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 *AMICUS CURIAE* JEWISH SOCIAL POLICY ACTION NETWORK SUPPORTING RESPONDENT

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INTEREST OF *AMICUS*[1]

The Jewish Social Policy Action Network ("JSPAN") is an organization of American Jews dedicated to protecting the Constitutional liberties and civil rights of Jews, other minorities, and the vulnerable in our society. For most of the last two thousand years, Jews lived in countries in which religion and state were one, and in which members of all minority faiths were constantly reminded of their outsider status by prominent governmental displays of religious symbols.

In Europe especially, Jews and minority Christian faith communities faced discrimination, persecution, expulsion or worse. Those who emigrated to America in the nineteenth and twentieth centuries found that here one could be both a Jew and an American, a Catholic and an American, even an atheist and an American. JSPAN believes that the gift of church/state separation bestowed on us by the Founding Fathers is essential to all our fundamental freedoms and that therefore great care must be taken to prevent any erosion of the separation of church and state principles embodied in the Establishment Clause. Critical to this effort is that the courthouse doors remain open to those seeking to enforce government neutrality in church/state matters.

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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 the *amicus curiae*, or its 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.

JSPAN has filed *amicus curiae* briefs in Establishment Clause cases regularly since it was formed in 2003, most recently in this Court in *Pleasant Grove City, Utah v. Summum*, No. 07-665; and members of JSPAN's Church/ State Policy Center have done so in scores of such cases over the past 50 years.

ARGUMENT

A. Standing

1. Mischaracterizations of the Record Relating to Standing May have Caused the Court to Grant Certiorari Improvidently.

This *Amicus* agrees fully with Respondent's argument that Appellants, having chosen not to seek review in this Court of the standing ruling embodied in the *Buono I* final judgment, 212 F. Supp. 2d 1202 (C.D. Cal. 2002), cannot now relitigate that issue. This brief argues that even if it were otherwise, Mr. Buono had standing.

Statements by Appellants in their Petition and/or their Brief are seriously at odds with the record. Among them are assertions that "respondent objects to displaying the cross on public property *only because that property is not an open forum*" (Br. 10; Pet. 9); that his alleged injury was "*simple exposure to the lack of a public forum*" (Br. 17); that he "*seeks only to assert the right of others*" (Br. 10; Pet. 10, 14) and to "*vindicate a view of the Establishment Clause – one that requires public property to be open to all, if to any, religious symbols*" (Br. 13).

Moreover, Appellants' counsel deposed Mr. Buono and attempted to elicit testimony supporting a thesis that even though no such violation was pleaded, this case is really about Free Speech, not the Establishment Clause. They failed, totally, yet in their Petition and Brief they describe his testimony not as it was but as they wish it had been. We reference relevant portions of his deposition which are included as an Appendix to this brief.

a) This is Not an "Open Forum" Case, and Mr. Buono's Injury was Not "Simply Exposure to the Lack of a Public Forum."

Appellants could not have misunderstood what offended Mr. Buono. In his deposition he made clear beyond the slightest doubt that he knew well the difference between "open forum" and "religious preference" principles and that this was not an "open forum" case (Dep. Tr. at 12, 83-85, 91-94), that he was a religious, church-attending, Roman Catholic who obviously does not find a Cross standing out in open space offensive (Dep. Tr. at 146-147), and that it was government's promotion of religion (Dep. Tr. at 160-161), its preference of one religion over all others, "the display of a Latin Cross on Government owned property . . . not open to others," that so deeply offended him (Dep. Tr. at 69, 73, 81, 83, 89, 104, 118-120).

b) Mr. Buono did Not Sue to Vindicate a Personal Ideological View of the Establishment Clause or to Assert the Rights of Others, But to Prevent Injury to Himself.

Of course it may be said of all plaintiffs that they seek to vindicate their view of the law. But like any other plaintiff, Mr. Buono also seeks to redress a very personal injury he himself has suffered.

