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 *AMICI CURIAE* THE BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY AND THE INTERFAITH ALLIANCE IN SUPPORT OF RESPONDENT

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This brief is filed on behalf of the Baptist Joint Committee for Religious Liberty ("BJC") and the Interfaith Alliance in support of Respondent, with the written consent of the parties.[1]

INTERESTS OF THE *AMICI CURIAE*

The BJC is a 73-year-old education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation. The BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise clauses is essential to religious liberty for all Americans. The BJC has participated as *amicus curiae* in many of the major religious liberty cases before the Supreme Court.

The Interfaith Alliance is the only national interfaith organization dedicated to protecting the integrity of both religion and democracy in America. The Interfaith Alliance has 185,000 members across the country made up of 75 faith traditions as well as those of no faith tradition. The Interfaith Alliance celebrates religious

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism.[2]

STATEMENT OF FACTS

1. *Case Summary.*[3] In March 2001, Frank Buono filed suit against the federal government, claiming that the National Park Service's ("NPS") maintenance of a Latin cross on federal land located in the Mojave National Preserve (the "Preserve") violated the Establishment Clause. J.A. 1. A prior version of the cross purportedly had been erected by the Veterans of Foreign Wars ("VFW") as part of a World War I memorial. J.A. 53. Currently, however, the cross stands alone, with no indication that it is meant to signify anything other than a symbol of Christianity. *Id.* Mr. Buono sought a declaratory judgment that the cross violated the Establishment Clause and a permanent injunction compelling defendants to remove the cross. J.A. 59. In 2004, the court of appeals affirmed a district court final judgment holding that Mr. Buono had standing to bring an Establishment Clause challenge to the presence of

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2. Although the interests of *amici* arise in many Establishment Clause and Free Exercise Clause contexts, *amici* here file this brief in support of Respondent's standing arguments.

3. *Amici* refer to and incorporate by reference Respondent's Counterstatement of the Case. Brief of Respondent Frank Buono at 1-8, *Salazar v. Buono*, No. 08-472 (July 27, 2009).

the cross on federal land and that the government's maintenance of a Latin cross 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 ("*Buono I*"). The government sought neither en banc review of the court of appeals' decision nor review of that decision in this Court.

In 2005, Respondent brought an action to enforce the judgment in *Buono I ("Buono II")*. 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.

2. *Mr. Buono's Direct Injuries.* Mr. Buono's standing stems from direct injuries to his aesthetic and environmental interests. Mr. Buono was a steward of the Preserve, where the cross is located, for many years both during and after his 25-year employment with the NPS. J.A. 61-63. This employment included serving as the assistant superintendent of the Preserve from November 1994 to December 1995. J.A. 61-62. Mr. Buono now visits the Preserve "two to four times a year on average," and intends "to continue to visit the Preserve on a regular basis." J.A. 64. Because of these facts, the Preserve has "special significance" for Mr. Buono. *Id.*

Mr. Buono stated that he would visit the Preserve even more frequently once he moved from Oregon to southern California or Arizona, which he planned to do shortly after filing the complaint. *Id.* Mr. Buono stated that "[t]he presence of the cross on federally owned land in the Preserve deeply offends [him] and impairs [his] enjoyment of the Preserve." J.A. 64-65. Specifically, although Mr. Buono is Catholic, he is greatly troubled by observing the cross on federal land while knowing that other religious groups are not allowed to erect any religious signs or symbols on the same land. J.A. 64.

Significantly, Mr. Buono alleged that the presence of the cross has caused him to alter his activities: "[Mr.] Buono [has and] will [in the future] 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. 107a, 123a; *see also* J.A. 65. Cima Road is often Mr. Buono's preferred road into the Preserve for a number of reasons besides convenience. First, Cima Road runs through the world-class Joshua Tree forest. J.A. 74. Mr. Buono enjoys the scenery of the Joshua Tree forest, especially when the trees are in bloom; indeed, the NPS touts the forest in its visitor brochure as one of the Preserve's featured attractions. *Id.* Second, Mr. Buono sometimes takes Cima Road to visit abandoned mines and mining equipment just off that road, because he finds such mines and equipment fascinating. J.A. 74-75. Finally, the trail head of the Teutonia Peak hiking trail, one of only two constructed hiking trails on the Preserve, is situated on the land where the cross is located. J.A. 92. Thus, if Mr. Buono

avoids Cima Road because of the cross, he deprives himself of one of the few access points to, in his words, a land of "spectacular beauty." *Id.*

