from [its] earlier holdings that standing may be predicated on noneconomic injury," but that the respondents had not "alleged an injury of any kind, economic or otherwise, sufficient to confer standing." *Id*. at 486. It pointed out that the named plaintiffs resided in Maryland and Virginia while the government property that was the subject of the claim was located in Pennsylvania. And, although the organizational plaintiff claimed members in Pennsylvania, "[i]t does not explain, however, how this fact establishes a cognizable injury," such as by alleging facts establishing that "one or more of its members has suffered, or is threatened with, an injury other than their belief that the transfer violated the Constitution." *Id*. at 487 n. 23.

The Solicitor General attempts to justify its "religion-based objection" requirement by invoking a single phrase wrested from *Valley Forge*—that the plaintiffs there "failed to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." The Solicitor General claims that this phrase establishes that "ideological" objections cannot support standing; only "religious" objections are sufficient (even though the *Valley Forge* Court did not draw this distinction and even though both "ideological" and "religious" objections could be characterized as "psychological consequences").

As just explained, however, the *Valley Forge* Court used the phrase quoted by the Solicitor General to refer to situations in which the plaintiff had not suffered *any* particularized injury, economic or non-economic. The claim of harm instead rested solely on the plaintiffs' metaphorical "observation" of the implementation of a government decision with which they disagreed. The mere allegation of a constitutional violation, the Court determined, was not sufficient to confer standing.

This Court specifically *distinguished* situations in which the alleged constitutional violation affected a plaintiff's use and enjoyment of public land, pointing out explicitly that such facts had *not* been alleged by the plaintiffs in *Valley Forge*. Thus, "[t]he *Valley Forge* Court drew a distinction between abstract grievances and personal injuries, not ideological and religious beliefs." Pet. App. 106a (court of appeals opinion). The ruling accordingly provides no support

for the government's exclusion of non-religion based objections.

Here, respondent asserted an Establishment Clause challenge to a religious display of the sort that has been heard routinely by the lower courts and by this Court. The district court concluded that respondent "will tend to avoid Sunrise Rock [the cross's location] 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; see also J.A. 64-65, 82, 85 (respondent's testimony that he is offended because cross is located on federal land); J.A. 74-76 (respondent's testimony explaining interference with his use and enjoyment of the park). The court of appeals determined that respondent "is, in other words, unable to 'freely us[e]' the area of the Preserve around the cross because of the government's allegedly unconstitutional actions. We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact." Pet. App. 107a (citation omitted).[4] Respondent plainly has standing to pursue his claim.[5]

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[4] The government's assertion (U.S. Br. 16) that respondent's lacks standing based on "the costs he incurs" to avoid viewing the cross rests entirely on its erroneous view of *Valley Forge*. Because, contrary to the government's contention, the diminution in respondent's use and enjoyment of the park is an injury sufficient to confer standing, these additional burdens serve to confirm that cognizable injury, and not a device to confer standing by "incurring some tangible burden to avoid noncognizable injuries (*ibid.*).

[5] The government's arguments about third-party standing (U.S. Br. 17-20) are inapposite because respondent is asserting his own rights under the Establishment Clause to eliminate harm

II. TRANSFER OF A GOVERNMENT-OWNED RELIGIOUS SYMBOL TO PRIVATE OWNERSHIP DOES NOT AUTOMATICALLY ELIMINATE AN ESTABLISHMENT CLAUSE VIOLATION.

The government appears to argue (U.S. Br. 20-21) that it can cure any Establishment Clause violation involving government display of a religious symbol by simply transferring to private owners the piece of land that contains the religious symbol at issue. No lower court has adopted such a blanket rule and this Court's precedents provide no support for that approach. Under the appropriate fact-specific analysis, the transfer here does not remedy the constitutional violation.

First, the government makes much of the question whether a land transfer should be presumed to remedy any Establishment Clause violation. Certainly any congressional enactment is subject to a presumption of constitutionality, but that is very different from a presumption that the statute fully remedies a constitutional violation. Moreover, where—as here—the government is subject to an injunction based on a fully litigated constitutional claim and the record indicates substantial effort by

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that he has suffered directly (his loss of the use and enjoyment of the park because of the offense to him from the presence of the cross) resulting from the government's violation of the Establishment Clause.

