

No. 08-372

IN THE

SUPREME COURT OF THE UNITED STATES

FALL TERM 2009

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 FOR RESPONDENT

Round #1, 6:00 p.m.
November 4, 2009

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QUESTIONS PRESENTED

- I. Does Mr. Buono’s diminished use and enjoyment of the Mojave National Preserve qualify as an invasion of his legally protected interests sufficient to satisfy the requirements of both Article III and prudential standing?
- II. Does the display of a religious icon on an area of federal property that is closed to displays by other religions violate the Establishment Clause of the United States Constitution?
- III. Is the transfer of that religious symbol to the group that is responsible for illegally erecting and maintaining it a further violation of the Establishment Clause, rather than a “cure?”

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit are reported at Buono v. Kempthorne, 527 F.3d 758 (9th Cir. 2008) and Buono v. Norton, 371 F.3d 543 (9th Cir. 2004). The respective opinions of the United States District Court for the Central District of California are reported at Buono v. Norton, 364 F. Supp. 2d 1175 (C.D. Cal. 2005) and Buono v. Norton, 212 F. Supp. 2d 1202 (C.D. Cal. 2002).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1343(3) and 28 U.S.C. §§ 2201 and 2202. (2006).

STANDARD OF REVIEW

Questions of law are reviewed by this court de novo. Pierce v. Underwood, 487 U.S. 552, 558 (1988). De novo review also applies to cases resolved by summary judgment. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). “[I]f the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c).

STATEMENT OF THE CASE

Preliminary Statement

On October 6, 1999, the American Civil Liberties Union sent a letter to the superintendant of the Mojave National Preserve explaining that the Latin cross erected on Sunrise Rock in 1998 violated the Establishment Clause. (J.A. 21.) The letter asked that the cross be removed. (J.A. 21.) As a result of this letter, the National Park Service undertook a study of the Sunrise Rock cross. (J.A. 24.) This study concluded that the cross did not qualify as a historic site and should be removed. (J.A. 24.) To prevent such action, the United States Congress passed Public Law 106-554 as part of “the Department of the Interior Appropriations Act for fiscal year 2001,” which forbade the use of federal funds by the Secretary of the Interior to remove the cross. (J.A. 22, 28.)

On March 22, 2001, Frank Buono filed a complaint in the United States District Court for the Central District of California. (J.A. 2.) Mr. Buono sought declaratory and injunctive relief

requiring that the Department of the Interior remove the cross from federally owned land, alleging in his complaint that it violated his constitutional rights under the Establishment Clause. (J.A. 17, 18.) On May 29, 2001, Petitioners filed an answer to Mr. Buono's complaint arguing that the distinctly Christian cross is a war memorial and not a religious display. (J.A. 2.)

In January 2002, while in the midst of the resulting litigation, Congress passed legislation designating the Sunrise Rock cross "a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." (J.A. 16.) Congress passed contemporaneous legislation prohibiting the use of federal funds to "dismantle national memorials commemorating United States participation in World War I." (J.A. 16.)

On March 13, 2002, both Mr. Buono and Petitioners filed respective motions for summary judgment. (J.A. 2, 3.) After the hearing, the district court granted Mr. Buono's motion and denied Petitioners'. (J.A. 4.) Accordingly, the court entered judgment for Mr. Buono declaring that the cross violated Mr. Buono's constitutional rights and ordered it be removed. (J.A. 5.)

On August 8, 2003, Petitioners filed a notice of appeal to the Ninth Circuit Court of Appeals. (J.A. 7.) One month after oral arguments before the Ninth Circuit, Congress attempted to circumvent the injunction already in place through further legislation. (J.A. 16.) Public Law 108-87 seeks to transfer Sunrise Rock and the cross to private citizens. (J.A. 16.) It also contains a reversionary clause which transfers the land back to the government if the land and cross are not maintained as a National Memorial. (J.A. 17.)

The Ninth Circuit affirmed the district court's decision, holding that the cross violated the Establishment Clause and that the size or illumination of the cross was irrelevant because a reasonably informed person would at least suspect that the cross resided on federal land. (J.A.

11.) The Ninth Circuit also addressed Public Law 108-87 directly, explaining that it had no bearing on the court's decision because the transfer had not been completed yet and "voluntary cessation of allegedly illegal conduct does not moot a case." Buono, 527 F.3d at 772.

Due to congressional attempts to complete the land transfer and circumvent the order, Mr. Buono filed a motion to enforce the injunction. (J.A. 8.) The district court granted Mr. Buono's motion on April 8, 2005 and permanently enjoined Petitioners from enforcement of Public Law 108-87. (J.A. 8.) On July 5, 2005, Petitioners again filed notice of appeal to the Ninth Circuit. (J.A. 8.)

On September 6, 2007, the Ninth Circuit filed its opinion affirming the lower court's judgment and later denied Petitioners' motion for panel rehearing. (J.A. 13.) The Ninth Circuit held that the government's continuing oversight and rights in the land, the method for effectuating the land transfer and congressional action leading up to the passage of Public Law 108-87 constituted a continuing government endorsement of religion. Buono, 527 F.3d at 779, 783. This Court granted Petitioners' request for certiorari on February 23, 2009. (J.A. 1.)

Statement of the Facts

A five-foot-tall, freestanding, white Latin cross resides on federal land in Southern California's Mojave National Preserve. (J.A. 16.) This distinctly Christian symbol is located along Cima Road, on a stone outcropping known as Sunrise Rock. (J.A. 18.) Sunrise Rock is part of the over 1.4 million acres of federally owned land that make up the vast majority of the Mojave National Preserve. (J.A. 18, 27.) The Veterans of Foreign Wars purport to have erected the original cross in 1934. (J.A. 20.) However, that "original" cross is no longer in existence, and has been replaced many times since 1934. Buono, 527 F.3d at 769. The current iteration of the cross is constructed of iron pipe, and is maintained by private individuals. (J.A. 27-28.) It

was erected in 1998 by Henry Sandoz, a local resident. Buono, 527 F.3d at 769. Mr. Sandoz had neither permit nor permission to erect this cross. Id.

The California Desert Protection Act created the Mojave National Preserve in 1994. (J.A. 19.) The Bureau of Land Management transferred the preserve to the control of the National Parks Service in October of that year. (J.A. 19.) The cross predates the preserve's creation, and "has been erected and maintained on federal land exclusively by private individuals." (J.A. 28.) The National Park Service claims that it has not maintained or promoted the presence of the cross in any way. (J.A. 28.)

