No. 08-472

In The Supreme Court of the United States

KEN L. SALAZAR,
SECRETARY OF INTERIOR, *et al.*,

Petitioners,

v.

FRANK BUONO,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICUS CURIAE*

The Freedom From Religion Foundation ("Foundation")[1], a national nonprofit organization based in Madison, Wisconsin, is currently the largest national association of freethinkers, representing atheists, agnostics and others who form their opinion about religion based on reason, rather than faith, tradition or authority. The Foundation has members in every state in the United States and in the District of Columbia and Puerto Rico. The Foundation's two purposes are to educate the public about nontheism, and to defend the constitutional principle of separation between state and church.

The Foundation's interest in this case arises from two distinct concerns. First, religious symbols on public property that violate the Establishment Clause of the First Amendment to the United States Constitution cannot be remedied by simply selling off or transferring portions of public property to private parties in order to ensure the symbol remains. The Foundation has brought more than forty lawsuits in federal and state courts to remedy Establishment Clause violations, more than a quarter of these challenging religious symbols on government

[1] This brief has not been authored, in whole or in part, by counsel for either party. No monetary contribution has been made to the preparation or submission of this brief other than the *amicus curiae*, its members or its counsel. Consent to this brief has been given by all parties and copies of their written consent are being lodged herewith.

property. The Foundation and its members are frequently involved as plaintiffs in lawsuits challenging the government's display of religious symbols on public property, including the two land transfer cases cited by both parties in this case, *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005) and *Freedom From Religion Foundation v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), and other cases brought forth by Foundation members, such as *Gonzales v. N. Twp. of Lake County*, 4 F.3d 1412 (7th Cir. 1993), and the series of cases involving the Mt. Soledad cross.

Second, war memorials designated by Congress and state governments to honor veterans should remain free from religious imagery. The myth is false that "there are no atheists in foxholes." The Foundation's own membership includes veterans of World War II, the Korean War, the Vietnam War, the Gulf War and current military servicemen and women involved in U.S. military operations in Iraq and Afghanistan. Many of the Foundation's founding members, when the group went national in 1978, were World War II veterans and some of its early members were World War I veterans. Federal and state governments have consistently failed to recognize the contributions and sacrifices of "atheists in foxholes" and the actions in this case continue to demonstrate government favoritism toward Christianity over all other faiths and religion over non-religion. In an effort to honor its veteran membership the Foundation has erected an Atheists in Foxholes

monument on the grounds of its southern Freethought Hall in Lake Hypatia, Alabama, and gives out its Atheist in Foxhole award. Further information about the "no atheists in foxholes" myth, the Foundation's monument in Alabama and the annual Atheists in Foxholes award is included in the Appendix – Parts A, B, and C.

SUMMARY OF ARGUMENT

The Latin cross atop Sunrise Rock ("Sunrise Rock cross") is a purely sectarian symbol that cannot be viewed as anything other than the preeminent and exclusive symbol of Christianity. Congress should not designate any national memorials consisting solely of patently religious symbols. To do so not only violates the Establishment Clause of the First Amendment to the United States Constitution, which secures the freedom of conscience of all American citizens by ensuring government does not promote religion, but also grossly disrespects the growing non-Christian and non-religious segment of the U.S. population. Any nationally designated war memorials should honor all veterans regardless of religious preference or practice.

The government's placing or condoning of religious symbols on government property is a blatant violation of the separation between state and church that cannot be remedied solely by selling off, transferring or exchanging the disputed parcel or

symbol. The only truly effective way to end the perception of government endorsement of the religious message is to remove the symbol.

Even if this Court deems land sales, transfers or exchanges to be the proper remedy for this type of an Establishment Clause violation, the Ninth Circuit's decision to remove the Latin cross should be affirmed. Notwithstanding the land transfer, the violation continues through the Congressional designation of the cross as a national memorial, the reversionary interest contained in the land transfer agreement and the continuing and ongoing supervision and management by the government of the federal area.

This case comes down to a simple truth: the most effective remedy for an unlawful display on public property is to remove the display.

ARGUMENT

I. THE LATIN CROSS AT SUNRISE ROCK IS A PURELY SECTARIAN SYMBOL THAT, EVEN IF DEEMED A NATIONAL MEMORIAL TO HONOR VETERANS OF WORLD WAR I, CONVEYS A RELIGIOUS MESSAGE.

In assessing the constitutionality of religious symbols on government property, this Court, as well as a majority of federal courts, continue to apply the analysis outlined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the *Lemon* test, a governmental

practice violates the Establishment Clause if it does not have a secular purpose, if its primary effect is to advance or inhibit religion, or if it fosters excessive government entanglement with religion. *See Stone v. Graham*, 449 U.S. 39, 40-41 (1980). The Establishment Clause is violated if the government action fails any prong of this test. *Id*. Despite reliance on this three-prong test, no bright-line rule exists for evaluating Establishment Clause cases and each challenge must be based on fact-specific analysis. *See Van Orden v. Perry*, 545 U.S. 677, 686 (2005); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989).

This Court has also used the "endorsement test" to determine the validity of a challenged government action. In *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring), Justice O'Connor wrote that "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." Justice O'Connor's primary concern was whether a particular government action conveys "a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688. This test subsequently was adopted and used in *Allegheny*,

> "Whether the key word is 'endorsement', 'favoritism', or 'promotion,' the essential principle remains the same. The Establishment

> Clause at the very least prohibits the government from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" 492 U.S. at 593-594 (quoting *Lynch*).