SUMMARY OF THE ARGUMENT

The government asserts several challenges to Mr. Buono's standing in this case. First, the government suggests – without authority – that Mr. Buono lacks standing to challenge the government's purported remedy to his injury. Second, the government tries to re-litigate whether Mr. Buono ever had standing to obtain the injunction in the first place. Both of the government's arguments are unavailing. As an initial matter, a party obtaining the injunction has the right to have it enforced, and the courts have both the power and the duty to insure that the injunction is not disregarded. Consequently, Mr. Buono has the right to challenge a purported cure of the underlying Establishment Clause violation which was enjoined in *Buono I*. Second, Respondent's Article III standing has been fully and finally decided in *Buono I*, and, thus, is *res judicata* in the case at bar. Third, even if this Court entertains the government's challenge to Mr. Buono's Article III standing, Mr. Buono has standing to assert an Establishment Clause violation.

This Court interprets Establishment Clause standing in much the same way as any other Article III standing case: a person must allege a redressable injury in fact that was caused by the challenged government conduct. The injury can be economic or non-economic, but must amount to more than a mere ideological injury. A person must be directly affected by the allegedly unconstitutional conduct.

The injury itself can take many forms such as economic injury and aesthetic injury, including the profanation of a person's religion. The Latin cross is an established religious symbol, and the placement of a religious symbol at a place designated as a memorial to the dead conveys a religious message. To deny that such placement is primarily a religious decision with a primary effect of advancing religion degrades the meaning and purpose of the religious symbol, causing an injury to those who hold that symbol to be an integral part of their religious beliefs.

Injury also stems from the need to avoid the challenged government conduct. Avoiding the religious symbol causes both aesthetic and recreational injury to an individual – all sufficient to establish Establishment Clause standing.

ARGUMENT

I. RESPONDENT HAS STANDING TO ENFORCE THE INJUNCTION

As an initial matter, the government suggests that Mr. Buono does not have standing to enforce the district court's injunction because he "lacks standing under the Establishment Clause to challenge Congress's land transfer." Pet. Br. 9. The government cites no authority for this proposition, because there is none.

Federal courts have inherent power and authority to enforce a judgment and punish a party for disobeying the courts' orders. 18 U.S.C. § 401(3). "When a court employs 'the extraordinary remedy of injunction,' it

directs the conduct of a party, and does so with the backing of its full coercive powers." *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). The parties are bound to obey an injunction and are under an obligation to take steps to insure that violations of the order do not occur. *See GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 386 (1980); *Union Tool Co. v. Wilson*, 259 U.S. 107 113-14 (1922).

Moreover, the party obtaining the injunction has the right to have it enforced. Fed. R. Civ. P. 70; *Buckeye Coal & Ry. v. Hocking Valley Ry.*, 269 U.S. 42, 49 (1925); *People by Vacco v. Operation Rescue Nat'l*, 80 F.3d 64, 71-72 (2d Cir. 1996); *cf. United States v. Amoco Chem. Co.*, 212 F.3d 274, 275 n.2 (5th Cir.2000) ("a consent decree is enforceable by those who are parties to it."). As the Seventh Circuit has observed, "[n]o one wants an injunction that cannot be enforced. . . . An injunction is supposed to be a swift and effective remedy, summarily enforceable through contempt or other supplementary proceedings in the court that issued the injunction." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1183 (7th Cir. 1985).

Here, the government is attempting, by way of a land transfer, to craft a remedy to the underlying Establishment Clause violation, and thereby moot the district court's injunction. But Mr. Buono has a vested right in the government's *compliance* with the injunction, not avoidance of it, since the injunction was issued to address his specific injury. Consequently, the government's claim that Mr. Buono does not have standing to challenge the land transfer is unsupportable.

II. THE GOVERNMENT IS BARRED FROM RE-LITIGATING MR. BUONO'S STANDING TO OBTAIN THE INJUNCTION

The government also attempts to re-litigate whether Mr. Buono had standing to assert a claim under the Establishment Clause, the predicate finding for issuing the injunction. Pet. Br. 13-20. But Mr. Buono's standing was addressed and finally determined during the course of litigation ending with *Buono I*. As the district court held and the Ninth Circuit affirmed:

> There is no question based on the uncontroverted facts that [Buono was] harmed by being subjected to an unwelcome religious display, namely the cross. . . . Plaintiff came into a direct and unwelcome contact with the cross. [He] was offended by its presence, and [he] will continue to be offended by its presence on subsequent, imminent trips by [him] to or near the site of the cross.