Cima Road is one of six main roads that provide access to the preserve, and it is estimated that 40,150 vehicles containing 96,360 persons travel along Cima Road on an annual basis. (J.A. 29-30.) The cross becomes plainly visible to these vehicles from approximately 100 yards away. (J.A. 27.) The National Park Service "openly invites people to camp in their vehicles alongside Cima Road" at the Sunrise Rock location. (J.A. 30.) The cross is only yards away from this location, and is clearly visible. (J.A. 30.) Additionally, the cross is clearly visible from the trailhead of the Teutonia Peak hiking trail, which is one of only two constructed hiking trails in the preserve. (J.A. 38.) The cross has also become the site of sunrise Easter services. (J.A. 21.)

The Veterans of Foreign Wars purport to have erected the cross as a memorial for soldiers of World War I. (J.A. 16.) While a small plaque once accompanied the cross, it has been missing for some time. (J.A. 19.) The Latin cross is "a symbolic representation of Jesus' death on the cross," and is exclusively associated with Christianity. (J.A. 37.)

Mr. Buono worked for the National Park Service from 1972 to 1997. (J.A. 18.) The Secretary of the Interior invited him to a reception for his active involvement "in the designation

of the Mojave Preserve area as a national park system area.” (J.A. 20.) He served as assistant superintendant of the Mojave National Preserve from November 1994 to December 1995. (J.A. 18.) Mr. Buono’s work has given the Mojave National Preserve a special significance to him. (J.A. 21.) Despite his retirement, and the fact that he currently resides in Oregon, Mr. Buono regularly visits the Mojave National Preserve. (J.A. 25.) Mr. Buono intends to move closer to the preserve within the next few months, and will visit the preserve even more often once he has done so. (J.A. 25.)

Mr. Buono is a Roman Catholic who regularly attends mass. (J.A. 25.) He has “no objection to Christian symbols on private property.” (J.A. 25.) However, the presence of a religious symbol on federal land which is not open to similar symbols of different religions “deeply offends” Mr. Buono, and diminishes his enjoyment of the Mojave National Preserve. (J.A. 25.) A representative of the Department of the Interior “has stated that no other freestanding, permanent displays are permitted in the area” and that “if someone were to erect another freestanding display in the area, employees of the National Park Service would remove it.” (J.A. 20.) The National Park Service summarily denied at least one other request to place a symbol in that area. (J.A. 27.) Contrarily, when a National Park Service representative spoke with the private individuals responsible for maintaining and re-erecting the cross about the “possibility of having them voluntarily remove the cross,” they not only refused, but also threatened to replace the cross if it was taken down. (J.A. 28.)

SUMMARY OF ARGUMENT

The Sunrise Rock Cross, located in the Mojave National Preserve, adversely affects Mr. Buono’s ability to use and enjoy the preserve. The Mojave National Preserve represents the crowning achievement of Mr. Buono’s professional life. Mr. Buono feels a great sense of pride

in the preserve and visits it at every opportunity. The cross has caused Mr. Buono so much discomfort that he often feels compelled to avoid the Sunrise Rock area. At other times he feels compelled to visit the cross, hoping that it has been removed.

The diminished use and enjoyment experienced by Mr. Buono constitutes an injury sufficient to confer standing. While this Court has never addressed the issue, circuit courts have held that use and enjoyment of a public park are interests protected under the Establishment Clause. Mr. Buono's injury is not merely psychological. He is offended by this cross and that offense has caused him to sustain an injury-in-fact. Diminished use and enjoyment of public lands is a well recognized noneconomic injury. Further, actions taken by Congress to protect the cross, including the proposed land transfer, will serve only to perpetuate Mr. Buono's injury. Because Mr. Buono's claim only extends to the injury he has actually sustained, he does not claim a generalized grievance nor does he rely on the rights of third parties.

The existence of the Sunrise Rock cross on federal land is a violation of the Establishment Clause of the United States Constitution. When determining whether a government entity has violated the Establishment Clause, this Court uses the three prong test established in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The Sunrise Rock cross fails all three prongs of this test. It does not have a secular purpose, its principle effect advances one religion over others, and it fosters excessive government entanglement with religion. See id. Because of this, the cross is unconstitutional, and must be removed.

Transferring the property that the cross is on does not cure this violation, and instead further breaches the Establishment Clause. Like the cross itself, the transfer is evidence of government partiality to one religion over others. Further, the government's attempts to save this cross through several distinct legislative means are a demonstration of its continued endorsement

of the cross, and the religion that it represents. Because the Establishment Clause is in place to prevent government endorsement of one religion over others, Congress's endorsement of Christianity at the expense of all other religions is a violation of the United States Constitution, and must be redressed.

ARGUMENT

I. MR. BUONO SATISFIES THE REQUIREMENTS OF BOTH ARTICLE III AND PRUDENTIAL STANDING BECAUSE THE PRESENCE OF THE SUNRISE ROCK CROSS ADVERSELY AFFECTS HIS USE AND ENJOYMENT OF THE MOJAVE NATIONAL PRESERVE.

The jurisdiction of the federal courts is limited to cases and controversies. U.S. Const. art. III, § 2, cl. 1. Article III serves as the Constitution's "central mechanism" for defining the role of federal courts in the Separation of Powers Doctrine. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992). Proper application of Article III depends on common understandings about the role of the federal courts. Id. The "irreducible minimum" of Article III standing requires proof of an injury-in-fact, traceable to the alleged unlawful conduct and redressable by the requested relief. Id. Mr. Buono's claim satisfies these requirements, and therefore falls within the jurisdiction of the federal courts.

The question of standing is essentially a question of whether "the litigant is entitled to have the court decide the merits of the dispute." Warth v. Seldin, 422 U.S. 490, 498 (1975). While the standing inquiry holds at its core the Article III requirements, it also focuses on judicial limitations that further define the proper role of the federal courts. Allen v. Wright, 468 U.S. 737, 751 (1984). These include the prohibition against asserting a third party's legal rights, the prohibition against asserting generalized grievances and the requirement that the alleged injury falls within the zone of interests protected by the invoked statute. Id. Without these judicially imposed limitations, a court might be called upon to decide questions of wide public

significance better left to the representative branches of government. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004). However, Mr. Buono’s claim does not fall under these prohibitions, and should therefore be considered a valid question before this Court.

A. The Diminished Use and Enjoyment Experienced by Mr. Buono Is an Injury-In-Fact That Is Concrete, Particularized, Actual and Imminent.

In order to invoke the jurisdiction of the federal courts, a plaintiff must first demonstrate that he has suffered “an invasion of a legally protected interest.” Lujan, 504 U.S. at 560. A plaintiff must offer evidence which proves that the injury is “concrete and particularized” and “actual or imminent.” Id. The constitutional and prudential requirements are not susceptible to precise definition and relate to justiciability in “different and overlapping ways.” Allen, 468 U.S. at 751. As such, many of the elements of the injury-in-fact test overlap with the prudential concerns described above. Id. Thus “the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met.” Duke Power Co. v. Carolina Env’tl. Study Grp., 438 U.S. 59, 80 (1978). Mr. Buono’s claim satisfies both the concerns of the standing doctrine and the constitutional requisites, and is therefore sufficient to invoke the jurisdiction of the federal courts.