A Latin cross on government property is an expressive activity that certainly creates a perception of government endorsement. The Sunrise Rock cross, displayed on a prominent place in the Mojave National Preserve ("Preserve") for over seventy years, unabashedly creates the perception of government endorsement. It conveys the message to the twenty-six percent of the U.S. population[2] who are not Christians that they are not "favored members of the political community." *Id.* The cross, even if described as a war memorial, has an exclusionary effect, making non-Christian and non-believing veterans political outsiders.[3]

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[2] *See* http://www.americanreligionsurvey-aris.org/ (last visited July 29, 2009).

[3] Have not Mojaves and other Native Americans, many of whom are not Christians, served their country with valor in American wars? Are they too to be excluded from a memorial in the midst of a federal reserve, which their ancestors called home?

A. The Overwhelming Majority Of Federal Courts Have Recognized The Latin Cross To Be An Inherently Religious Symbol.

Many recent cases have specifically concerned the Latin cross being displayed on public property. A Latin cross is one described as having two arms, one horizontal, one vertical, at right angles to one another. *See Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007).

The religious significance of the Latin cross is unambiguous and indisputable. "The Latin cross . . . is the principal symbol of Christianity around the world, and display of the cross alone could not reasonably be taken to have any secular point." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 792 (1995) (Souter, J., concurring). An overwhelming majority of federal courts agree that the Latin cross universally represents the Christian religion, and only the Christian religion. *See, e.g., Separation of Church and State Comm. v. City of Eugene,* 93 F.3d 617, 620 (9th Cir. 1996) ("There is no question that the Latin cross is a symbol of Christianity, and that its placement on public land . . . violates the Establishment Clause.") (fifty-one foot Latin cross located on a butte in city park was not permissible); *Gonzales*, 4 F.3d at 1421 ("[A]n attempt to create an aesthetically pleasing religious symbol does not obviate its religious purpose.") (a crucifix in public park intended to act as war memorial was not permissible); *Harris v. City of Zion,* 927 F.2d 1401,

1412 (7th Cir. 1991) ("a Latin cross . . . endorses or promotes a particular religious faith. It expresses an unambiguous choice in favor of Christianity.") (a Latin cross was not allowed on city's seal), *cert. denied,* 505 U.S. 1218 (1992); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986) ("When prominently displayed . . . the cross dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be. Such a display is not only religious but sectarian.") (an illuminated thirty-five foot by eighteen foot Latin cross on top of fire station as part of Christmas display was not permissible), *cert. denied*, 479 U.S. 961 (1986); *ACLU of Ga. v. Rabun County Chamber of Commerce,* 698 F.2d 1098, 1103 (11th Cir. 1983) (per curiam) ("Substantial evidence supports the district court's finding that the Latin cross is a universally recognized symbol of Christianity.") (Large, lighted cross in state park was not permissible); *Libin v. Town of Greenwich,* 625 F.Supp. 393, 399 (D. Conn. 1985) (Burns, J.) (cross has meaning only as symbol of Christianity; invitation to viewer to make religious connection "can be construed as a message endorsing the religious beliefs that allow the connection to be made") (display of cross on firehouse held not permissible); *Jewish War Veterans v. U.S.,* 695 F.Supp. 3, 15 (D.D.C. 1988) ("[The Latin cross] The principal symbol of Christianity, this nation's dominant religion, simply is too laden with religious meaning to be appropriate for a government memorial assertedly free of any religious message.") (a

large cross on Marine Corps base intended as a symbol of national resolve was not permissible); *Mendelson v. City of St. Cloud*, 719 F.Supp. 1065, 1069 (M.D. Fla. 1989) (The Latin Cross is the "unmistakably universal symbol of Christianity, and has no secular purpose.") (ruling that Latin cross on city tower was not permissible); *Houston ACLU v. Eckels*, 589 F.Supp. 222, 234 (S.D. Tex. 1984) ("That the cross . . . is the primary symbol for Christianity . . . is beyond question.") (three Latin-style crosses and a Star of David as part of a war memorial in a public park were not permissible).

No court of final resort has ever upheld the government's *permanent* display of a Latin cross on public land as constitutional.

The inherent religious significance of the Latin cross is undeniable and is not disguisable. No secular purpose, no matter how sincere, will detract from the overall message that the Latin cross stands for Christianity and the overall display promotes Christianity. The display of this patently religious symbol on a prominent rock within a national preserve confers government endorsement of Christianity, a blatant violation of the Establishment Clause. The Sunrise Rock cross could not stand alone in the federal preserve, nor could it remain where it is without the extraordinary intervention of Congress taken for religious purposes.

B. The Sunrise Rock Cross, As A War Memorial, Conveys A Message Of Government Endorsement Of Christianity.

The Veterans of Foreign Wars (VFW) originally erected a cross in the Mojave Desert Preserve to honor the fallen soldiers. In 2002, after litigation over the cross's removal ensued, Congress passed Pub. L. No. 107-117, § 8137, which designated the cross as a national memorial commemorating U.S. participation in WWI.[4] The Petitioners argue that the cross is not a religious message but rather a symbol of death and remembrance for veterans.