In both the Petition and Brief (Pet. 9-10; Br. 13), Appellants argue that Mr. Buono, as a practicing Roman Catholic who respects the Cross, is asserting no injury-in-fact to himself but rather is only asserting other people's rights. To understand how religious preferences cause injury not only to the non-preferred but to believers of the preferred faith as well, the latter need only consider how angry and offended they would be were the government to permit symbols of other faiths but not theirs – say Stars of David and Buddhist Stupas but not Latin Crosses – to be displayed on public land. Knowing how such conduct by the government would offend them, it cannot be that they must acquiesce, simply stand by and suffer the spiritual bruising caused by government when it does to others, in their name, what they would never willingly allow government to do to them. If they refuse to acquiesce and instead institute suit, it cannot be seriously claimed that they are basing their claim on some ideological notion, some idiosyncratic view of their own, and not on one of the central beliefs of their religion (and virtually all religions), the Golden Rule. (*E.g.*, Judaism: Talmud, Shabbat 31a; Buddhism: Udama-Varga 5:18;

Confucianism: Analects 15:23; Christianity: Matthew 7:12, Luke 6:31; Hinduism: Mahabharata 5:1517; and Islam: Number 13 of Imam "*Al-Nawawi's Forty Hadiths*").[2]

Appellants correctly quote Mr. Buono's testimony that he is a practicing Roman Catholic who does not "find the Cross, itself, offensive" (Dep. Tr. at 146). What they infer from that testimony is that "(r)espondent has disclaimed any spiritual injury stemming from the display . . . of the Cross." Pet. 13. Not a word in the record supports that inference. Clearly it is the government's exclusive preference of Christianity that offends him (Dep. Tr. at 83), so much so that - as the district court found - rather than come into contact with the stand-alone Cross, he chooses to drive on a different road. Pet. App. 123a. Constitutionally, governmental

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2. For Mr. Buono, as a practicing Catholic, the teachings of his church show the close link between the principles of the Golden Rule and his status as a litigant seeking to prevent the power of government from being used to impose his beliefs on others. Article 2 of *Dignitatis Humanae*, The Declaration on Religious Liberty of the Second Vatican Council (Vatican II), provides:

> This Vatican Synod declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or social groups and of any human power, in such wise that in matters religious no one is to be forced to act in a manner contrary to his own beliefs.
>
> This right of the human person to religious freedom is to be recognized in the constitutional law whereby society is governed. This is to become a civil right.

preferences violate the Establishment Clause; but religiously, as noted above, in a pluralistic society such preferences violate a core value of virtually every faith.

Even apart from the spiritual bruising empathetic Christians like Mr. Buono may suffer from being cast in the role of victimizer, there is yet another injury they suffer. For those who know how often over the past 1700 years the marriage of Church and State has corrupted both, the concern that Christianity might be corrupted by becoming government's favored religion is clearly a *religious* concern. And if one shares Roger Williams' and the Founding Fathers' concerns over the "purity" of religion that led ultimately to the Establishment Clause and the separation of the realms of religion and government it was intended to achieve, such concern over the purity of one's *own* religion is surely a religious concern.

The plain fact is that adherents of all western religions – Protestants of all denominations, Jews and Catholics – have suffered unspeakable injury as a result of religious establishments; at bottom, that is why the Founding Fathers agreed to disestablish religion by enshrining first and foremost in our Bill of Rights the First Amendment's Establishment and Religious Freedom clauses.

c) *Valley Forge Christian College v. Americans United* does Not Support Appellants' Claim that Mr. Buono Lacks Standing.

Appellants argue that "mere views about the appropriate scope of the Establishment Clause, however firmly held, do not confer standing" (Br. 14-15), citing as authority *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982). They insist that Mr. Buono's objection to the Latin Cross on public land "arises solely from his commitment to certain constitutional views." Br. 16. But as argued above, that simply is not so. The fact that Mr. Buono is offended that a religious symbol he deeply believes in is being used by his government to make others feel like outsiders in their own land is not a "mere view about the appropriate scope of the Establishment Clause."[3]

Moreover, in *Valley Forge* the Court stated:

> We simply cannot see that respondents have alleged an *injury of any* kind, economic or otherwise, sufficient to confer standing. Respondents complain of a transfer of

3. Mr. Buono was joined as a plaintiff in this case by the late Allen Schwartz, a Jewish War veteran who regularly traveled past the cross at issue here and was personally offended by its presence on federal land because it was "governmental favoritism of one religion that he does not share, thereby making him feel like an outsider." Amended Cplt. ¶¶ 6-8. In pursuing this action, Mr. Buono was thus keenly aware that a symbol of his faith was being used in a manner deeply offensive to someone else's faith.

> property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer through a news release. Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsman of the general welfare.

Id. at 486-87 (emphasis in original).

That is clearly not the situation here. Mr. Buono has a long time attachment to the area in question, was not roaming around looking for constitutional violations, was exposed to the Cross as part of his normal routine, and has altered his behavior as a result.

2. Appellants' Argument that Taxpayer Standing Cannot be an Alternative Basis for Standing in This Case is Based on Erroneous Facts and a Misleading Analysis.