1. Mr. Buono suffered an invasion of his legally protected rights because the Establishment Clause protects the use and enjoyment of public parks.

To satisfy the injury-in-fact test, Mr. Buono must first demonstrate that he has suffered an invasion of a legally protected interest. Lujan, 504 U.S. at 560. To satisfy the correlating prudential concern, Mr. Buono must show that the interest invaded falls within the zone of interests protected by the Establishment Clause. Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1981). The inquiry into the zone of protected interests is especially relevant when evaluating the actions of regulatory agencies, but

it is still worthwhile here as it helps define the injury sustained by Mr. Buono. See, e.g., Valley Forge Christian Coll., 454 U.S. at 470 (“[T]he Court has required that the plaintiff’s complaint fall within ‘the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’”) (internal citation omitted); Air Courier Conference of Am. v. Am. Postal Workers Union, 498 U.S. 517, 519 (1991) (policy change by U.S. Postal Service could not be challenged by postal workers because statute governing policy did not protect their interests); Fed. Election Comm’n v. Akins, 524 U.S. 11, 20 (1998) (plaintiffs had standing to challenge denial of information by Federal Election Commission because Congress designed the Federal Election Commission Act to protect that very interest).

The traditional Establishment Clause injury is exemplified in Santa Fe Independent School District v. Doe, where an elected student official in a predominantly Christian public school led student prayers before football games and other events. 530 U.S. 290, 294 (2000). The plaintiffs alleged that, although the school did not require participation, the student led prayers constituted an endorsement of religion which alienated those of other religious beliefs. Id. at 310. This Court held that alienation caused by governmental endorsement of religion constituted an invasion of the interests and rights protected by the Establishment Clause. Id. This Court further explained that such analysis requires the “Court to keep in mind the myriad and subtle ways” in which violations of the Establishment Clause may cause injury. Id.

In American Civil Liberties Union v. Rabun County Chamber of Commerce, a private party erected a large iron structure which, when lighted, resembled a cross and, alternately, a Christmas tree. 698 F.2d 1098, 1101 (11th Cir. 1983). When the structure fell into disrepair, the Rabun County Chamber of Commerce approved a plan to rebuild it. Id. The Eleventh Circuit held that this decision violated the First Amendment because use and enjoyment of a state park

are interests protected by the Establishment Clause. Id. at 1108. In Gonzales v. North Township of Lake County, Indiana, a private group erected a crucifix in a public park as “a ‘memorial’ . . . to honor the heroic deeds of servicemen who gave their life in battle.” 4 F.3d 1412, 1414 (7th Cir. 1993). In an opinion similar to Rabun County Chamber of Commerce, the Seventh Circuit held that individuals, whose use and enjoyment of the park had been adversely affected, even if they still visited and used the park, had sustained an invasion of the rights protected by the Establishment Clause. Id. at 1417.

Here, as in Rabun County Chamber of Commerce and Gonzales, private individuals erected a religious display in a public park. As in Rabun County Chamber of Commerce, the Sunrise Rock cross has become the site of various religious celebrations including Easter Sunday services. The Veterans of Foreign Wars claim to have erected the original cross in 1934 to commemorate soldiers who gave their lives in World War I. However, the current purpose of the cross is obscured both because it has been re-erected by private individuals and because it lacks any identification as a memorial. As in Gonzales, even if a plaque were placed on the cross, there would still be question worthy of judicial inquiry as to the nature of the display. Mr. Buono has standing to litigate this question because, as in both Rabun County Chamber of Commerce and Gonzales, his use and enjoyment of the Mojave National Preserve has been diminished by the presence of a religious display.

Also, like the plaintiffs in Rabun County Chamber of Commerce and Gonzales, Mr. Buono is a regular patron of the Mojave National Preserve and his use and enjoyment of the park is diminished by the religious display erected there. Mr. Buono worked to create the Mojave National Preserve during his career with the National Park Service. It is, very literally, his life’s work. Although he no longer lives in Southern California, he is a regular patron of the park and

especially enjoys visiting the Joshua Tree Forest. Upon seeing the cross Mr. Buono became intensely curious and, after further investigation, discovered that the cross had been erected on federal land. Mr. Buono has very strong feelings about the separation of church and state and the presence of the cross greatly affects his enjoyment of the park. As he explained in his deposition, sometimes he feels compelled to avoid the cross. Other times he feels compelled to seek it out, hoping that it has been removed. As in Rabun County Chamber of Commerce and Gonzales, Mr. Buono's use and enjoyment of the Mojave National Preserve has been curtailed by the cross. Because use and enjoyment of public parks are interests protected by the Establishment Clause, Mr. Buono has sustained an invasion of his legally protected rights sufficient to confer standing.

2. The diminished use and enjoyment experienced by Mr. Buono is a concrete noneconomic injury that is not merely psychological in nature.

After demonstrating that a legally protected right has been violated, a plaintiff must show that his own injury is concrete in nature. Lujan, 504 U.S. at 559-60. It is not enough to allege mere abstract or psychological injury, particularly when seeking an injunction. City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983). However noneconomic injury may be sufficient to support standing in some circumstances. Allen, 468 U.S. at 755. Generally a plaintiff alleging noneconomic injury must demonstrate that it is real and is protected by the invoked statute. Lyons, 461 U.S. at 101; see, Allen, 468 U.S. at 757. This type of injury is of particular relevance to Establishment Clause violations because it is the most common. See, e.g., Elk Grove Unified Sch. Dist., 542 U.S. at 5 (father alleging violation of the Establishment Clause by the recitation of the Pledge of Allegiance at his daughter's school had alleged a sufficient noneconomic injury but did not have standing on other grounds); Santa Fe Indep. Sch. Dist., 530 U.S. at 310 (Court granted standing to plaintiffs alleging feelings of alienation as a result of government

endorsement of religion); Gonzales, 4 F.3d at 1417 (plaintiffs who continued to visit a public park after erection of religious display had standing to challenge the display because their use and enjoyment of the park had been diminished); Rabun Cnty. Chamber of Commerce, 698 F.2d at 1108 (noneconomic injury alleged by plaintiff claiming diminished use and enjoyment of a public park because of religious display contained therein was sufficient to grant standing).