Even if this Court accepts the Petitioner's argument that the Sunrise Rock cross is acting as a war memorial, this designation cannot overcome the government's message of Christian endorsement. As the district court in *Mercier I* noted,

> " . . . it is difficult to see how dedicating a [religious] monument to a particular group can diminish its religious nature. A Bible is no less holy because the blank line following the phrase 'Presented To' in the front cover is filled in with the name of a non-believer instead of a Christian minister. Building a church in memory of a beloved parishioner does not make it any less a place of worship." *Mercier v. City of La Crosse*, 276 F.Supp.2d 961, 974 (W.D. Wis. 2003).

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[4] This legislation also provided for installation of a memorial plaque and a replica of the original VFW cross from 1934.

Likewise, dedicating a Latin cross to fallen soldiers does not alter the inherently religious message that the cross conveys. *Id.* The Seventh Circuit came to the same conclusion in *Gonzales*. In that case, a Roman Catholic crucifix was placed by the Knights of Columbus in a public park, with a plaque dedicating it to those who have sacrificed their lives to defending this country. *Gonzales*, 4 F.3d at 1414. The court was not convinced that the primary reason for the crucifix was the purpose of a war memorial. Rather, the court decided the memorialization was simply a means to an end, of achieving a secular purpose. *Id*. at 1421. The court held "the *Lemon* test does not permit a municipality to exempt a[n] obviously religious symbol from constitutional strictures by attaching a sign dedicating the symbol to honored dead." *Id*.

Also significant is that the plaque on the crucifix was hidden by shrubbery and less than thirty years after its original placement, the plaque had gone missing. The Seventh Circuit recognized there would be "no chance that anyone without special knowledge of the crucifix's history would know that it was purportedly intended to memorialize fallen soldiers." *Id*. at 1423.

Similarly, the cross atop Sunrise Rock lost its original plaque indicating its dedication, and for an unspecified number of years (believed to be throughout most of its history) has had no indication that its purpose is to serve as a war memorial. Additionally, no evidence has been offered to show that the cross

has been used for any services commemorating war veterans. Instead, the record indicates that devotional Easter services have been held at the site for numerous years. *Buono III*, 502 F.3d at 1072. Therefore, it is a sham to refer to the cross as a war memorial.

Even should this Court find that a justified secular purpose exists and that the display can be called a war memorial, the Sunrise Rock cross will nevertheless fail the second and third prong of the *Lemon* test. In order to determine whether the cross advances or inhibits religion in its principal or primary effect, the Court must look to the message conveyed by the religious symbol.

Congress's attempt to camouflage a patently religious message by declaring the cross a war memorial and including a replica of the original sign does not erase the monument's primary message. The primary message conveyed by displaying a Latin cross is an endorsement of Christianity, despite any secular purpose that may be proclaimed. *See, e.g., Separation of Church and State*, 93 F.3d 617 (cross donated to city and dedicated war memorial violated Establishment Clause); *Houston ACLU*, 589 F.Supp. 222 (cross and Star of David as part of war memorial held to have no secular purpose); *Jewish War Veterans*, 695 F.Supp. 3 (non-religious symbol more appropriate than cross to honor servicemen on Marine Corps base); *Gonzales*, 4 F.3d 1412 (Knights of Columbus's intent to dedicate crucifix to fallen soldiers did not obviate its religious purpose).

The Sunrise Cross stands alone. It is in the middle of 1.6 million acres within the Preserve. There is nothing in the surrounding area, which would permit a reasonable viewer to infer its purpose as a war memorial, or as a non-religious symbol in general. Even if a reasonable observer had knowledge that the cross has a "history" as a war memorial, the reasonable observer would also know the cross's longstanding history as a site for devotional Easter worship services. Therefore, the current state of Sunrise Rock would lead a reasonable person to conclude that that cross is part of the Preserve and that the government, rather than a private entity, endorses religion, especially when viewed from Cima Road. *See Marshfield,* 203 F.3d at 495. Furthermore, the proximity of the cross to the Preserve, and the lack of visual definition between the federal government and the VFW, creates a perception of improper endorsement. *Id*. at 496.

Petitioners argue unpersuasively that recognizing the cross as a war memorial makes the cross "less religious." Many devout Christians, such as the Respondent in this case, would certainly take offense at such an attempt to trivialize or secularize the cross. It is preposterous to argue that "the government can avoid an establishment clause violation by 'dedicating' a religious object to a nonreligious group." *Mercier v. City of La Crosse*, 305 F.Supp.2d 999, 1008 (W.D. Wis. 2004), rev'd, 395 F.3d 693 (7th Cir. 2005). Adopting such a view would permit government bodies to erect crosses and build churches on public

property as long they could think of a new group to whom to dedicate each one. *Id*.

II. SECTARIAN SYMBOLS SUCH AS THE LATIN CROSS SANCTIONED BY GOVERNMENT AS WAR MEMORIALS NEGLECT THE SACRIFICES OF OUR NON-CHRISTIAN AND NON-BELIEVING VETERANS.