Appellants, in note 1 of their Brief (Br. 17), after noting that taxpayer standing was not pleaded, argue that taxpayer standing cannot be an alternative basis for standing in this case because the congressional enactment Buono challenges does not rest on the taxing and spending clause as required in *Hein v. Freedom From Religion Foundation*, 551 U.S. 587 (2007). That is not so. While Appellants correctly state that the land

transfer was "an evident exercise of Congress's power under the Property Clause, Art. IV, sec. 3, cl. 2 of the Constitution," (Br. 17, n.1), that was not so regarding a critical provision of that legislation. The 2004 Act incorporated by reference the 2002 legislative authorization to spend up to $10,000 for the acquisition and installation of a replica Cross and a replica plaque, an authorization that was necessarily enacted pursuant to Art. III, sec. 8's taxing and spending provisions. The 2004 Act required the Interior Secretary to have the "continuing responsibility" set forth in the incorporated earlier provision.

3. The Principles of Separation of Powers, Checks and Balances, and Judicial Review, Compel the Conclusion that Mr. Buono has Standing.

Respectfully, were this Court to conclude that Mr. Buono lacks standing, it will have created its own "donut hole" in one of the most fundamental principles in American jurisprudence, viz., Judicial Review. As Chief Justice John Marshall opined in *Marbury v. Madison*, 5 U.S. (Cranch 1) 137, 178 (1803), if the judiciary stayed its hand in deference to the legislature, it would give that branch of our carefully structured government "a practical and real omnipotence." James Madison himself recognized that danger much earlier, in the concluding paragraph of his *Memorial and Remonstrance*: "Either . . . we must say that the will of the Legislature is the only measure of their authority, and that in the plenitude of this authority they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred." *Quoted in*

Everson v. Board of Educ. of Ewing Twp., 330 U.S. 1, 71 (1947) (Appendix).

We cite here the views of the majority Justices in *Flast v. Cohen*, 392 U.S. 83 (1968) (not overruled but limited in *Hein v. Freedom From Religion Foundation*, *supra*, to cases involving Congressional expenditures), not in order to support taxpayer standing but to demonstrate how almost unanimous that Court was in its support of Madison's and Marshall's views regarding judicial review, and to focus on how essential it is to find some path to the door of Judicial Review in Establishment Clause cases in order for both principles to have the meaning our Founding Fathers intended them to have.

Although the lone dissenter in *Flast*, Justice Harlan, would have allowed judicial review only "if Congress ha(d) appropriately authorized such suits," *id*. at 131, the remaining Justices, in four separate opinions, concluded that standing principles must be applied in a manner that does not subvert the protection promised by the Establishment Clause. For the Court, Chief Justice Warren concluded that whenever there are specific constitutional limitations on the taxing and spending power, such as in the Establishment Clause, "a taxpayer will have a clear stake . . . in assuring that they are not breached by the Congress." *Id*. at 105. Concurring, both Justices Douglas and Fortas stated the applicable standing principle in Establishment Clause cases more broadly. Justice Douglas warned that "where wrongs . . . are done by violations of specific guarantees, it is abdication for courts to close their doors," *id*. at 111, and Justice Fortas suggested that

perhaps "citizen" standing, even without reference to his taxpayer's status, ought be the basis for challenging governmental expenditures under the Establishment Clause because legislative acts which raise Establishment Clause issues "*should be subjected to judicial testing. This is not a question which we, if we are faithful to our trust, should consign to limbo, unacknowledged, unresolved, and undecided.*" *Id.* at 115-16 (emphasis added).

This *Amicus* is keenly aware of the long-enduring debate over whether there is an inherent conflict between democracy and judicial review and whether judicial review was part of the original understanding of the Founders or, as Alexander Bickel and others have claimed, a slight-of-hand, anti-majoritarian, creation of John Marshall. In 116 Yale Law Journal Pocket Part 215-227 (2007) there are three related scholarly articles bringing new life to that debate, which serve as a "powerful corrective" to what one of the authors called "mounting opposition to judicial review," opposition this *Amicus* views as deeply disturbing. All three, taken together, restate in modern guise Madison's view, just as did the eight Justices in *Flast.*

Professor Mary Sarah Bilder's new insight is that the origin of the judicial review concept was not John Marshall's creativity but English corporate law (already centuries old by the time corporate charters were granted to the early colonists) which required that corporate by-laws not be "repugnant" to the laws of England. Thus colonial legislation could not be repugnant to English law and on that theory hundreds of cases were appealed from colonial courts to the

English Privy Council. All that Chief Justice Marshall did in *Marbury*, Professor Bilder wrote, was recommit American constitutional law to an English practice that was already many centuries old and a colonial practice already two centuries old.