In Santa Fe Independent School District, the plaintiffs alleged a psychological injury, stemming from a feeling of alienation. 530 U.S. at 310. This Court held that alienation constituted a sufficient injury under the Establishment Clause. Id. at 314. In both Rabun County Chamber of Commerce and Gonzales, the plaintiffs claimed that religious displays adversely affected their use of a public park. Gonzales, 4 F.3d at 1417; Rabun Cnty. Chamber of Commerce, 698 F.2d at 1101. The Eleventh and Seventh Circuits both held such noneconomic injury sufficiently concrete to grant standing without delving into the origins of the injury. Gonzales, 4 F.3d at 1417; Rabun Cnty. Chamber of Commerce, 698 F.2d at 1101. Significantly, the Seventh Circuit held that the longstanding habits of plaintiffs are not a litmus test for standing. Gonzales, 4 F.3d at 1416. The court went further, explaining that the plaintiffs did not have to discontinue their use of the park because the “prohibition to their full use and enjoyment . . . is an injury in fact.” Id. at 1417.

Here, Mr. Buono’s injury is sufficiently concrete to confer standing. As in Rabun County Chamber of Commerce and Gonzales, Mr. Buono’s use of the Mojave National Preserve has been adversely affected by the presence of the cross. While geographic proximity is often an important concern, the fact that Mr. Buono does not live in Southern California and that his visits are somewhat irregular does not make his injury less concrete. Geographic proximity is important because it ensures that a plaintiff will continue to be affected by the unlawful conduct.

Mr. Buono, despite living in Oregon, continues to visit the preserve whenever the opportunity presents itself and thus will continue to be affected by the cross. As in Gonzales, the fact that Mr. Buono continues to visit the Mojave National Preserve despite the presence of the cross does not constitute a litmus test for his standing. While the preserve is vast, Mr. Buono's use and enjoyment of specific areas has been curtailed by the presence of the cross. He has sustained a real and substantial noneconomic injury. As in Rabun County Chamber of Commerce and Gonzales, this injury is sufficiently concrete to confer standing.

Similarly, his Roman Catholic heritage and the fact that he regularly subjects himself to crosses do not preclude him from being offended by the presence of a cross on federal land. Mr. Buono has a strong belief in the separation of church and state. This deeply rooted belief drove him to investigate the cross further. Upon discovering that private individuals illegally erected the cross on federal land Mr. Buono became deeply offended. Generally, mere psychological offense as a result of such a deeply rooted belief is not enough to confer standing, but characterizing Mr. Buono's injury in this way fails to address the real concrete injury he has sustained. Mr. Buono often feels compelled to avoid Sunrise Rock and is unable to visit some of his favorite areas of the Mojave National Preserve. On other visits he feels compelled to seek out the cross, hoping it has been removed. As in Rabun County Chamber of Commerce and Gonzales, the subjective reason for Mr. Buono's feeling of offense is not relevant because he has sustained a real, concrete, noneconomic injury protected by the Establishment Clause. This injury is sufficient to confer standing.

3. Mr. Buono’s diminished use and enjoyment of the Mojave National Preserve does not constitute a generalized grievance nor does it arise from the rights of third parties because it is a personal injury that is particular to him.

“[A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” Warth, 422 U.S. at 499. In the limited circumstances where third party standing is applicable, there must be some unity between the interests of the plaintiff and the third party. Elk Grove Unified Sch. Dist., 542 U.S. at 15. A plaintiff is also generally barred from seeking adjudication of “abstract questions of wide public significance” or “generalized grievances.” Warth, 422 U.S. at 499. These prohibitions seek to prevent claims which may be better suited for the more political branches of government. Id.; Valley Forge Christian Coll., 454 U.S. at 475. For similar reasons, this Court requires a plaintiff show that the injury on which the claim is based be particular to him. Lujan, 504 U.S. at 559-60.

In Elk Grove Unified School District, the plaintiff challenged the recitation of the Pledge of Allegiance in this daughter’s elementary school classroom. 542 U.S. at 5. He claimed that his legal right to instruct his child as to religious beliefs had been violated by the words “under God” in the pledge. Id. at 15. The girl’s mother had full legal custody and did not wish to bring suit against the school district. Id. This Court held that the father had not alleged a particularized injury because his claim relied on the adverse rights of a third party. Id. at 5. In Rabun County Chamber of Commerce, the American Civil Liberties Union and other plaintiffs claimed that a religious display erected in a state park violated the Establishment Clause. 698 F.2d at 1102. The American Civil Liberties Union claimed only that the Constitution had been violated and relied on the injury of its members, whose use and enjoyment of the park had been adversely affected. Id. at 1106-09. The Eleventh Circuit held that, while the individual plaintiffs whose enjoyment of the park had been adversely affected had standing, the American Civil Liberties

Union did not. Id. at 1109. The Seventh Circuit made a similar determination in Gonzales, holding that individuals whose use of a public park had been diminished by a religious display erected in the park had standing to invoke the jurisdiction of the federal courts. Gonzales, 4 F.3d at 1414.

Here, Mr. Buono does not rely on the rights of third parties and does not allege a generalized grievance. Unlike the father in Elk Grove Unified School District, Mr. Buono claims only that his own personal enjoyment of the Mojave National Preserve has been significantly diminished. In addition, unlike Rabun County Chamber of Commerce, Mr. Buono is not alleging generalized violations of the Constitution. His claim is not simply that the Establishment Clause has been violated, but that its violation has caused an injury particular to him.

Claims based solely on a strong belief in the separation of church and state are not sufficient to confer standing because they constitute merely psychological, generalized grievances. Mr. Buono's injury arises from a strong belief in the separation of church and state but the injury itself is neither generalized nor merely psychological. He has suffered a real, concrete injury because his enjoyment of the park has diminished. Mr. Buono played a critical role in the formation of the Mojave National Preserve, has strong ties to it and visits it as often as he can. His diminished enjoyment is not typical of the average citizen and does not constitute a generalized grievance. Because of his strong connection to the park and the adverse effect of the cross on his enjoyment, Mr. Buono has suffered an injury particular to himself and sufficiently satisfies the prudential requirements laid out by this Court.

4. Mr. Buono sustained an actual injury due to the presence of the Sunrise Rock cross and congressional action to protect the cross creates the imminent threat of perpetuating that harm.

Finally, in order to satisfy the requirements of the injury-in-fact test a plaintiff must show that the injury is actual or imminent. Lujan, 504 U.S. at 559-60. The imminence prong is particularly important when seeking an injunction compelling government action as Mr. Buono does here. Lyons, 461 U.S. at 101.

As described above, in both Rabun County Chamber of Commerce and Gonzales, plaintiffs were able to overcome challenges to their standing by proving impairment of their use and enjoyment of public parks. Gonzales, 4 F.3d at 1417; Rabun Cnty. Chamber of Commerce, 698 F.2d at 1101. In Santa Fe Independent School District, this Court held that feelings of alienation caused by a policy of student led prayer were sufficient to support standing. 530 U.S. at 310. The school district claimed it had taken steps to remedy the situation by altering its policy. Id. Looking to the history of past action by the school district, this Court held that the changes were intended to preserve the policy and to not remedy the injury. Id. at 310. As such, this Court affirmed the injunction order, holding that the history of government action established the imminence of the potential injury. Id.