Notably, other famous war memorials without using any sectarian images make it clear to a reasonable observer that their sole purpose is to honor veterans. Such memorials include the National World War II Memorial, the Vietnam Veterans Memorial and the Korean War Veterans Memorial. Each is secular in nature and without any sort of religious reference, which ultimately offends no one and is respected by all. The lack of religious imagery within those memorial designs does not in any way diminish their significance or detract from the respect and honor shown for our veterans. Any Congressional action designating a monument to war veterans, therefore, can and should be free from religious iconography.

A. Recent Surveys Indicate That The Non-Religious Is The Fastest Growing Segment Of The U.S. Population By Religious Identification.

Congress's actions designating Sunrise Cross as a national memorial illustrate its failure to recognize

America's increasingly large secular population and to accommodate the changing demographics of the United States. Religious identification surveys indicate that at least fifteen percent or thirty-four million adult Americans are now non-religious. Less than seventy percent of Americans believe in a traditional theological concept of a personal God. The non-religious is the fastest-growing segment, by religious identification, in the U.S. population, according to the definitive American Religious Identification Surveys. *See* http://www.americanreligionsurvey-aris.org/ (last visited July 29, 2009).

Congress's actions in this case evidence favoritism toward one religion over another and religion over non-religion, in a manner which insults and excludes all non-religious and all non-Christian American veterans who have fought or died for our country. "When the government displays favoritism to one faith . . . it sends a chilling message to those in the minority that they are not full members of the community." *Lynch*, 465 U.S. at 688. This Court has observed that "it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent." *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963).

The Ninth Circuit correctly held in this case that the cross – even as a purported war memorial – is a sectarian war memorial that carries "an inherently religious message and creates an appearance of

honoring only those servicemen of that particular religion." *Ellis v. City of La Mesa*, 990 F.2d 1518, 1527 (9th Cir. 1993). The cross as designated as a national memorial by Congress, also tends to make "adherence to a religion relevant . . . to a person's standing in the political community." *Allegheny,* 492 U.S. at 594. Its presence as a war memorial "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id*. at 595. "Even if one strains to view the religious symbols in the context of a war memorial, their primary effect is to give the impression that only Christians and Jews are being honored . . . " *Eckels*, 589 F.Supp. at 235. The Sunrise Rock cross also excludes non-Christians and the "atheists in foxholes" who have also served in World War I with honor and distinction.

III. REMOVAL OF RELIGIOUS ICONOGRAPHY AND MESSAGES FROM PUBLIC PROPERTY IS THE ONLY TRULY EFFECTIVE REMEDY TO END LONGSTANDING ESTABLISHMENT CLAUSE VIOLATIONS.

It is no remedy to allow the federal government, or state, local and municipal governments, to sell, transfer or exchange public property which has long been host illegally to inherently religious symbols in order to cure egregious Establishment Clause violations. To be sure, the only truly effective way to

adequately divorce the government from the religious symbol is to order its removal.

Land sales, transfers or exchanges ("land sales") serve only to provide the government with a sham remedy to end serious constitutional violations. The government's endorsement remains unmistakable. Such remedies do nothing more than provide an environment that is ripe for government manipulation, as was even recognized by the Seventh Circuit in *Marshfield*, "We are aware, however, that adherence to a formalistic standard *invites manipulation*. To avoid such manipulation, we look to the substance of the transaction as well as its form to determine whether government action endorsing religions has actually ceased." 203 F.3d at 491. (emphasis added)

The land sale remedy encourages government lawyers and actors to find *any plausible* secular justification for the real estate transaction and it rewards government officials who conveniently omit from the legislative record any indication that their purpose is, in actuality, religiously motivated.[5] This remedy creates a "solution that . . . borders on a fraud." *See Mercier III*, 395 F.3d at 706 (Bauer, J., dissenting).

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[5] It is no surprise that virtually no legislative history appears to exist for the case at bar. Rep. Jerry Lewis, from California's 41st District, who sponsored all three Congressional Acts at issue, took a "no comment" approach, remaining silent about the proposals he authored and sponsored.

Moreover, supposed land sales create an incentive for governments and their actors – looking to dodge Establishment Clause violations while still promoting religion – to carve out and sell portions of valuable public property only to groups that it knows will maintain displays conveying inherently religious messages.[6] The district court in *Mercier I* warned that these transfers would permit Chief Justice Moore to "display the Ten Commandments in his courtroom so long as he could convince the state to sell a tiny portion of the courthouse to a private party and erect a disclaiming sign." 276 F.Supp.2d at 977-978. The district court further noted that the public land sales themselves send the message of government endorsement of a particular religious viewpoint. The court stated,

> "If anything, the sale of the parcel exacerbates the violation because it communicates

[6] The district court in *Mercier II* presented a compelling hypothetical to illustrate this premise: "Suppose that the city were sponsoring a 'free speech' day in Cameron Park. Although all citizens could attend the event, the city would allow only those expressing Christian religious principles to speak. When other members of the community objected to the preferential treatment, the city did not open up the event to allow other groups to speak or cancel the event all together. Instead, the city sold a platform in the park and the land directly underneath it to a group that it knew would talk about Christian teachings. In an effort to avoid litigation, the city put up a sign disclaiming any endorsement of Christian views. In this hypothetical, there could be no dispute that the sale would violate the Establishment Clause." *Mercier I*, 305 F.Supp.2d at 1012.

> to non-adherents that not only is the City willing to display a Judeo-Christian symbol on public property, but it is also willing to carve up a public park to insure that the symbol does not have to be moved or share its space with displays expressing other viewpoints." *Mercier II,* 305 F.Supp.2d at 1013.