Professor Scott Gerber on the other hand located the deep historical roots of judicial review in eighteenth century political theory, most especially in John Adams' "Thoughts on Government" (1776). The judicial power, Adams wrote, must be "distinct from both the legislative and executive, and independent of both that it may be a check upon both, as both should be checks upon it," and he tied together the concepts of an "independent judiciary" and "judicial review" in order to strengthen the latter.

For his part, Professor William M. Treanor regarded Professor Bilder's analysis as a landmark contribution to the literature of judicial review because it buttresses a boundary protection understanding of the doctrine's origin. Privy Council review was, at its core, concerned with boundaries, ensuring that colonial governments did not overstep their bounds. In our early Republic judicial review performed a similar function – ensuring that legislatures did not legislate in ways undercutting the power of other entities.

"Checks and Balances," "Boundary Protection" that inheres in the "Separation of Powers" principle, "Judicial Review," the "Establishment Clause" – all are interconnected Constitutional principles and all are utterly essential for the proper functioning of a modern, pluralistic, democratic society. For the reasons set forth in the remainder of this Brief, a holding that there is no standing in this case will seriously weaken them all.

4. The Special Impact of Inflexible Standing Principles in Cases of Religious Symbols on Public Property.

Although this case involves national legislation, the real impact of a reversal of the Court of Appeals decision will be felt in small towns and cities that are already religiously fairly homogeneous. Notwithstanding the continuing geographic dispersion of Americans of many different faiths seeking better lives and new opportunities, there are still vast areas where there are few if any Catholics, and in 2500 out of America's 3140 counties there are no Jews.[4] Legislators in such towns and cities, knowing that no one will likely have standing to stop them (and knowing that in any event a legislative transfer and exchange of a few square yards of land would cure any violation), would soon find that permitting religious symbols on public lands and buildings is a winning political strategy, and one which could at the same time "sort out" potential new residents by discouraging those of dissimilar beliefs from ever becoming residents.[5]

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4. C. Grammich, "Many Faiths of Many Regions: Continuities and Changes Among Religious Adherents Across U.S. Counties" (Rand, Dec. 2004).

5. *See* Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 Supreme Court Review 135 (2006). Posit a sign at a town border that states, "Come to Corpus Christi, Population 98% Christian." Presumably that would encourage "sorting," i.e., encourage persons of a certain religion to reside there and others not to. Professor Samaha poses the question, if the reasonable observer endorsement test retires with Justice O'Connor's retirement, should an anti-sorting test take its place?

Traveling Americans have a right (indeed a constitutional right under the Privileges and Immunities clauses in Article IV and Amendment XIV) to travel to and through all parts of this nation without being made to feel unwelcome by local governments. Otherwise, as this Court long ago observed, "our Republic would constitute "little more than a league of states; . . . not . . . the Union which now exists." *Paul v. Virginia*, 8 Wall 168, 180 (1869). The privileges and immunities of citizenship include the right to resettle without being treated like an alien in their new community. (*See* discussion in this Court's 7-2 decision in *Saenz v. Roe*, 526 U.S. 489, 501-02 (1999)). This right would be ephemeral for members of minority religious groups if local communities could use religious symbols to serve as signposts that members of certain religions are unwelcome. When moving to a community in which they may be part of a religious minority, no Americans should be, in the words of Justice Bradley in the *Slaughter-House Cases*, 16 Wall. 36, 112–113 (1873), "bound to cringe to any superior, or to pray for any act of grace as a condition of enjoying all the rights and privileges enjoyed by other citizens."

And that is the nub of the concerns of this *Amicus* – that what we might call "religiously-gated communities" – communities which let people know through the use of religious symbols on public ground that only persons of a certain religion will be comfortable there – in combination with inflexible standing principles in Establishment Clause cases, will undermine the relations between communities and between religions

in America; in other words change the very nature of the America we and most of the rest of the world revere. While municipal taxpayers would presumably have standing (*Bradfield v. Roberts*, 175 U.S. 291 (1899), *Daimler Chrysler Corp v. Cuno*, 547 U.S. 332 (2006)), "sorting" would prevent the "wrong" people from becoming municipal taxpayers.