Pet. App. 131a; *see also* Pet. App. 107a.

The government did not appeal that decision, and instead choose to reassert its standing challenge in *Buono II*, the action to enforce the underlying injunction. However, "[t]he general rule is that even though a judgment of contempt and an underlying injunction whose violation is the basis of the contempt finding are related . . . each is a separate judgment and each must be appealed within the time limits prescribed by the rules." *Cherokee Express, Inc. v. Cherokee Express, Inc.*, 924 F.2d 603, 608 (6th Cir. 1991). Appeal

deadlines, of course, are "mandatory and jurisdictional." *Mo. v. Jenkins*, 495 U.S. 33, 45 (1990).

Where a court's determination of a person's standing becomes final, such that no appeal may be taken from that decision, no party may re-litigate whether that person has standing in this Court or any other. *See*, *e.g.*, *Federated Dep't. 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."); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938) ("After a Federal court has 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."); *Ins. Corp. of Ir. 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. It has long been the rule that principles of *res judicata* apply to jurisdictional determinations — both subject matter and personal."); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377-78 (1940); *Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992) (discussing *Chicot County*).

In 1931, this Court articulated this principle in *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931). In that case, the Court held that a party who had unsuccessfully contested and litigated the court's personal jurisdiction could not later collaterally

attack the original court's judgment in another court. *Id*. at 226-37. The Court stated:

> Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

Id. at 525-26.

Recently, the Court reaffirmed this long-standing principle in *Travelers Indemnity Company v. Bailey*, 129 S. Ct. 2195 (2009). In that case, this Court held that *res judicata* bars collateral attack on jurisdictional determinations. *Id.* at 2206. The Court reasoned: "If the law were otherwise, and courts could evaluate the jurisdiction that they may or may not have had to issue a final judgment, the rules of *res judicata* would be entirely short-circuited." *Id.* (internal citations omitted).

The government here attempts to cloak its challenge to Respondent's Establishment Clause standing in the garb of a new and separate challenge to the standing to enforce the injunction in light of the land transfer. Given that it propounds the same arguments in this appeal that it asserted in its arguments against Respondent's

standing initially, such a characterization of the standing issue as new and different falls flat. But even if the government is not precluded from arguing standing, Mr. Buono's Article III standing is beyond dispute.

III. BUONO HAS INJURIES SUFFICIENT TO SUPPORT STANDING

It is well established that Article III standing is not confined to plaintiffs who demonstrate an economic injury. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982) (standing under the Establishment Clause may be supported on noneconomic injury). By their very nature, Establishment Clause injuries tend to be non-economic in nature. *See*, *e.g.*, *id.*; *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 851-52, 858 (2005) (finding an Establishment Clause violation when petitioners posted a version of the Ten Commandments in a heavily trafficked area of their courthouses); *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (finding an Establishment Clause violation when high school students were compelled to take part in a religious benediction at graduation ceremonies).

A. Legal Standard

Under Article III of the United States Constitution, a plaintiff in a federal case must show: 1) concrete and actual injury; 2) a causal connection between the injury and the challenged conduct; and 3) a redressable injury. *Vt. Agency of Natural Res. v. United States ex rel Stevens*, 529 U.S. 765, 771 (2000). In Establishment Clause cases, concrete and actual injury occurs when

the plaintiff shows that he has been directly affected by the government's establishment of religion. *Sch. Dist. of Abingdon Twp. v. Schempp*, 374 U.S. 203, 225 n.9 (1963).

In *Schempp*, the plaintiffs were a family whose children attended public school in Pennsylvania. *Id.* at 205-06. At the time, Pennsylvania law mandated that at least ten verses of the Bible be read aloud at the beginning of each school day. *Id.* at 205. Plaintiffs, who were members of the Unitarian Church, claimed that such readings ran contrary to their religious beliefs. *Id.* at 206. The Court held that the plaintiffs had standing to bring suit, stating, "[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." *Id.* at 225 n.9.