These types of sales give the government a huge loophole through which to escape constitutional violations. As Justice Souter observed in his concurring opinion, "by allowing government to encourage what it cannot do on its own, the proposed per se rule [of the plurality] would tempt a public body to contract out its establishment of religion, by encouraging the private enterprise of the religious to exhibit what the government could not display itself." *Capitol Square*, 515 U.S. at 792. In allowing the government to simply sell, transfer or exchange public property on which sectarian religious symbols improperly sit, this remedy does nothing more than camouflage the fact that the government is accomplishing exactly what it is prohibited from doing under the Constitution: endorsing and furthering one religion.

Land sales allow the government to not only continue to display inherently religious symbols on miniscule sections of private property within larger tracts of public property, but they also serve to demonstrate a preference for one particular group looking to express one particular viewpoint, which is

more often than not a religious viewpoint. Further, an additional "remedy" occasionally proposed, namely, adding disclaimers and other physical demarcations of private property, does not adequately diminish the religious message and perception of government endorsement. The only way for the government to directly and effectively end the Establishment Clause violation is to remove the symbol. The "complete physical separation between government and the offending object . . . addresses the concern at the core of such disputes – nonadherents' ability to use public space without disaffecting influence of the endorsed religious symbol." Jordan C. Budd, *Cross Purposes: Remedying the Endorsement of Symbolic Religious Speech,* 82 Denv. U.L. Rev. 183, 227 (2004).

A. Government Initiated Real Estate Transfers To Pre-Determined Buyers Willing To Maintain Religious Displays Violate The Constitutional Prohibition Against Government Favoritism Of One Particular Group.

It is a fundamental principle of Establishment Clause jurisprudence that the government is prohibited from favoring religion over non-religion and a particular faith over all other faiths. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way in which 'establishes a [state] religion or religious faith, or

tends to do so.'"); *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor J., concurring) ("[The endorsement test] does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."); *Abington,* 374 U.S. at 305 (Goldberg J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion over nonreligion."); *Everson v. Bd. of Educ. of Ewing Twp.,* 330 U.S. 1, 15-16 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws, which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.").

The state action (the disposition of government property) must comply with these constitutional dictates. The stated purpose for the sale "cannot be a

sham to avoid a potential Establishment Clause violation." *See Gonzales*, 4 F.3d at 1419; *see also Rabun*, 698 F.2d at 1110 ("At the core of the Establishment Clause is the requirement that a government justify in secular terms its purpose for engaging in activities which may appear to endorse the beliefs of a particular religion. Although courts have rarely looked behind the stated legislative purposes, it is clear that an avowed secular purpose, if found to be self serving, may 'not be sufficient to avoid conflict with the First Amendment.'") (citations omitted). The land sale must not demonstrate favoritism and it must satisfy the test set forth in this Court's *Lemon* decision and recently reaffirmed in *McCreary*. *See Lemon*, 403 U.S. 602; *see also McCreary County v. ACLU*, 545 U.S. 844 (2005). This Court has previously recognized that the state action does not necessarily dissipate simply because public land transferred to private hands. *See Evans v. Newton*, 382 U.S. 296 (1966).

The land exchange in the instant case represents a cleverly devised subterfuge to disguise seventy years of flagrant constitutional violation. Congress not only showed favoritism when it went to "herculean efforts" to preserve the Sunrise Rock cross, but its action to exchange one acre of land upon which the cross sits to a private party also demonstrates Congress's preference for religion over non-religion and Christianity over all other faiths. Congress continuously intervened in this matter in order to preserve one religious message, to the exclusion of all

others, in the Mojave National Preserve.[7] In *Mercier I*, the district court judge correctly noted that the "Defendant sold a very small parcel of land in the middle of a park to a pre-determined buyer for the purpose of preserving *one* religious message." 276 F.Supp.2d at 976 (emphasis in original). Judge Crabb further observed that the " . . . defendant did not make the decision to sell because it wanted to foster the speech of all its citizens in the park but because it believed the sale was the only way to insure that the monument would stay where it is." *Id.*

The attempt to "patch up" an admitted violation of the Constitution with the shell game of land transfer produces an ugly kludge – an inelegant and overcomplicated solution to a simple problem. The obvious remedy, the constitutional solution, was for the VFW to move the cross to the nearby ranch

[7] Congress took extraordinary action to intervene in the Sunrise Rock cross case, passing considerable legislation to prohibit federal funds from being used to remove the cross, to designate the Christian cross as a national memorial, and to initiate the land transfer. *See* Pub. L. No. 106-554, § 133; Pub. L. No. 107-248, § 8065(b); Pub. L. No. 107-117, § 137; Pub. L. No. 108-87, § 8121. Congress went so far as to divest invaluable federal land specifically dedicated as a nature preserve, which it had recently set aside, according to the California Desert Protection Act of 1994, as a "public wildland resource of extraordinary and inestimable value for this and future generations." *See* Pub. L. No. 103-433, § 2(a)(1). Congress, after its historic vote to preserve this natural desert bounty in 1994, is now inexplicably eager to carve up a parcel of this heritage of all the American people for the purpose of "saving the cross."

owned by one of its members, not for Congress to swap federal land under the cross for land on the ranch.