This surely is an appropriate case in which to remember Justice O'Connor's cautionary question in *McCreary Cty. v. ACLU*, 545 U.S. 844, 882 (2005): "Why would we trade a system that has served us so well for one that has served others so poorly?"

B. Merits

1. The Exchange Legislation was Not an Attempt to Cure Congress's Previous Violations of the Establishment Clause.

Without a doubt Congress has the right – indeed the duty – to correct its own previous violations of the First Amendment's Establishment Clause. However, Appellants' assertions in Section III of their Brief (Br. 30-40) that that is all the Congress was doing when it enacted the transfer and exchange legislation is totally at odds with the record. All four Acts – the third and fourth no less than the first and second – violated the Establishment Clause (a) by seeking to prevent the removal of the Latin Cross and thereby (b) to prefer Christianity over all other religions, in violation of

unanimous decisions of this Court.[6] The third and fourth Acts also violated a permanent injunction of a federal court.

Far from attempting to cure its previous violations of the Establishment Clause, Congress's last two Acts were clear-cut, unambiguous, directions to Appellants to "permit" the continuing display of the Latin Cross in violation of an equally clear-cut, unambiguous, court order permanently enjoining exactly that: "Defendants…are hereby permanently *restrained from permitting* the display of the Latin Cross in the area of the Sunrise Rock in the Mojave National Preserve" (emphasis added).

To demonstrate how seriously Appellants departed from the record – and from applicable legal principles – in Section III A, we set forth below a few examples:

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6. Regarding the Latin Cross, even Justice Kennedy's dissent in *County of Allegheny v. ACLU*, 492 U.S. 473, 661 (1989) allowed as how the Establishment Clause forbids a permanent Latin Cross on City Hall, citing as authority two cases of such Crosses on public land, *ACLU of Georgia v. Rabun Cty. Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983) and *Lowe v. City of Eugene*, 254 Ore. 518, 463 P.2d 360 (Or. 1969), *cert. denied*, 397 U.S. 1042, *reh'g denied*, 398 U.S. 944 (1970). And regarding religious preferences, Justice Rehnquist in his dissent in *Wallace v. Jaffree*, 472 U.S. 38, 105 (1985), opined that "(i)t would seem . . . the Establishment Clause . . . has acquired a well-accepted meaning; it forbade the establishment of a national religion, and forbade preference among religious sects or denominations. . . ." A religious preference violates the "clearest command of the Establishment Clause. . . ." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

Br. 30: "The injunction could not divest Congress of its 'authority to alter the prospective effect of previously entered injunctions.' *Miller v. French*, 530 U.S. 327, 344 (2000)."

> *However one views the 5-4 decision in* Miller v. French, *that decision in no way permits Congress to enact laws violating the Establishment Clause. Even if there had been no prior injunction, Congress could not pass a law requiring government to spend money to preserve the existing display of the Cross.*

Br. 32: "The court of appeals' analysis began from a mistaken premise: that the 2004 Act is part of the government's 'longstanding efforts to preserve and maintain the cross' in order 'to evade the injunction'."

> *There was no mistaken premise. The 2001 and 2002 Acts were long-standing Congressional efforts, prior to any Court injunction, to preserve and maintain the Cross in violation of the Establishment Clause. The third and fourth Acts were just as clearly repeated Congressional efforts to do the same and "to evade the injunction" as well.*

Br. 32: "Only after the district court enjoined the government from displaying the cross, did Congress pass the 2004 Act under review."

> *Apart from the fact that the third Act, too, was enacted after the injunction, the injunction enjoined the government not only from displaying the Cross, but also from "permitting" the display of the Latin Cross*

> *— a very significant phrase given the fact that in the 2004 Act under review that is indisputably what the Congress was doing.*

Br. 33: "On its face the 2004 Act does nothing 'to preserve and maintain the cross.' It requires only that the VFW maintain the conveyed property as 'a' war memorial, not 'the' war memorial that had been designated in the 2002 Act. . . . The 2004 Act does not mention a cross, let alone require the VFW to display one."

> *The 2004 Act requires that "the conveyed property" (defined as "the Cross" and "adjoining Preserve property" in the 2002 Act (8137(a)) be maintained as a memorial by the VFW – thus requiring it to preserve and maintain the Cross – and also requires the Interior Secretary, notwithstanding the transfer, "to continue to carry out" the construction and installation of the Cross and Plaque required by the 2002 Act.*
>
> *What is more disturbing is Appellants' confusing distinction between the words "a" and "the." The notion that the original plaque and Cross which Congress in 2002 explicitly required to be replicated for not more than $10,000 (8137(c)) was not "the" national memorial designated as such in the very same legislation (8137 (a)), and also was not "the" parcel of property beneath the Cross referred to in the 2004 legislation, constitutes a play on words not worthy of Appellants.*

Br. 34: "(T)he Court is normally deferential to [the government's] articulation of a secular purpose." *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987).