Conversely, in *Valley Forge*, 454 U.S. at 468, the federal government conveyed a plot of land to the Valley Forge Christian College, a nonprofit educational institution in Pennsylvania. Americans United for Separation of Church and State, Inc. ("Americans United"), along with members living in Maryland and Washington, D.C., sued under the Establishment Clause, claiming that the conveyance violated their right as taxpayers, because their tax dollars were being used to violate the First Amendment. *Id.* at 469, 487. In this case, the Court held that the plaintiffs did not have standing because, despite their obvious and genuine fervor for their cause, none of them had suffered any direct injury as a consequence of the conveyance. *Id.* at 485-86. The Court noted that the plaintiff

organization had failed to make specific allegations of injury to any of its members living in Pennsylvania. *Id.* at 487 n.23. *Valley Forge*, however, emphasized the rule of *Schempp* that taking offense at state-sponsored religious practices and being "forced to assume special burdens to avoid them" was the kind of noneconomic injury that confers Article III standing. *Id.* at 486 n. 22.

This express emphasis by the Court on the kind of direct, non-economic injury that conveys standing only supports Mr. Buono's standing here. Mr. Buono alleges a sufficiently direct injury from government action that fits well within the tests for standing as articulated by this Court.

B. A Person Has Standing To Sue Under The Establishment Clause If He Is Directly Affected By Unwelcome Government Establishment Of Religion

Mr. Buono differs from the Maryland and Virginia citizens in *Valley Forge*, who were not directly affected by the government's alleged conduct in Pennsylvania. Here, Mr. Buono alleged that he was directly injured in his enjoyment of the Preserve by the government's violation of the Establishment Clause. Moreover, the government's suggestion that Article III standing requires that a person object to the religious message itself, in some entirely different context, is unfounded in law or logic.

1. Aesthetic and recreational injury is sufficient to establish a concrete and personalized injury

The "injury in fact" requirement may be satisfied by harm to aesthetic, recreational, and environmental interests. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (reasoning that such interests "are important ingredients of the quality of life in our society" that warrant judicial protection); *accord United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-87 (1973) (finding harm to "aesthetic and environmental well-being" sufficient for standing). Generally, to gain standing based on a non-economic injury, a plaintiff is required to establish that he or she has been "directly affected by the laws and practices against which their complaints are directed." *Valley Forge*, 454 U.S. at 486, n.22 (quoting *Schempp*, 374 U.S. at 225 n.9). Where such a particularized and direct harm is shown, standing is appropriate. *See Van Orden v. Perry*, 545 U.S. 677, 682-84 (2005) (not questioning standing of plaintiff to bring Establishment Clause claim when he brought suit six years after having last walked by a monument including the Ten Commandments on state property); *Saladin v. City of Milledgeville*, 812 F.2d 687, 691-93 (11th Cir. 1987) (standing established because plaintiffs were directly confronted by the word "Christianity" on city seal).

Here, Mr. Buono has alleged facts sufficient to support standing based on direct injuries to his aesthetic and environmental interests. In particular, Mr. Buono was a steward of the Preserve for many years and he now visits the Preserve "two to four times a year

on average," and intends "to continue to visit the Preserve on a regular basis." J.A. 64. Mr. Buono has stated that "[t]he presence of the cross on federally owned land in the Preserve deeply offends [him] and impairs [his] enjoyment of the Preserve." J.A. 64-65. Mr. Buono has also alleged that the presence of the cross has caused him to alter his activities: "[Mr.] Buono [has and] will [in the future] 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. 107a, 123a.

Contrary to the government's arguments, such noneconomic injuries are no less personal, and they do not transform Respondent into a mere bystander. As noted earlier, Establishment Clause injuries are uniquely non-physical and rarely economic. Mr. Buono's injury here is sufficiently direct and consistent with other non-economic injury cases like *McCreary County v. ACLU*, *supra*, where plaintiffs objected to the display of the Ten Commandments in a public courthouse. 545 U.S. at 851-52. Furthermore, Mr. Buono has shown more concrete injury here than required under cases like *Van Orden v. Perry*, where the plaintiff had not witnessed the monument in question for six years before filing suit. 545 U.S. at 682. In both *McCreary* and *Van Orden*, the plaintiffs had standing.

ACLU of Illinois v. City of St. Charles, 794 F.2d 265, 267 (7th Cir. 1986), is particularly persuasive. There, defendant city ("St. Charles") had a longstanding tradition of erecting a six-acre Christmas display that included a large Latin cross, reindeer, Santa Claus, and

other items. St. Charles would light the cross, making it an "unmistakable symbol of Christianity." *Id.* The two plaintiffs were residents of St. Charles who objected to the cross because, in their view, the display of the cross violated the separation of church and state. *Id.* One of the plaintiffs was a Methodist, while the other was a "nonbeliever" who was "raised as a Christian." *Id.* Both plaintiffs alleged that they "departed from their accustomed routes of travel to avoid seeing [the cross when lit]." *Id.* The district court granted a preliminary injunction prohibiting St. Charles from maintaining the display of the cross, and the Seventh Circuit affirmed. *Id.* at 267, 276.