Congressional preference for favored religious speech cannot be sanctioned by manipulation. What if the Freedom From Religion Foundation were to illegally erect a towering "THERE IS NO GOD" sign in the middle of federal property and call it a memorial to recognize "atheists in foxholes" and in the U.S. military? What if offended onlookers sued and Congress responded with emergency steps to effect a land swap solely calculated to ensure the Foundation could continue to advertise its atheistic message surrounded by invaluable public land? No reasonable observer would conclude that this trespassing graffiti or Congress's actions to promote a "no God" message would therefore be constitutional. The same is true of land swaps that perpetuate religious endorsement.

B. No Amount Of Fencing Or Signage Can Disassociate The Government From The Religious Message Of An Intrinsically Sectarian Symbol Such As A Latin Cross, Nor Can Disclaim The Government Endorsement.

In an attempt to diminish the perception of government endorsement of religion, some courts have ordered governments to place disclaimers, usually signage, and to erect physical barriers such as fences to demarcate private property from public

property. This additional remedy is hopelessly ineffective. Particularly for purely religious symbols such as the Latin cross in Mojave National Preserve, "[n]o sign can disclaim an overwhelming message of endorsement." *Allegheny*, 492 U.S. at 619. "As a result, no matter how many fences or signs the [government and private entity] build, it is impossible to defeat the impression that the monument is still part of [the government's] property." *Mercier II*, 305 F.Supp.2d at 1019.

Justice Souter aptly observed in *Pinette*, " . . . the presence of a disclaimer does not always remove the possibility that a private religious display 'conveys or attempts to convey a message that religions or a particular religious belief is favored or preferred' when other indicia of endorsement . . . outweigh the mitigating effect of the disclaimer." 515 U.S. at 794. Even though Congress ordered a plaque to be erected at the Sunrise Rock cross site indicating its status as a war memorial, the pervasively sectarian nature of the "memorial" voids any disclaiming effect the plaque would serve.

Even if a court ordered the VFW to erect a fence surrounding the Sunrise Rock cross, or required additional signage, the inherently religious nature of the cross defeats any disclaimer. The very existence of such a disclaimer would prove the obvious perception of government endorsement. Furthermore, any reasonable person familiar with the history and context of the cross would know that Congress and the VFW went to herculean efforts to preserve a cross that

historically has been used solely for Easter worship services, despite its alleged status as a war memorial. Any disclaimer posted at the site would be useless. The dissenting opinion in *Mercier III* recognized,

> "The disclaimer seems to me to be taken from a scene in the movie, 'The Wizard of Oz' in which the phony wizard, whose fraud has been exposed, directs the onlookers to 'pay no attention to that man behind the curtain;' a disclaimer that is no more or less effective than the disclaimer on the monument. It too is an obvious sham." *Mercier III*, 395 F.3d at 706 (Bauer, J., dissenting).

The only effective way to end constitutional violations such as these is to order the government to remove the symbol from government property.

IV. EVEN IF THIS COURT DEEMS LAND SALES UNDER CERTAIN INSTANCES TO BE A PERMISSIBLE MEANS TO END CONSTITUTIONAL VIOLATIONS, THE NINTH CIRCUIT DID NOT ERR IN REFUSING TO GIVE EFFECT TO CONGRESSIONAL ACTIONS.

No court, including the Seventh Circuit, has sanctioned real estate transfers as a per se means of ending constitutional violations. Even under the analytical framework of *Marshfield*, if unusual circumstances exist, a land sale, transfer or exchange may not effectively cure an Establishment Clause violation. The Seventh Circuit reiterated in *Mercier*

III, " . . . there must be no unusual circumstances surrounding the sale of the parcel of land so as to indicate an endorsement of religion." 395 F.3d at 702. Such unusual circumstances include

> " . . . a sale that did not comply with applicable state law governing the sale of the land by a municipality, *id.*; a sale to a straw purchaser that left the City with continuing power to exercise the duties of ownership; or a sale well below fair market value resulting in a gift to a religious organization." *Id.*

To determine the validity of such a sale, the court in *Marshfield* evaluated the "form and substance" of the transaction to determine whether a land sale terminated the endorsement of religion. *Marshfield*, 203 F.3d at 491.

In the case at bar, the land exchange exudes unusual circumstances that render it an invalid remedy. Congress's first acts were to ensure no government funds would be used to remove the Christian cross and to designate the Christian cross as a national memorial. *See* Pub. L. No. 106-554, § 133 and Pub. L. No. 107-117, § 8137. Congress's further intervention to transfer the land benefits only one group, the VFW, under terms that require the VFW to keep a Latin cross displayed within a national public Preserve. *See* Pub. L. No. 108-87, § 8121. These terms also include a reversionary clause, which specifies should the VFW fail to maintain the property "as a war memorial, the property shall revert to the ownership of the United States." Pub. L. No. 108-87,

§ 8121(e). Congress had no other reason to exchange the land other than to maintain the location of a Latin cross. The prohibition of funding for the removal of the Christian cross, its national memorial designation and the reversionary clause in the land transfer agreement further evidence Congress's intent. Everyone understands that the Congressional Acts were only passed in order to preserve a religious message in the Preserve. These acts are further bolstered by the fact that Congress required no signs or demarcations, however inadequate to ensure no perception of government endorsement of Christianity. The actions uniformly show Congress's blatant refusal to separate itself from the display of a purely Christian monument and an attempt to evade a court injunction for the purposes of promoting religion. Therefore, the Ninth Circuit did not err in refusing to give effect to the intervening Congressional Acts.