Finally, the government's passing reference (U.S. Br. 13-14) to respondent's standing to challenge the land transfer is mystifying. Surely if respondent had standing to assert the Establishment Clause claim that led to entry of the injunction, he has standing to assert that the transfer does not sufficiently remedy the underlying constitutional violation.

the government to avoid the effect of the injunction (including prohibiting the use of federal funds to comply with the injunction (see Pet. App. 60a)), presuming that the transfer fully vitiates the Establishment Clause violation seems unjustified. Certainly a court would never entertain such a presumption if a private party subject to an injunction sought to avoid its effect by transferring the property at issue, after other efforts to avoid compliance had fallen short.[6]

That is not to say that a land transfer may never vitiate an Establishment Clause violation. Just that the determination depends upon the particular facts and circumstances of each case.

Second, the logical starting point in assessing the effect of the land transfer is to identify the factors that gave rise to the finding of an Establishment Clause violation. The court of appeals concluded that "the Sunrise Rock cross will project a message of government endorsement to a reasonable observer" (Pet. App. 111a). The court relied principally on the fact that the cross "sits on public park land." *Ibid.*

Third, the threshold question therefore is whether the transfer sufficiently disengages the government from ownership of the land on which the cross is located. Respondent demonstrates (Resp. Br. 37-48) that the continued status of the cross as a na-

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[6] In *Freedom From Religion Foundation, Inc.* v. *City of Marshfield*, 203 F.3d 487 (7th Cir. 2000)—the decision on which the government rests its argument for a presumption—there was no finding of an Establishment Clause violation and no injunction entered prior to the sale of the land. That certainly distinguishes the case from one in which the constitutional violation has been adjudicated fully.

tional memorial and the government's continuing involvement with the site (see Pet. App. 26a-27a) support the district court's conclusion, upheld by the court of appeals, that "the government retains important property rights in, and 'will continue to exercise substantial control over,' the property on which Sunrise Rock is located, even after the land exchange." *Id.* at 29a (citation omitted). Compare *City of Marshfield*, 203 F.3d at 492 (after transfer, the City "ceased maintaining" the property; "no indication that the City is using the Fund merely as a straw purchaser, with the intention of continuing to exercise the duties of ownership").[7]

Fourth, even if the government has divested itself of the technical incidents of ownership, a court must consider whether "a violation of the Establishment Clause persists because the layout of the [cross] and the location and orientation of the statue would cause a reasonable observer to perceive that the [cross] was still a part of the * * * park and thus continues to constitute government endorsement of religion." *Id.* at 493. The Seventh Circuit concluded in *Marshfield* that despite the sale of the land to a private entity, the property remained "a part of th[e] public forum"—the surrounding public park—because of its historical association with the park, the buyer's commitment to use the property only for a public use, and the size and location of the property in comparison to the surrounding park. *Id.* at 494. It therefore applied this Court's decision in *Capitol Square Review & Advisory Board* v. *Pinette*, 515 U.S.

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[7] In addition, the timing and means of transfer in this case demonstrate unusual government involvement. Cf. *Bd. of Educ.* v. *Grumet*, 512 U.S. 687 (1994).

753 (1995), to assess the endorsement issue. 203 F.3d at 495-497.

The court of appeals here correctly concluded that "carving out a tiny parcel of property in the midst of this vast preserve—like a donut hole with the cross atop it—will do nothing to minimize the impermissible governmental endorsement" of religion. Pet. App. 33a. Indeed, petitioners had argued earlier in the case that, because of private property within the Preserve, a less well-informed reasonable observer would believe that the cross could be on private land, and the presence of the cross accordingly did not constitute an impermissible government endorsement of religion. The court of appeals' explanation in rejecting that argument is relevant here as well: "[g]iven the ratio of publicly-owned to privately-owned land in the Preserve and the use to which the Sunrise Rock area is put, a less well-informed reasonable observer would still believe—or at least suspect—that the cross rests on public land." *Id.* at 112a. That is another reason why the land transfer here does not vitiate the Establishment Clause violation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

MARC D. STERN
American Jewish Congress
825 Third Avenue
New York, NY 10022
(212) 360-1545

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

KARA H. STEIN
American Jewish Comm.
165 East 56th Street
New York, NY 10022
(212) 891-6742
Counsel for Amici Curiae

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