Here, as in Rabun County Chamber of Commerce and Gonzales, Mr. Buono has sustained an actual injury in that the Sunrise Rock cross has significantly impaired his enjoyment of the Mojave National Preserve. Mr. Buono's injury is also imminent under the analysis provided by this Court in Santa Fe Independent School District. After discovering that the cross resided on federal land, Mr. Buono made efforts to have the cross removed. His efforts caused the National Park Service to undertake a study of the cross, concluding that it did not qualify as a historic site and should be removed. Undoubtedly in response to concerned constituencies,

Congress forbade the National Park Service from using federal funds to remove the cross. After unfavorable judgments in the district court and the Ninth Circuit, Congress passed legislation declaring the cross and Sunrise Rock a national memorial and allocated funds to its maintenance and repair. Congress took all of these actions in blatant disregard of Mr. Buono's constitutional rights. Upon realizing Congress's intention to protect the cross, Mr. Buono sought the enforcement order granted below. While the Ninth Circuit considered the government's appeal, Congress again attempted to circumvent the injunction by enacting a land transfer to a private party on the condition that the party maintains the area as a national memorial.

Without regard to whether the land transfer is itself a violation of the Establishment Clause, Mr. Buono has standing to challenge it because it is the latest action taken by Congress to protect the cross. Whether the land transfer cures the Establishment Clause breach is a critical question in this case, but does not preclude standing. As in Santa Fe Independent School District, congressional action here has the appearance of protecting the cross and not of remedying the harm. It would have been much simpler for Congress to follow the injunction order and remove the cross. It is possible that, had Congress sought a land transfer initially, this would not be the case. However, as this Court explained in Santa Fe Independent School District, the history of governmental action must be evaluated when determining the purpose of the alleged remedy. Id. Here, the history of congressional action does not support the claim that Congress is simply trying to protect a monument to fallen veterans. The Veterans of Foreign Wars illegally erected the cross without permit or authorization, its purpose is questionable, and Congress has taken repeated actions to protect it. The land transfer should be interpreted, not as an attempt to remedy Mr. Buono's harm, but as Congress's latest attempt to perpetuate it. Thus,

Mr. Buono has sufficiently shown an invasion of his constitutional rights which is concrete, particular, actual and imminent and has standing to pursue injunctive relief.

B. Mr. Buono's Diminished Use and Enjoyment of the Mojave National Preserve, Which Arises Both from the Presence of the Cross Itself and Actions Taken by Congress To Protect It, Can Only Be Redressed by Removal of the Cross.

Article III requires a plaintiff to prove that there is some casual connection between the injury and the alleged unlawful conduct. Lujan, 504 U.S. at 560. Under this analysis, the reviewing court must consider “the documentary evidence and the testimony in the record” as found by the lower court and discern whether this prong of the standing inquiry has been satisfied. Duke Power Co., 438 U.S. at 77. A plaintiff must also show that the injury suffered is likely to be redressed by the requested relief. Lujan, 504 U.S. at 561. “A defendant’s voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of that practice. Friends of Earth, Inc. v. Laidlaw Env'tl. Serv., Inc., 528 U.S. 167, 170-71 (2000).

In Duke Power Co., the plaintiffs claimed that their rights under the Fifth Amendment had been violated. 438 U.S. at 63-68. The plaintiffs were nuclear power suppliers who agreed to build plants only if their liability were limited. Id. Congress passed legislation to that effect and later amended it to substantially lessen the limited liability provided while the plants were still under construction. Id. at 73. This Court held that even though the amendment did not constitute an explicit taking, because it effectively destroyed the plaintiffs’ ability to finish their plants and recoup their investments the plaintiffs had demonstrated a sufficient causal link. Id. at 77. In Elk Grove Unified School District, this Court explained that a father’s right to teach his child about religion did not impose limits on the ability of others to discuss religion with that child. 542 U.S. at 4-6. As such, the plaintiff failed to state an injury upon which relief could be

granted but this Court went further, explaining that even if there were an injury it could not be remedied by an injunction against the school because others could easily approach the child and discuss religion. Id. at 15.

Here, as in Duke Power Co., the cross and subsequent actions taken by Congress to protect it have diminished Mr. Buono's ability to use and enjoy the Mojave National Preserve. The cross itself compels Mr. Buono to act somewhat irrationally, at times avoiding it and at others seeking it out. Because the cross is located near Cima Road, one of six main roads into the preserve, Mr. Buono is often forced to avoid entire areas of the preserve, including the Joshua Tree Forest which he once supervised and has particular interest in. As in Duke Power Co., there is a sufficient causal connection between the cross and Mr. Buono's injury to confer standing.

Also, as in Duke Power Co., actions taken by Congress to protect the cross have only deepened the injury felt by Mr. Buono. Congress has clearly chosen to protect the will of its constituents at the expense of Mr. Buono's constitutional rights. Rather than remove the cross, as ordered by both the district court and the Ninth Circuit, Congress enacted legislation to prevent the cross's removal. Now Congress hopes to transfer the land to the same private individuals who erected and now maintain the current version of the cross. As in Duke Power Co., there is a sufficient causal connection between Mr. Buono's injury and the actions taken by Congress because those actions perpetuate the injury already suffered by Mr. Buono.

Unlike the father in Elk Grove Unified School District, Mr. Buono's injury could easily be redressed by enforcement of the injunction already in place. As discussed above, Mr. Buono's injury arises directly from the presence of the cross. Its removal, as required by the injunction ordered below, would remedy this injury. Further, until it is determined that the land

transfer does not perpetuate the harm, the land transfer cannot constitute an adequate remedy. It would simply circumvent the Establishment Clause and Mr. Buono would continue to see his use and enjoyment adversely affected. The political branches of government failed to redress Mr. Buono's injury by removing the unlawfully erected cross. This Court could succeed where both Congress and the National Park Service failed by ordering that the cross be removed. As required by this Court in Elk Grove Unified School District, the unlawfully erected cross and congressional action to protect it has caused Mr. Buono's injury. Also as required by Elk Grove Unified School District, Mr. Buono seeks redress of his injury by enforcement of the injunction already in place, a remedy this Court may provide. Because his injury arises from the unlawful conduct and is redressable by the requested relief, Mr. Buono should retain standing before this Court.