Religious symbols do not belong in the midst of such a public preserve, nor should public preserves be carved up to promote the religious views of private individuals or groups favored by Congress. To overrule the Ninth Circuit in this matter would set in motion dangerous precedent, which would open the door to countless sham divestitures of public property in order to aid religion (inevitably, the dominant religion) in our country. Such a ruling would fail to safeguard not only the Establishment Clause, but also public land throughout the United States, which may have been usurped unlawfully for strictly

religious purposes. If the Court rules in favor of the Petitioners, interlopers would be assured that they too may be offered "first rights" and "sweetheart deals" to buy valuable property in a no-bidding situation, and gain access to public real estate in order to pursue their private religious purposes.

CONCLUSION

For the foregoing reasons, this Court should affirm the Ninth Circuit's decision holding that the land transfer statute did not adequately remedy the constitutional violation and permanently enjoining the government from completing the land transfer.

Respectfully submitted,

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APPENDIX A

Dispelling the Myth "There Are No Atheists In Foxholes"

The "atheist in foxhole" canard has been of special distaste to veterans who are not religious, including the Foundation's large veteran membership. They have written letters and spoken out when the cliché is thoughtlessly repeated in the media or by public officials. This phrase may have originated during the Battle of Battan in early 1942. It was also ascribed to World War II journalist Ernie Pyle. The phrase was used in the 1942 World War II movie, "Wake Island." But it is believed the phrase "there are no atheists in the trenches" dates back at least as far as World War I. In the Yale Book of Quotations, Fred R. Sparo, editor of "You Can Quote Them," notes "There are no atheists in the trenches," appeared in the Oakland Tribune, May 6, 1918, among other sources. (*See* The Yale Alumni Magazine, http://www.yalealumnimagazine.com/issues/2008_03/arts_quotations.html) This shows a longstanding bias in society against atheists and agnostics in the military dating to at least World War I. Congressional action which not only favors Christianity but deliberately excludes and marginalizes non-Christian veterans as well as nonreligious veterans is an affront not just to those individual veterans but to the Establishment Clause and its prohibition against a union between government and religion.

The Foundation's newspaper, Freethought Today (1984-present), has carried many articles by or about "atheists in foxholes," including:

- "Elmer Hochkammer: Foxhole Atheist" (April 1984), recounting how this Foundation member, a genuine "atheist in a foxhole," was severely wounded in the Battle of Bune in 1943.
- Larry Townsend, a Foundation member now living in Florida, who sent a letter to Peter Jennings of ABC News in 1996 after Jennings repeated the untrue assertion that there were "no atheists in foxholes." Townsend, who was living in Pearl Harbor when it was bombed in 1941 and joined the Marines, noted, "I was heavily involved in the war from the first minute to the last. I have seen a number of foxholes and I have been an occupant of a few and know for sure that there was at least one atheist in one of them." (June/July 1996)
- Ken Dunn, California, who enlisted in the Marine Corps in 1940, attaining gunnery Sergeant, and who served a six-year stint that involved some of the major Pacific battles of World War II, including Guadalcanal. Dunn wrote about coming under fire as a U.S. Marine in the first U.S. offensive in the Pacific, Guadalcanal, where there were 3,200 causalities in four days. During one battle, Ken's troops suffered fifty percent casualties. He noticed that the deaths were without respect to religious

views. He ordered his men to put away their prayer beads as they were landing and "get a firm grip on their weapon." When Ken requested an "A" for "Atheist" on his dog tags, he was told that was impossible and the space was left blank. ("Dog tags Without God: Outspoken Foxhole Atheist," August 1997; "Atheist in a Foxhole," October 1999).

- Foundation Lifetime Member Norman LeClair, of Florida, wrote his "Recollections of a None" (May/June 1988): "Looking back over a military career that spanned two wars and lasted twenty-plus years, I can't help but think about our government-subsidized religion and how it impacted so negatively on many of my experiences in uniform." He enlisted in the regular Air Force when the Korean War broke out and served through the Vietnam War, where he encountered prejudice against "nones." He was told by a chaplain's assistant upon his return from Vietnam: "Oh! You can't be a none. You can only be a Catholic, a Protestant or a Jew."

- Mike Hagen recounted his experiences as an atheist after joining the Navy in 1977. After he chose "no preference" for his designation, he was told at his first duty station at the ICU at Naval Regional Medical Center in Bremerton, Washington, that it was the policy of the ward to consider any "no preference" as "a nondenominational Christian." Offended, Hagan wrote the Department of Defense asking to change the "no preference" to "atheist." After sending three letters, his

category was changed to atheist by the direction of the Chief of Personnel in Washington, D.C. (May/June 1988)