In addressing plaintiffs' standing, the court found that plaintiffs' alleged detours to avoid the cross were sufficient to support standing. *St. Charles*, 794 F.2d at 268 (finding allegations of detours to avoid the cross analogous to the injury suffered by the plaintiffs in *SCRAP*, 412 U.S. 669, wherein the Supreme Court conferred standing on plaintiffs who argued that defendants' actions curtailed plaintiffs' use and enjoyment of national parks). The Court rejected St. Charles' argument that the harm plaintiffs incurred in detouring from the cross was self-inflicted. *Id.* (relying on *Schempp*, 374 U.S. at 224 n. 9, and *Valley Forge*, 454 U.S. at 486 n.22, to find that a detour was a sufficient injury to support standing).[4]

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4. Notably, the *St. Charles* court dismissed the fact that the cross was maintained by volunteers as irrelevant to the issue of standing, finding that the U.S. Supreme Court had no requirement that Establishment Clause violations be tied to an expenditure of public funds. *St. Charles*, 794 F.2d at 268-69.

Like plaintiffs' claim in *St. Charles*, Mr. Buono's claim concerns a large Latin cross prominently displayed on public property. One of the *St. Charles* plaintiffs objected to the cross despite being Methodist; Mr. Buono objects to the Sunrise Rock cross despite being Catholic.[5] Moreover, like the *St. Charles* plaintiffs, who detoured from their regular routes to avoid the cross, Mr. Buono detours from his preferred route into the Preserve to avoid the Sunrise Rock cross and, in doing so, is deprived of the beauty of the Preserve. Mr. Buono, like the *St. Charles* plaintiffs, has alleged facts sufficient to support his standing to bring his Establishment Clause claim. *See* 794 F.2d at 268-69 (plaintiffs' allegation that they altered normal routes of travel to avoid cross satisfied Article III standing). *See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.* (*TOC*), *Inc.*, 528 U.S. 167, 183 (2000) (plaintiffs found to successfully allege injury in fact upon demonstrating that the challenged activity would harm them by lessening the aesthetic and recreational value of the area); *Sierra Club*, 405 U.S. at 734 (destruction of scenery in a national park visited by the plaintiffs "may amount to an injury in fact sufficient to lay the basis for standing").

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5. Additionally, the objectionable implication from a cross memorial that only Christians – not those of other religious faiths or those of no religious faith – died for their country, or that only Christians should be commemorated for their service to their country, is injurious.

2. Courts should not consider an individual's religious motives or beliefs in determining standing under the Establishment Clause

Elements of standing, identified and discussed *supra*, do not require or even allow an inquiry into the plaintiff's personal religious beliefs and motivations. The Court's examination of a person's religious motivations or beliefs alone to determine standing raises concerns about government entanglement in religion. It improperly places the Court in the position of evaluating the validity and significance of the beliefs espoused by the party. *See e.g.*, *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). The suggestion that Mr. Buono's specific religious beliefs (*i.e.*, respect for cross displays on private property) disqualify him from asserting an Establishment Clause challenge to the display of a cross on public land has no place in this Court's standing doctrine.

Historically, courts – including the United States Supreme Court – allow a person's challenge to government endorsement of his religion under the Establishment Clause without examining the person's motivations or personal beliefs. Although the Court has not addressed directly whether a person has standing to object to government endorsement of his or her own religion, the Court has allowed such challenges in the past. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S.

290, 294 (2000) (Mormon and Catholic plaintiffs objected to Christian prayer at public high school football games); *Weisman*, 505 U.S. 577 (Jewish plaintiffs challenged inclusion of invocations and benedictions including nonsectarian prayer by Jewish rabbi in public school graduation ceremony); *Stone v. Graham*, 449 U.S. 39 (1980) (plaintiffs, including individuals of Christian and Jewish faiths, challenged state statute requiring displays of the Ten Commandments in public schools). *See also Am. Jewish Cong. v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (Jewish association objected to the presence of a 27-foot menorah in a public park near City Hall during the holiday season); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993) (Catholic plaintiff objected to the use of public money and public land to display and illuminate Latin cross); *Lamont v. Woods*, 948 F.2d 825, 267 (2d Cir. 1991) (plaintiffs, including a Jewish rabbi, challenged a federal assistance program that provided funding to schools associated with Jewish and Christian religions); *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989) (plaintiffs, including a Jewish rabbi, objected to the display of a menorah in a public park by City Hall); *St. Charles*, 794 F.2d 265 (Methodist individual objected to display of government-owned Latin cross); *Hall v. Bd. of Sch. Comm'rs of Conecuh County*, 656 F.2d 999 (5th Cir. 1981) (Christian plaintiff objected to allowing students to conduct morning devotional readings over public address system and teaching elective Bible literature course in a manner which advanced religion); *Allen v. Hickel*, 424 F.2d 944, 945 (D.C. Cir. 1970) (Episcopal

minister and Catholic priest challenged display of nativity scene on federal parkland).[6]