C. The Federal Courts Represent Mr. Buono's Last Resort To Seek Redress for the Noneconomic Injury He Has Sustained.

The central purpose of the standing requirements is to identify those disputes properly resolved by the judiciary. Lujan, 504 U.S. at 560. By doing so, Article III ensures that the judiciary does not encroach on issues better resolved by the more political branches. Id. This concept is most dramatically displayed when the judiciary declares an act of Congress unconstitutional. Valley Forge Christian Coll., 454 U.S. at 475. While this is a powerful tool for vindicating individual rights, if used inappropriately "it is also the ultimate threat to the continued effectiveness of the federal courts." Id. For this reason, the judiciary must guard its power and use it only as a last resort or necessity. Allen, 468 U.S. at 752.

However, as this Court held in United States v. Students Challenging Regulatory Agency Procedures (SCRAP), the test for standing is not whether the plaintiff has sustained a significant injury but whether the injury sustained establishes a direct stake in the outcome of the litigation.

412 U.S. 669, 690 n.14 (1973). This Court explained that plaintiffs have been granted standing “with no more at stake in the outcome of the action than a fraction of the vote . . . a \$5.00 fine and costs . . . and a \$1.50 poll tax. Id. (internal citations omitted). "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Id. (internal citations omitted).

Here the political branches have acted. The National Park Service, an agency operating under the executive branch with the discretion of Congress, undertook a study of the cross and determined it should be removed. Congress then passed legislation, undoubtedly reflecting the desires of its constituencies, to protect the cross. Mr. Buono has been left with no means for seeking relief from the political branches, thus the federal courts are his last resort. Although the federal courts must avoid encroaching on the powers of Congress and the Executive, its critical role is in the defense of individual rights. As discussed, Mr. Buono does not allege a generalized grievance that might be addressed through the political process. His injury is personal and particular to him. His single vote is not enough to garner the attention of the political branches because his injury is not one felt by a majority or even a large number of citizens.

The requirements of standing should not be elevated to require a substantial injury. Mr. Buono alleges much more than a mere psychological injury but even so, this Court has held that psychological injuries might be enough to confer standing under the Establishment Clause. Santa Fe Indep. Sch. Dist., 530 U.S. at 310. Injuries arising solely from a strong belief in the separation of church and state are not generally enough to confer standing but Mr. Buono’s injury might actually be tied to his religious beliefs. Mr. Buono may strongly oppose governmental endorsements of his own religion because he does not want the government

interfering with his religious practices. Even if this is not his motivation, Mr. Buono has also experienced a diminished use and enjoyment of the Mojave National Preserve. Any attempt to disqualify this injury as psychological or inadequate is merely an attempt to elevate the requirements of standing to require a significant injury. This Court, however, has specifically denounced approaches requiring significant injury. Students Challenging Regulatory Agency Procedures, 412 U.S. at 690. Despite the fact that Mr. Buono's injury is noneconomic in nature it amounts to much more than the mere identifiable trifle required. As such, Mr. Buono has alleged an injury which is sufficient to show a personal stake in the outcome of the litigation. After all, when the cross is removed, Mr. Buono's full use and enjoyment of the Mojave National Preserve will be restored. Mr. Buono has sustained an injury-in-fact, caused by the unlawful presence of the cross and actions taken by Congress to protect it. This injury would be redressed by removal of the cross. Finally, Mr. Buono has no other means but the federal courts to seek the required relief. For the aforementioned reasons Mr. Buono should be granted standing to challenge the lawfulness both of the cross itself and of congressional action taken to protect it. The injury-in-fact establishes his standing while the Establishment Clause's violation provides his motivation.

II. THE SUNRISE ROCK CROSS'S CONTINUED EXISTENCE ON FEDERAL LANDS IS A VIOLATION OF THE ESTABLISHMENT CLAUSE BECAUSE IT CONVEYS A FEDERAL ENDORSEMENT OF ONE RELIGION OVER OTHERS.

The First Amendment to the United States Constitution bears the Establishment Clause, which guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This clause does not establish a statutory regime, but rather determines the state of mind with which the government must approach its interactions with the religious world. See, e.g., Lemon, 403 U.S. at 612. In

practice, the objective is to prevent “unnecessary intrusion of either the church or the state upon the other.” Id. The Sunrise Rock cross is an unfortunate example of federal intrusion upon private religious affairs, and is therefore in violation of the Establishment Clause.

A. The Sunrise Rock Cross Fails the Lemon Test, and Is Therefore in Violation of the Establishment Clause.

This Court has established a three-part test to guide analysis of questions arising in its context. Lemon, 403 U.S. at 612. Government action must be found to “have a secular legislative purpose; . . . its principal or primary effect must be one that neither advances nor inhibits religion . . . [and it] must not foster an excessive government entanglement with religion.” Id. (internal citation omitted). This Court has used this standard to analyze Establishment Clause issues for more than 35 years. See, e.g., McCreary County, Kentucky v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 860-61 (2005). When considered under the Lemon test, the Sunrise Rock cross fails at each of the three inquiries. See generally Buono, 527 F.3d 758. The Ninth Circuit properly applied these tests to the issue at hand, and this Court should affirm its decision.

1. Congress’s promotion and protection of the cross has fostered “excessive government entanglement with religion.”

The United States Congress has spent a hugely disproportionate amount of time, money, and legislative power on this five-foot iron cross. It has passed no fewer than four appropriations bills and similar pieces of legislation in its efforts to protect and preserve this religious icon. This is analogous to the sort of scenario this Court addressed in Lemon itself, where it was “confronted with successive . . . appropriations that benefit relatively few religious groups.”¹ 403 U.S. at 623. In Lemon, this Court found the repeated legislative attention necessary would

¹ Note that Lemon addressed appropriations to religious schools, rather than religious icons; the analogy is drawn to the series of appropriations in both instances.

lead to excessive government entanglement with religion. Id. The Sunrise Rock cross has already received repeated legislative attention, but unlike the educational funds at issue in Lemon, the cross serves little or no secular purpose. Because the entanglement here is even more excessive than that in Lemon, this Court should find that the cross fails this prong of the Lemon test, and is therefore unconstitutional.

2. The principal effect of the Sunrise Rock cross is to promote Christianity, which violates the Establishment Clause.

The cross is a symbol that is religiously significant to Christians; it has little meaning to individuals of different faiths other than to signify Christianity. It stands alone in an area where no similar religious displays may be erected. Moreover, there are no indications on or anywhere near the cross that would cause an observer to even suspect that it was intended to stand as a “war memorial.” Because of this clear association with Christianity, and the lack of indication otherwise, a reasonable observer could only conclude that the cross stands as an endorsement of Christianity. This endorsement fails the “principal effect” prong of the Lemon test, and therefore stands as a violation of the Establishment Clause.