> *But the Court then went on to say, at 594-95, that "in scrutinizing legislative purpose one examines the specific sequence of events leading to [the law's] passage."*

Br. 34: "The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it."

> *We agree, but neither will the Court "turn a blind eye to the context in which the policy arose,"* Santa Fe Ind. School Dist. v. Doe, *530 U.S. 290, 315 (2000), or ignore "the relationship between the statute and the two that preceded it. . . ."* Wallace v. Jaffree, *472 U.S. 38, 58 (1985).*

Br. 36: "The transfer of a war memorial…is a far cry from the conscious injection of religion in the public schools . . . ; teaching creationism . . . ; requiring bible study . . . ; or posting the Ten Commandments."

> *All the illustrations are Establishment Clause violations, as are the four successive conscious efforts by the Congress to prevent the removal of the Cross from frequently visited scenic public land (Dep. Tr. at 71-72). These four congressional enactments were even clearer religious preferences by government than the others.*

Br. 36: "The present case bears none of the indicia that Congress's secular justification is a sham."

> *To the contrary, all four Congressional Acts do. More than that, all four leap over the constitutional boundaries that separate the legislative from the judicial branch, and violate the checks and balances that preserve our fundamental liberties; and now Appellants, by raising the defense of standing, seek to shut the door on Judicial review as well.*

Br. 37, n.5: "While the 2002 Act requires the Park Service to acquire a replica cross, it requires the Secretary to install . . . only the replica plaque, not the replica cross: Sec. 8137(c)."

> *This is, to say the least, an "incorrect" reading of the statute which, in 8137(a) explicitly designated the "five-foot-tall white cross . . . as well as a limited amount of adjoining Preserve property" as a national monument; and in the same statute (8137(c)) authorized that up to $10,000 be spent to acquire a replica "of the original plaque and cross" . . . and "to install the plaque in a suitable location on the grounds of the memorial" (i.e. on the "limited amount of adjoining Preserve property"). The location of the replicated white Cross needed no legislative description for it was to replace "the original five-foot white cross." But the plaque had to be placed somewhere on the*

newly acquired "limited amount of adjoining Preserve property," and Congress gave the Secretary the discretion to choose "a suitable location on the grounds of the memorial" (8137(c)) just as, in 8137(a), it had given the Secretary the discretion to designate the "limited amount of adjoining Preserve property."

CONCLUSION

The principle that should govern the disposition of this case is the first clause in the Bill of Rights, "Congress shall make no law respecting an establishment of religion. . . ." Here Congress has made four such laws, indubitably respecting an establishment of religion, and in the process has also directed government officials to defy an order of the federal Court. This Court has the power and, we believe, the duty to void such egregiously unconstitutional laws.

Respectfully submitted,

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APPENDIX

APPENDIX

Excerpts from Deposition of Frank Buono

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. EDCV 01-216-RT
(SGLx)

FRANK BUONO; ALLEN SCHWARTZ, PLAINTIFFS

v.

Gale Norton, Secretary of the Interior, in her official capacity; John J. Reynolds, Regional Director, Pacific West Region of the Department of Interior, in his official capacity; Mary Martin, Superintendent of the Mojave National Preserve, in her official capacity, Defendants

Deposition of Frank Buono
Taken in [*sic*] Behalf of the Defendants
December 27, 2001

* * * * *

[12]

Q Let me ask your understanding of what it is that the complaint, and now the amended complaint, are designed to do. Why did you file this lawsuit?

A The complaint alleges a violation of the establishment clause of the First Amendment of the Constitution.

Q And what is that violation?

A The existence of a permanent and unattended religious symbol on federal land.

Q And am I correct in assuming that that religious symbol is a cross located at Sunrise Rock?

A That is correct.

* * * * *

[69]

Q You testified a moment ago, I believe, that you were curious when you first saw the cross. Did you find it objectionable?

A The cross per se, no.

Q Did you find something else about it objectionable?

A I've had a long interest – I've been a member of the American Civil Liberties Union for several years. I've had a long interest in separation of church and state issues. In particular, in the national parks where I spent

my whole working career. And I've been more than curious about some of the breaches that I perceived.