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6. Likewise, numerous federal district courts frequently find that an individual has standing to seek relief from a government endorsement of his or her own religion. *Summers v. Adams*, No. 3:08-2265-CMC, 2008 WL 5401537, at *5 n.11, 7 (D.S.C. Dec. 23, 2008) (holding that plaintiffs, who included a retired United Methodist minister and a Christian pastor, had standing to challenge South Carolina license plates featuring a cross and the words "I believe"); *Turner v. Habersham County*, 290 F. Supp. 2d 1362, 1364, 65 (N.D. Ga. 2003) (holding that ordained Baptist minister had standing to challenge display of Ten Commandments in courthouse); *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961, 968-71 (W.D. Wis. 2003) (holding that plaintiffs, who included a member of the Catholic church, had standing to challenge display of Ten Commandments in city park), *rev'd on other grounds*, *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005); *ACLU of Tenn. v. Hamilton County*, 202 F. Supp. 2d 757, 761-62 (E.D. Tenn. 2002) (holding that plaintiffs, who included a Jewish rabbi, had standing to challenge display of Ten Commandments in courthouse); *Adland v. Russ*, 107 F. Supp. 2d 782, 784 (E.D. Ky. 2000) (holding that plaintiffs, who included a Jewish rabbi and Christian ministers, had standing to challenge display of Ten Commandments on state capitol grounds); *Joki v. Bd. of Educ. of Schuylerville*, 745 F. Supp. 823, 824 n.1, 832 (N.D.N.Y. 1990) (holding implicitly that plaintiffs, one of whom "received religious training in a Baptist Church" but had married a Jewish woman and was raising his children in the Jewish religion, had standing to challenge a painting of the crucifixion in public school); *Harvey v. Cobb County*, 811 F. Supp. 669, 671 n.1, 674-75 (N.D. Ga. 1993) (holding that Jewish plaintiff had standing to challenge display of Ten Commandments in county courthouse building); *May v. Cooperman*, 572 F. Supp. 1561 (D.N.J. 1983) (allowing Roman Catholic plaintiffs to challenge school prayer statute), *aff'd*, 780 F.2d 240 (3d Cir. 1985).

As these cases show, the government's contention that Mr. Buono's religious beliefs could defeat his standing in this case runs contrary to a long line of established precedent.

3. Even if courts consider religious motives or beliefs, a person has standing to assert an Establishment Clause claim even where the symbol is one associated with his or her own religion

a. A person can object to government advancement of his religion

The Court has held that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Weisman*, 505 U.S. at 589 (finding the inclusion of a nonsectarian prayer in a public school graduation ceremony violated the Establishment Clause). Where government interferes with that private choice and responsibility, it violates the Establishment Clause. Standing to complain about such government action is not limited to those who object to the religion endorsed by the government. "It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses [the Religion Clauses] exist ***to protect religion*** from government interference." *Id.* (emphasis added). It is the government entanglement with religion that causes

one's injury. Standing to challenge government endorsement cannot be limited to endorsement of another's religion, as profanation of any religion through government advancement of religion violates the Establishment Clause.

A person's injury can stem solely from the degradation of his religion by government endorsement of his religion. Courts throughout the nation recognize that the Establishment Clause does not tolerate profanation of religion. *See e.g.*, *ACLU of N.J. v. Schundler*, 168 F.3d 92, 98-99 (3d Cir. 1999) ("Demystification, desanctification, and deconsecration suggest a process of profanation, something that the Establishment Clause neither demands nor tolerates."). Such profanation of religion is a concrete injury "substantial enough to require attentive examination" by a court. *Allen*, 424 F.2d at 950. The *Allen* plaintiffs, who included an Episcopal minister and a Catholic priest, challenged the government's sponsorship of a pageant in a national park that included the exhibition of a crèche – a religious symbol that depicts the birth of Christ. *Id.* at 945.