B. The Establishment Clause Bars the Federal Government from Endorsing One Form of Religion over Others.

The Sunrise Rock cross is an endorsement of Christianity. The cross stands alone on a hilltop on federal land. It bears neither sign nor marking to show viewers that it serves any particular purpose; a viewer must therefore reasonably believe that the cross stands as a symbol of Christianity. Because that symbol stands on federal land, at the very least the viewer must reasonably assume some affiliation between the cross and the government. Such an assumption would be correct; Congress has affiliated itself with the cross through its actions to preserve it. The Establishment Clause bars this blatant government affiliation with a religious symbol.

County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 590, (1989) (“[T]his court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization”). The government’s actions here violate this rule. The cross therefore stands in violation of the Establishment Clause.

Congress has attempted to shield the cross from the Establishment Clause. When the National Park Service found that the cross did not qualify as a historic site, Congress moved quickly to simultaneously declare the cross a national World War I memorial and forbid the use of federal funds to dismantle national World War I memorials. If Congress truly believed that the cross was primarily a secular monument, there would have been no need to legislate further to protect it. Instead, this fervent defense of the cross gives a reasonable indication of Congress’s intent to promote the cross, and thereby promote Christianity. This favoring of one religious creed over others flies in the face of current Establishment Clause jurisprudence. See, e.g., County of Allegheny, 492 U.S. at 590-91.

1. A reasonable observer would believe that the Sunrise Rock cross serves as government endorsement of the Christian faith.

A lone cross displayed on a rock outcropping in the middle of a huge expanse of federal land can do little else than convey an impression that Christ is favored by the federal government. This Court has held government actions conveying or attempting to convey such a message to be unconstitutional, and a violation of the Establishment Clause. County of Allegheny, 492 U.S. at 593. Because there are no markings to designate any purpose other than one of sectarian endorsement, a reasonable observer will believe that the cross is endorsed by the federal government, and that Christianity is therefore similarly endorsed. See generally County of Allegheny, 492 U.S. at 593-94.

2. Protecting the cross while simultaneously disallowing any other religion from erecting a display near Sunrise Rock demonstrates an endorsement of one religion over others.

The denial of permission to other religious groups for similar displays is paramount in differentiating this case from those where the courts found that the Clause had not been violated. See McCreary County, Kentucky, 545 U.S. at 866; Van Orden v. Perry, 545 U.S. 677, 684 (2005). This issue is best exemplified by the dichotomy of McCreary County, Kentucky and Van Orden. In both cases, this Court considered whether a monument of the Ten Commandments violated the Establishment Clause. McCreary County, Kentucky, 545 U.S. at 844; Van Orden, 545 U.S. at 677. However, this Court found the constitutionality of these displays to be different, despite their identical imagery. McCreary County, Kentucky, 545 U.S. at 881 (holding that the monument was unconstitutional); Van Orden, 545 U.S. at 690-91 (holding that the monument was constitutional). This stark contrast resulted from the Van Orden monument's location in a "large park containing seventeen monuments and twenty-one historical markers, all designed to illustrate the 'ideals' of those who settled in Texas and of those who have lived there since that time." 545 U.S. at 702 (Breyer, J., concurring in the judgment). Because the Van Orden monument was not given exclusive access, but was instead joined by other religious and secular monuments, there was no Establishment Clause issue. Id. The McCreary County, Kentucky monument, on the other hand, manifested a "purpose to favor one faith over another." 545 U.S. at 844. The Sunrise Rock cross manifests a similar purpose through the exclusion of all other religions from the area. Because of this, the Sunrise Rock cross should be found similarly unconstitutional.

Opening the Sunrise Rock area to any public displays could indeed redress the breach of the Establishment Clause. Instead, the cross has been favored by congressional action. It is an

unfortunate possibility that the majority of those congressional members who voted to support the Sunrise Rock cross did so based on their faith, rather than their secular belief that the cross served primarily as a war memorial. 84.8% of the members of the 111th Congress are either Protestant or Catholic. David Masci & Tracy Miller, Faith on the Hill: Religious Affiliations of Members of Congress, Pew Forum (Dec. 19, 2008), <http://pewforum.org/docs/?DocID=379> (last visited October 18, 2009). This sort of “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.” Lemon, 403 U.S. at 622. It is the role of the courts to protect the minority from the tyranny of the majority; indeed, “the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy” W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (noting that “one’s right to . . . freedom of worship . . . may not be submitted to vote; they depend on the outcome of no elections”). But here, Congress has used its political power to endorse one religion above all others. Such an endorsement directly violates the Establishment Clause, and must not stand.

C. Designating the Sunrise Rock Cross a Memorial Does Not Negate the Religious Imagery of the Cross.

For the cross to be constitutional, it must have a valid secular purpose. Lemon, 403 U.S. at 612. Generally, this Court gives government actors a great deal of deference when demonstrating secular purpose. Edwards v. Aguillard, 482 U.S. 578, 586 (1987). However, “it is required that the statement of such purpose be sincere and not a sham.” Id. at 586-87. In this instance, Congress declared the cross a national monument in order to prevent its dismantling by the National Park Service. The acts naming the cross a national memorial need to be considered in context with Congress’s other actions, and do not exist in a vacuum. McCreary County, Kentucky, 545 U.S. at 866. While a cross may conceivably be a reasonable form of memorial,

Congress's history of questionable legislation in regards to this cross belies a more sectarian purpose. Id. at n.14. ("One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage."). Upon careful consideration, this Court will see that the government's actions were unconstitutional thanks to their "sectarian heritage." See id.

III. TRANSFERRING THE SUNRISE ROCK PROPERTY TO PRIVATE OWNERSHIP DOES NOT CURE THE UNDERLYING ESTABLISHMENT CLAUSE VIOLATION BECAUSE THE GOVERNMENT CONTINUES TO ENDORSE THE CROSS.

Congress's proposed transfer of the Sunrise Rock cross to private citizens is a sham transaction whose sole purpose is to evade the Constitution. This transfer itself serves as evidence of Congress's endorsement of the cross, as its continued efforts to protect it clearly demonstrate. This continued protection of religious imagery has the actual effect of endorsing one religion above others, despite government protestations of secular intent. This Court has "paid particularly close attention to whether the challenged practice either has the purpose or effect of "endorsing" religion." County of Allegheny, 492 U.S. at 592 (noting that this is "a concern that has long had a place in our Establishment Clause jurisprudence"). The transfer of Sunrise Rock to private individuals does not cure the Establishment Clause violation because it furthers government endorsement of religion. This Court should therefore invalidate the land transfer, and affirm the Ninth Circuit's permanent injunction.