* * * * *

[71]

Q On those occasions when you stopped and got out of your car, looked at the cross outcropping, what else would you observe? What else could you see from within your line of vision?

A The area is one of the most scenic in the Preserve. It has a huge forest of dense growth of Joshua trees directly across the road, as well as this outcrop of granite rocks, which are uncharacteristic for the Preserve. Most of those rocks appear to me to be volcanic.

* * * * *

[72]

Q Are there any buildings visible?

A No.

Q Are there any telephone poles visible?

A No.

Q Are there any power lines visible?

A From there, I – no, I don't think so.

Q So basically, as you look out from this area, you see a natural environment subject to trails that you mentioned?

A And some – yeah. And vehicle. There are some vehicle tracks that go behind the outcrop and go off towards the Mescal Range off the east.

* * * * *

[73]

Q Were you traveling there specifically to observe the cross?

A We were traveling throughout Mojave National Preserve to observe areas of concern throughout the Preserve.

Q Do you define the cross as an area of concern?

A For me, yes. For them it was not a particular area of concern.

Q Them refers to?

A National Park Conservation Association. Their issues are environmental issues. First Amendment is not their valuing.

* * * * *

[81]

Q What if the plaque – what is it about this cross that you find objectionable?

A The cross is a clear recognizable religious symbol that occupies federal land.

Q And what religion does it recognize?

A The Christian religion.

Q Any particular part of the Christian religion?

A I believe the cross is universally recognized by all Christians, whether they are Protestant, Orthodox, or Catholic.

Q And do you know why it is called a Latin – do you know if this is called a Latin cross?

A I guess so. I'm not sure. I've heard of the Celtic cross and other crosses, but it's a cross.

Q Would it matter from your point of view what kind of cross it was?

A If it were a Greek Orthodox or Celtic cross, no, it wouldn't matter to me.

Q Any kind of a cross would be objectionable?

A A cross, yeah.

Q As a symbol of —

A Of Christianity.

Q — Christianity.

* * * * *

[83]

Q If symbols or other religions were included, for example, let's say if Mr. Hoops had been granted permission to erect a Buddhist Stupa, S-T-U-P-A, I believe is the term he referred to, would you find that objectionable?

A Yes.

Q And that is because it would be on federal land, and a religious symbol?

A I would find it – I would find objectionable the establishment of that particular piece of federal park land as a place where one could erect any symbol that one wanted to. I would find that objectionable.

Q Okay. If the Park Service said, here is a plot of land, anyone from any religious practice, feel free to erect symbols to your religion, would you find that objectionable or is that simply the exclusion of religions other than Christianity that troubles you?

A By this cross I am troubled by the fact it represents one religion to the exclusion of all others.

Q So it's possible that we could have an

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[84]

open public forum for all religions?

A That raises a separate question about whether it is appropriate to use federal park land, it's not a First Amendment issue, then, as an open public forum for the expression of all religious and all other points of view. Not just religious, but all other points of view, and free speech.

In other words, let's have a free speech zealot there, which anyone can put up any plaque, and billboard, any sign. This questions, then, a propriety of comportment with the National Park Service preservation mission.

* * * * *

Q Do you believe that the Bureau of Land Management had an obligation to remove the cross while it managed the land?

A Yes, I do.

Q So it really – the park service's mission is really irrelevant. It is simply a question of having a cross on federal land?

* * * * *

[85]

A They are two different questions. The park service's mission issue arose in the context of an open public forum. Now, we are talking about just the cross, so in this case, BLM's tolerance of effectively an unauthorized trespass with a symbol placed on federal lands, yes, it's objectionable. And BLM should have removed it.

* * * * *

Q If someone came in during the night and

* * * * *

[86]

spray painted a Jewish star on the rock outcropping, would you find that objectionable?

A Yes.

Q Would the Park Service be required to use some means of getting rid of that spray-painted cross?

A Yes.

Q And the same would be true for Muslim, crescent, or other religious symbol?

A Yes.

* * * * *

[89]

Q Is the Park Service required to maintain an encyclopedic knowledge, so they can know which symbols have to be removed, and which can be maintained?

A One does not need an encyclopedic knowledge to recognize the cross as a religious symbol for about one and a half billion people.

* * * * *

[91]

Q I believe you testified a moment ago, and correct me if I am wrong, that it was permissible for the Park Service to sell or offer for sale on Park Service land, food that carries an indication of rabbinic approval of kosher – satisfying kosher laws in the Jewish faith. That was acceptable, you don't

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[92]

object to that?