In finding standing, the court rejected the argument by the government that plaintiffs could "avoid walking near the [park land] while it was occupied by the crèche. Plaintiffs were entitled, as members of the public, to enjoy the park land and its devotion to permissible public use; a government action cannot infringe that right or require them to give it up without access to the court to complain that the action is unconstitutional." *Id.* at 947. Regardless of the merits of a plaintiff's contentions, a court has "no basis for denying to a citizen the right to question, through orderly court procedures, alleged

Government sacrilege of the symbols of his religion." *Id.* at n.7.

Just as in those cases, Mr. Buono, a self-identified Roman Catholic, has standing to object to the presence of the Latin cross in the Preserve. A person's religious beliefs are not determinative of the question of whether he may sue for unconstitutional government actions. To suggest that a person only has standing to object to government endorsement of another's religion ignores the injury to one's religious beliefs when government endorsement itself profanes that person's religion.

Mr. Buono no longer enjoys the government property because he sees the government's display of a Christian symbol in a way that misappropriates it and has the primary effect of advancing religion. That is a personal, direct injury, different perhaps from the injury to someone of another faith who feels like an outsider, but injurious nonetheless. Seeing one's faith receive preferential governmental treatment, while aware that no minority faith would receive that treatment, demonstrates the government's perversion of religion for its own ends. The government is taking something that should be a symbol of voluntary religious belief and practice and using it in a way (*i.e.*, maintaining it on government property) that alters its apparent symbolism by making it look like an "official" faith. It is not surprising that devout, voluntary adherents of a religion would not want to send the signal to those who do not share in the religion of the majority that they are political outsiders. Where the government endorses one religion over all others, it weakens the sanctity of that religion and its beliefs. The religious symbol

becomes the official marker of the government, representing a host of individuals who do not subscribe to that religion, rather than keeping the symbol one of an individual or faith community. The symbol and the religion are thereby degraded.

b. Government endorsement of a religion through use of a particular religious symbol detracts from that symbol's religious meaning, causing direct injury to members of that religion

(i) A Latin cross is first and foremost a religious – not secular – symbol

The historical religious significance of placing a cross at a burial site is undeniable. A cross on a grave symbolizes the deceased individual's religious beliefs. In fact, any religious symbol on a grave does the same. A brief examination of the symbols available for engraving by the Department of Veterans' Affairs ("the VA") on veterans' headstones (called "emblems of belief" by the VA) shows that the cross at a gravesite is not the secular symbol that some would like this Court to hold. *See* United States Department of Veterans' Affairs, Available Emblems of Belief for Placement on Government Headstones and Markers, *http://www.cem.va.gov/hm/hmemb.asp* (last visited July 27, 2009). Indeed, the VA itself defines an emblem of belief as "[a]n emblem that represents ***the decedent's sincerely-held belief that constituted a religion or the functional equivalent of a religion*** and was believed and/or accepted as true by the decedent in his or her life. The belief represented by an emblem need not be associated

with or endorsed by a group or organization." United States Department of Veterans' Affairs, Headstone and Marker Application Process Update, *http://www.cem.va.gov/hm/hmqa.asp* (emphasis added) (last visited July 27, 2009). Placement of that symbol on a headstone for use at a gravesite, therefore, connotes a religious belief – not a secular one.

A cross at a war memorial site which commemorates the deaths of soldiers who gave their lives in a particular war is no less religious in meaning. To deny that a Latin cross at a war memorial has a religious meaning not only falls contrary to logic, but also degrades the religious symbolism of the cross. As the use of religious markers at gravesites – placed there according to individual religious beliefs and decisions – commemorates the deceased's religious beliefs, so does a stand-alone religious symbol at a war memorial site. Any effort by the government to make a Latin cross stand as a generic symbol of death illustrates a misuse of that religious symbol. As discussed below, such profanation should not be tolerated.

(ii) Government endorsement of a Latin cross profanes the religious significance of the Latin cross in violation of the Establishment Clause

Given that the Establishment Clause permits neither the promotion nor the infringement of religion, the government may not act in a manner as to actually diminish the long-standing religious impact of a symbol. The Establishment Clause protects the public from

government endorsement of one particular religion in an effort to prohibit the coercive effects of such endorsement. *Engel v. Vitale*, 370 U.S. 421, 430-13 (1962). "Voluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices." *McCreary*, 545 U.S. at 884 (O'Connor, J., concurring). The Clause's purpose does not end there, however, as

> [i]ts 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 Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate.