- Donald O. Worrell, a Lifetime Member of the Foundation, Alabama, has participated in the Veterans History Project spearheaded by the Library of Congress. He was shipped overseas in November 1944, at age seventeen already a firm unbeliever, as a rifleman in the 7th Infantry Division. A month later, he found himself in the thick of the Battle of the Bulge in the freezing Ardennes Forest in Belgium. He was hit a few weeks later with a piece of shrapnel about the size of a quarter. After recuperating, he had many other close calls. He shot and killed a German soldier at close range in self-defense. A couple of other GI's rummaged through the dead soldier's papers and files, with one GI finding and taking the soldier's belt buckle, engraved "Gott Mit Uns" ("God With Us") as a war souvenir. Worrell received a Bronze Star with V for valor for his actions that night. From December 1944 to May 1945, Worrell encountered continual combat in what became known as "The Queen of Battle." (January/February 2005)

- Lifetime Member Lester Goldstein, Washington State, who retired as director of the School of Biological Sciences, University of Kentucky, was an aid-man in an infantry regiment during World War II who "saw a fair bit of combat." "That entailed exposure to numerous terrifying episodes, and I was

indeed quite fearful at those times. But it never occurred to me to call on God for protection." (October 2004)

- Asked Warren Allen Smith, a New Yorker, "Were there atheists in foxholes during World War II? Of course, as can be verified by my dog tags. A veteran of Omaha Beach in 1944, I insisted upon including 'None' instead of P, C, or J as my religious affiliation. My e-mail pal Arthur C. Clarke, the Commander of the British Empire who now is a Sri Lankan citizen, had 'None' on his tags, he tells me. In short, nontheists in Britain as well as the United States refused to be listed as members of any organized religion." (November 1997)

APPENDIX B

History of Atheist in Foxholes Monument

The Atheists in Foxholes monument in Lake Hypatia was unveiled on July 4, 1999. The monument is constructed from Georgia granite and was engraved by U.S. WWII veteran Bill Teague with the wording "In memory of ATHEISTS IN FOXHOLES and the countless FREETHINKERS who have served this country with honor and distinction. Presented by the national FREEDOM FROM RELIGION FOUNDATION with the hope that in the future mankind may learn to avoid all war." The monument features the insignia of all U.S. military branches and carries U.S. flags on top. The Atheists in Foxholes monument attracts veterans from around the country, who visit throughout the year and sign a book recording the names of veteran freethinkers, their military branch and years served. Every year since its placement, there has been a secular ceremony with veterans gathering by the monument on July 4th and reciting the original Pledge of Allegiance, which does not include "Under God."

This monument shares its history with the war memorial controversy and pending litigation over the Mt. Soledad cross. In July 1998, in part to honor its veteran members and in part to help remedy a long-standing Establishment Clause violation, the Foundation made a formal bid to the city of San Diego to purchase a tiny parcel of land under the forty-three-foot-tall Mt. Soledad cross, which had been sold to a private Christian group – a predetermined buyer.

When a court ruled that rigged sale was an unconstitutional ruse to "save the cross," the city announced sale of a larger parcel of land for the so-called purpose of construction of a war memorial, and opened the sale for bids.

The Foundation suggested a six-foot bronze statue of a freethought soldier atop a seven-foot granite base, with the wording:

> "In memory of ATHEISTS IN FOXHOLES and the countless FREETHINKERS who have served this country with honor and distinction. Presented by the national FREEDOM FROM RELIGION FOUNDATION with hope that in the future humankind may learn to avoid all war."

In making the bid, then-Foundation President Anne Nicol Gaylor wrote: "We've had so many memorials to Christians and to the glory of war. It is time for one for freethinkers that includes the idea of peace."

The winning bid for the parcel on Mt. Soledad, site of a forty-three-foot tall controversial cross, ended up going to the religious group which originally had been permitted to buy the 14x14 foot parcel of land under the disputed cross. The Foundation's bid was one of four rejected. Of the five bidders, three were Christian groups. That litigation is now entering its twenty first year, with courts continuing to rule against various tortured attempts to keep the cross at the highest point above San Diego.


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APPENDIX C

History of Atheist in Foxhole Award
Given Out by FFRF, Inc.

The Atheist in Foxhole award was inaugurated in 2006, at the suggestion of Vietnam War veteran and Foundation Board Member Steve Trunk, California. This award recognizes the service of atheist, agnostic and other nonreligious military personnel in the United States, and in particular those who fight Establishment Clause violations.

The first recipient was Philip Paulson, a Vietnam War vet, who had been an indefatigable plaintiff in what was then a 17-year state/church court battle in San Diego over the Mt. Soledad cross. In his acceptance speech, Paulson noted that he was "an atheist in a bunker" who survived the Battle of Dak To, one of the bloodiest battles of the Vietnam War, taking place between November 3-November 22, 1967. "I have seen people pray during a firefight. Those who prayed put their buddies' lives at risk." Paulson filed suit against the presence of the "Mt. Soledad Easter Cross" on public property. Cross supporters belatedly insisted the Latin cross a tribute to all war veterans. The complicated lawsuit is ongoing, with Trunk serving as one of the plaintiffs following the 2006 death of Paulson.

The second recipient of the Foundation's "Atheist in Foxhole" award is Jeremy Hall, age 24 when he received the 2008 award, who served two tours of duty in Iraq. Hall's attempt, approved by the proper

channels and receiving a permit, to start a freethought club at his base in Iraq was foiled by a Christian superior, resulting in litigation over discrimination taken by the Military Religious Freedom Foundation. Hall received so many threats from fellow enlistees in Iraq that he was put under around-the-clock protection and was removed to Ft. Riley, Kansas.