A You used the example of the yogurt container –

Q Yes.

A — that contains a small k on it.

Q Right.

A No. No objection to that, whatsoever.

Q By authorizing the sale of that product, is the Park Service excluding or discriminating against other religions that may have their own dietary laws?

A No. What the Park Service would be doing, or any other agency, is engaging in a reasonable accommodation of free exercise rights, so that consumers who come to visit the park and purchase that yogurt would be able to see that the product they are buying meets their specific dietary laws.

* * * * *

[93]

Q Is the Park Service or some other federal agency required to remove all of those crosses?

A No.

Q Why not?

A Because the cemetery represents the actual burial ground of a once living person. A person who presumably had an affiliation with the religion represented by the symbol that is placed on their tombstone. For Christians it would be a cross. If you go to Arlington you will find tombstones with the Star of David, as well.

So there is a great distinction between a tombstone and a religious symbol representing the, essentially, free expression of the person who is now deceased.

Q What about a memorial that commemorated veterans, but did not actually mark the physical burial place of soldiers?

* * * * *

[94]

A If the memorial consisted solely of a cross, it would be exclusionary, as well as being an establishment clause violation.

Q Well, let's say it had a cross of the Star of David.

A I would find that less objectionable, but objectionable still, because not all veterans are either Christians or Jews. We also have veterans who are

Atheists. Perhaps ten percent of the population of the United States are Atheists.

* * * * *

[104]

Q And what did you say to Mr. Burk?

A Mr. Burk is the president of the Citizens from Mojave National Park. And I was recounting to him several issues that were ongoing in the preserve. And I said, besides all this, I am pursuing something which is quite personal to me, which is not an environmental issue and it is the cross at Sunrise Rock.

Q When did you speak to Mr. Burk?

A Probably sometime in 2000.

Q Did he have any reaction?

A Yes. He was not supportive of my personal concern.

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[118]

Q On page 2, again that's paragraph No. 5.

It says, Although Mr. Buono has no objection to Christian symbols on private property, he is deeply offended by the display of a Latin cross

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[119]

on government owned property; is that a correct statement?

A That's correct.

Q Are you deeply offended by the presence of this cross?

A Yes.

Q Has that been the case from your initial visit?

A Well, from my initial visit I wasn't sure that it was on government owned land. I wasn't sure it was on federal lands, but since I became aware that it was federal lands, yes.

* * * * *

[120]

Q Once you knew it was federal land, at that point —

A Uh-huh.

Q — you became deeply offended?

A Yes.

* * * * *

[146]

Q Do you consider yourself a religious man, Mr. Buono?

A Yes.

Q What – do you identify with any particular organized religion?

A Yeah. Uh-huh.

Q What religion?

A Roman Catholic.

Q Do you go to services at a church?

A Yes, I do.

Q And this church has crosses displayed, one can assume? Is that a fair statement?

A Yes.

Q Have you ever had any training or – or — in – in religion or ever been – considered a career in the priesthood?

A No. Training in religion – I mean academically, yes.

Q As a – a Christian and a Roman Catholic, I take it you don't find the cross, itself, offensive?

A Obviously not.

* * * * *

[147]

Q And you don't find a cross standing out in open space by itself offensive?

A I do not.

Q The only thing that's offensive about this cross is that you've discovered that it's located on federal land?

A Correct.

Q But apart from Mr. Hoops, you know of no — no one else has ever approached you and told you that they found the cross offensive, have they?

A No one has ever initiated or sought me out to tell me that.

Q But you have – I think you said you have had some conversations with other people in which you describe your views of the cross –

A Uh-huh.

Q — and some of those individuals, I believe, you said —

A Agreed.

* * * * *

[160]

Q How – tell me how the government is promoting religion by allowing the cross to remain.

A By an act of omission and tolerating the continued existence and use of federal lands in an unauthorized fashion for the erection of a permanent, unattended, religious display.

Q And how does that promote religion? Does the government —

A It's self-evident.

Q Is the government inviting anyone to engage in religious services?

* * * * *

[161]

A The government doesn't have to compel people to worship at the foot of the cross in order to promote religion by allowing a cross to be placed and maintained on federal land by acquiescence.

Q So the government must remove the cross, in your view?

A Correct.

Q And anything short of that would be a constitutional violation, in your opinion?

A Correct.

Q And the same would be true for any other kind of religious symbol on any federal land?

A There are certain exceptions. We've talked about them, for example, grave stones for dead people.

Q But other than grave stones?

A As a general rule, yes.