Engel, 370 U.S. at 431-32 (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785)) (emphasis added).[7]

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7. Concern about the degradation of religion is hardly novel. As Justice Blackmun stated in dissenting from the Court's decision in *Lynch v. Donnelly*, 465 U.S. 668, 727 (1984) (Blackmun, J., dissenting) (emphasis added):

> The crèche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. . . .

(Cont'd)

Historically, the purpose of the Establishment Clause was to separate religion from the hands of government to prevent injury to dissenters, including Christian dissenters. It was the culmination of British and American political thought grounded not only in John Locke's views on religious toleration and liberty of conscience, but also in Martin Luther's and John Calvin's theology, as mediated by Roger Williams. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 357-67 (2002). Williams was a Baptist minister who, after being expelled from Massachusetts for heterodoxy, founded Rhode Island in 1644 — creating the first experiment in total freedom of conscience on American soil. Edwin S. Gaustad, Roger Williams 13, 59, 70 (2005); Baptists and the American Experience 16-17 (James E. Wood Jr. ed., 1976). Williams maintained that for religious belief

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(Cont'd)

> The import of the Court's decision is to encourage use of the crèche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence. ***Surely***, ***this is a misuse of a sacred symbol.***

Justice Brennan articulated a similar viewpoint in his dissent in *Marsh v. Chambers*, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting), where he described one purpose of the Establishment Clause as preventing "the trivialization and degradation of religion by too close an attachment to the organs of government." Government endorsement of a religious symbol does just that – trivializes the symbol and degrades the religion's use of that symbol.

One who worships in a particular faith must be allowed under the Establishment Clause to challenge that degradation.

to be genuine, people must come to it of their own free will, as coerced belief and punishment of dissent are anathema to true faith. Williams also recognized the dangers inherent in government use of religious sacraments. He argued that freedom of conscience flourishes only when churches act without governmental interference; for governmental sponsorship degrades religion's purity and integrity. *See*, *e.g.*, Roger Williams, *The Bloudy Tennant*, *Of Persecution for Cause of Conscience* (1644), *reprinted in* 3 Complete Writings of Roger Williams (Samuel L. Caldwell ed., 1963) ("[T]rue religion does not need the support of carnal weapons." (quoted in Conrad H. Moehlman, The Wall of Separation Between Church and State 60 (1951)).

James Madison echoed Williams' concerns in 1785, when opposing a bill introduced into the General Assembly of Virginia which provided an assessment for religious teachers. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) (available at *http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html* (last visited June 23, 2009)). He argued that the proposed government endorsement would "weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits." *Id.* Simply put – government endorsement of a religion minimizes its sanctity to both those who follow the religion and those who do not.

When government displays a religious symbol without note or comment, it endorses and supports the religious traditions to which the symbol is sacred. In trying to justify itself by explaining the significance of the religious symbol, government takes sides in any controversies about the meaning and significance of the religious symbol – an endorsement of religion that the Constitution prohibits. Because government can display religious symbols only if it claims a secular purpose and effect, the tendency of its explanations is always to distort and desacralize the religious symbol. The inevitable effect is that government supports only the religion of those who agree with both the sacred meaning of the symbol and the government's secularized explanation of the symbol. Government puts itself in competition with the religion of all other Americans. The Constitution excludes government from such religious competition – for the protection of believers and nonbelievers alike.

The Latin cross has such religious significance. It "is the preeminent symbol of many Christian religions . . . [and] to suggest otherwise would demean this powerful religious symbol." *Carpenter v. City & County of San Francisco*, 93 F.3d 627, 630 (9th Cir. 1996) (internal citations and quotations omitted). Classifying the Latin cross as secular injures those individuals who hold the cross to be a preeminent symbol of their foundational religious beliefs. As Justice Brennan observed in his concurrence in *Schempp*, 374 U.S. at 259: "[i]t is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into

the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government." Courts that view "religious displays through the 'lowest' (secularized) common denominator demean[] the religious nature of the objects displayed . . . ." Frank S. Ravitch, *Religious Objects As Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1061 (Winter 2005). Such diminution of the religious nature of those symbols directly injures adherents of that religious belief.

Establishment Clause cases have recognized the interests inherent in challenging government-sponsored religion under the Establishment Clause, including the interest in protecting religion from government. Such cases demonstrate the error in Petitioner's attempt to strip Mr. Buono's standing on the basis of his religious beliefs.

CONCLUSION

For the reasons argued above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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