A. The Transfer of the Sunrise Rock Cross Fails the Lemon Test and Is Unconstitutional.

In order to establish the constitutionality of the land transfer that Congress has entered into with the Veterans of Foreign Wars, it must also be considered through the lens of the Lemon test. 403 U.S. at 602. However, the transfer fails all three prongs of that test. There is not a

secular legislative purpose to the statute,² the principal effect of the statute is one that advances religion, and the transfer fosters an “excessive government entanglement with religion.” Id. Because the transfer so grievously fails this test, the Ninth Circuit’s reasoning was correct and should be affirmed.

1. The government’s primary purpose in the transaction is to avoid a federal injunction and to continue displaying the cross in a location where no other religions may erect freestanding expressions of faith.

The government’s purpose in this transaction is to continue to endorse the cross and therefore Christianity through a cooperating non-governmental third party. The transfer is a sham transaction intended to evade the federal injunction granted by the district court. To pass the Lemon test, the transfer must have “a secular purpose.” 403 U.S. at 612. Despite the deference this Court generally gives to the stated reasons of the legislature, this Court has held that “the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.” McCreary County, Kentucky, 545 U.S. at 864; See also Edwards, 482 U.S. at 586-87 (“While the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.”). The government halfheartedly argues that its primary purpose is simply to comply with the injunction while preserving a national memorial. However, it is evident from both past action and certain current inaction that Congress’s true intent is to preserve the cross itself by any means necessary. For example, rather than opening the infringing property to expressions from any religion, Congress has chosen to divest itself of it. Further, instead of doing so by an open bidding process where any group or individual has the opportunity to purchase the land, Congress chose to direct the

² Even if the statute is construed as partially secular, this “secular purpose” is a sham and should be discounted by this Court. See Edwards, 482 U.S. at 586-87.

sale to the very group that has maintained and re-erected the infringing cross.³ From these surrounding actions, it is reasonable to presume that the proffered purpose is a sham, and that the true intention is to continue displaying the Latin cross and thereby exclusively endorse Christianity. This is certainly not a “secular purpose,” and therefore fails the Lemon test. 403 U.S. at 612-13.

2. The principle effect of the land transfer is the exclusive endorsement of Christianity by the United States government.

The Establishment Clause forbids preferential treatment of one religion over others. See Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment) (noting that the Establishment Clause “preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred”). However, this land transfer favors a Christian symbol over those of other religions. The cross, which was erected after the creation of the Mojave National Preserve, was installed without permission from the National Park Service. Contrarily, an individual seeking to erect a similar memorial in the form of a Buddhist shrine at the Sunrise Rock location sought permission from the National Park Service prior to installation. That permission was refused, and the refusal further noted that the installation of a memorial without authorization is prohibited.⁴ Buono, 527 F.3d at 769. The Buddhist memorial was therefore not installed. As a result of these events, Congress chose to reward the Veterans of Foreign Wars for illegally installing a sectarian monument by granting them the exclusive right to purchase the land it was on. There is no record of any similar offer made to the individual who complied with the law. To reward the lawbreaker and punish the law abiding citizen is unacceptable, and will create a perverse incentive to install religious

³ Note that no similar offer of land has been made to the Buddhist group whose request to erect a shrine in the vicinity was refused.

⁴ Note that it is uncontested that the cross was installed and maintained without authorization.

monuments on federal land without permission. Moreover, this demonstrates that Congress is more interested in the religious component of the cross than they are with complying with state and federal rules and legislation. Such preferential treatment is a clear violation of the Establishment Clause. See McCreary County, Kentucky, 545 U.S. at 860 (“Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the ‘understanding, reached ... after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens . . .’”) (internal citation omitted); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (“The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person.”). Because it is the goal of the Establishment Clause to prevent both endorsement of and hostility towards religion by the government, the land transfer is unconstitutional and should be invalidated.

3. Transferring the Sunrise Rock cross to the private individuals who illegally installed it on federal land fosters even greater excessive entanglement.

The transfer of the Sunrise Rock cross once more runs afoul of the “excessive entanglement” rule. Lemon, 403 U.S. at 612. The “excessive entanglement” test is not a bright-line rule; this Court must “examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.” Id. at 614-15. The Sunrise Rock cross fails this test. Here, the relationship that will result from the land transaction is an unending one. The government retains a reversionary interest in the land, and therefore still holds a property right in the Sunrise Rock parcel. From the government’s choice to include a reversionary clause in the transfer, it is only logical to infer that they will monitor the Sunrise Rock in order to protect that property right. Combining this indefinite period of observation with the right of reversion, it is

apparent that the transaction does not end government involvement with the cross. The transfer is an attempt to hide, rather than cure, the government's influence over the cross. As this Court held in McCreary County, Kentucky, "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." 545 U.S. at 864. A sham transaction cannot cure an underlying Establishment Clause breach.

B. Regardless of the Actual Owner of the Sunrise Rock Acre, the Overwhelming Impression Is Still One of Government Endorsement of Christianity over All Other Religions.

Even if the land on which the cross sits is technically private, any reasonable observer will infer a government endorsement of Christianity from its display. The Establishment Clause forbids the government from "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." County of Allegheny, 492 U.S. at 593. Therefore, if the land transfer creates a situation where a reasonable individual would infer government endorsement of a given religion, the transfer itself should be found unconstitutional. There are two types of potential observers: those who are aware of the cross's legal history, and those who are not. Those who are aware of the cross's legal history would reasonably construe Congress's fervent defense of the cross as an endorsement of that cross. Because the cross is the predominant symbol of Christianity, it is reasonable that they would therefore believe that Congress has fought so hard for the cross because they endorse the religion that it symbolizes. A potential observer unaware of the legal history of the cross will know only that a Christian symbol stands alone in a federal preserve, with no other clues as to what it symbolizes or who owns it. Such an observer would have no reason to infer anything other than blatant government endorsement of Christianity through religious iconography. Therefore, a land transfer will either simply fail to end government endorsement of religion, or may even be construed as further

endorsement of religion. Neither outcome cures the Establishment Clause breach. Because the injunction does cure the breach, that injunction should be upheld and enforced.

CONCLUSION

Mr. Buono's use of the Mojave National Preserve has been diminished by the presence of a religious symbol, illegally installed there and by actions taken by Congress to prevent its removal. This injury-in-fact constitutes an invasion of Mr. Buono's First Amendment rights which is traceable to the unlawful presence of the cross and subsequent unlawful actions of Congress. Further, this Court is Mr. Buono's last resort to seek redress for this injury by having the cross removed.

The cross itself stands as a violation of the Establishment Clause of the United States Constitution. Because it is a vehicle through which Congress has expressed a clear endorsement of this one religion above all others, this Court should affirm the Ninth Circuit's enforcement of the injunction barring its display. Moreover, because the land transfer is a sham transaction through which Congress is attempting to ensure the cross's continued existence, it should also be considered unconstitutional and therefore invalid.

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