No. 08-472

In the Supreme Court of the United States

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

v.

FRANK BUONO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

More than 70 years ago, the Veterans of Foreign Wars (VFW) erected a cross in a remote area within what is now a federal preserve as a memorial to fallen service members. After the district court held that the presence of the cross on federal land violated the Establishment Clause and permanently enjoined the government from permitting its display, Congress enacted legislation directing the Secretary of the Interior to transfer an acre of land including the cross to the VFW in exchange for a parcel of equal value. The district court then permanently enjoined the government from implementing that Act of Congress, and the court of appeals affirmed. The questions presented are:

1. Whether respondent has standing to maintain this action given that he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.

2. Whether, assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

PARTIES TO THE PROCEEDINGS

The petitioners are Ken L. Salazar, Secretary of the Interior; Jonathan B. Jarvis, Regional Director, Pacific West Region, National Park Service, Department of the Interior; and Dennis Schramm, Superintendent, Mojave National Preserve, National Park Service, Department of the Interior.

The respondent is Frank Buono.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 54a-85a, 100a-113a) are reported at 527 F.3d 758 and 371 F.3d 543. The opinions of the district court (Pet. App. 86a-99a, 114a-144a) are reported at 364 F. Supp. 2d 1175 and 212 F. Supp. 2d 1202.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2007. The judgment was amended and a petition for rehearing was denied on May 14, 2008 (Pet. App. 35a-85a). On August 6, 2008, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 11, 2008. On August 28, 2008, Justice Kennedy further extended the

time to and including October 10, 2008, and the petition was filed on that date. The petition for a writ of certiorari was granted on February 23, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Pertinent statutory provisions are set forth in the joint appendix. J.A. 43-47.

STATEMENT

1. In 1934, the Veterans of Foreign Wars (VFW) erected a memorial to fallen service members. The memorial was in the form of a wooden cross set atop an outcropping known as Sunrise Rock in San Bernardino County, California. Pet. App. 56a, 101a. The cross was accompanied by a plaque identifying it as a war memorial that read: "'The Cross, Erected in Memory of the Dead of All Wars,' * * * 'Erected 1934 by Members of Veterans of Foregin [sic] Wars, Death Valley post 2884.'" *Id.* at 56a. Private parties have since replaced the cross several times, but there is no longer a plaque at the site. *Ibid.* The current cross is between five and eight feet high and is constructed of four-inch diameter metal pipes that are painted white. *Id.* at 55a.

At the time the VFW erected the cross, Sunrise Rock and the surrounding lands were under the authority of the Bureau of Land Management. Pet. App. 117a. In 1994, the Bureau transferred the lands to the National Park Service (Park Service) as a result of the California Desert Protection Act of 1994, 16 U.S.C. 410aaa *et seq.* Pet. App. 117a. That Act created the Mojave National

Preserve (Preserve), which encompasses approximately 1.6 million acres of land in the Mojave Desert. *Ibid.*; *id.* at 55a. Slightly more than 90% of that land is federally owned, with approximately 86,000 acres owned by private individuals and 43,000 acres owned by the State of California. *Ibid.*

The Preserve is located in southeastern California, approximately 60 miles east of Barstow, California. Pet. App. 116a-117a. It is bounded to the west and north by Interstate 15, which runs northeast from Barstow to Las Vegas, Nevada; and it is bounded to the south by Interstate 40, which runs east from Barstow to Flagstaff, Arizona. *Ibid.* On the northwest side of the Preserve, a narrow blacktop road, Cima Road, runs to the southeast through part of the Preserve. *Id.* at 118a. That road connects Interstate 15 with Cima, California, a town of roughly 21 people located within the Preserve. See U.S. Census Bureau, *Population Finder: Zip Code Tabulation Area 92323* <http://tinyurl.com/CimaPopulation>.

Sunrise Rock is located on the north side of Cima Road, about 11 miles from Interstate 15 and 7 miles from Cima. Pet. App. 118a. It is in a "remote location" that is part of the "natural desert environment." *Id.* at 111a, 122a. There are no buildings or signs of human habitation. *Id.* at 122a. According to respondent, the only visible signs of human activity are off-road vehicle tracks and a parking area for trail hikers. *Ibid.*; see *id.* at 125a. Sunrise Rock rises 15 to 20 feet above grade, *id.* at 111a, and the cross is visible to vehicles on Cima Road from a hundred yards away. *Ibid.*

2. The memorial has been the subject of several pieces of federal legislation. In 1999, the Park Service denied a request to erect a Buddhist shrine near the cross and indicated its intention to remove the cross.

Pet. App. 56a-57a. The following year, Congress prohibited the Park Service from spending federal funds to remove the cross. Consolidated Appropriations Act, 2001 (2001 Act), Pub. L. No. 106-554, App. D, § 133, 114 Stat. 2763A-230. One year later, Congress designated the "five-foot-tall white cross first erected by the Veterans of Foreign Wars of the United States in 1934 * * * as well as a limited amount of adjoining Preserve property" as a "national memorial commemorating United States participation in World War I and honoring the American veterans of that war." Department of Defense Appropriations Act, 2002 (2002 Act), Pub. L. No. 107-117, Div. A, § 8137(a), 115 Stat. 2278. That legislation also ordered the Secretary of the Interior (Secretary) to acquire a replica of the original plaque and cross, to install the replica plaque at the memorial, and to determine by survey "[t]he exact acreage and legal description of the property" included in the memorial. § 8137(b) and (c), 115 Stat. 2278. Then in 2003, Congress prohibited the spending of any federal funds to remove any World War I memorial. Department of Defense Appropriations Act, 2003 (2003 Act), Pub. L. No. 107-248, § 8065(b), 116 Stat. 1551.

3. Alleging that the presence of the cross on federal land violates the Establishment Clause, U.S. Const. Amend. I, respondent filed this action in March 2001. Pet. App. 58a, 115a. Respondent lives in Oregon, but alleged that he regularly visits the Preserve, where he was formerly employed as Assistant Superintendent. *Id.* at 104a-105a, 121a-122a. A practicing Roman Catholic, respondent never complained about the cross during his Park Service employment, and he "does not find a cross itself objectionable." *Id.* at 123a. Instead, respondent asserted that he is offended by the display of a

cross on government property that "is not open to groups and individuals to erect other freestanding, permanent displays." J.A. 50. Respondent claimed that he would avoid the cross on future visits to the Preserve. Pet. App. 107a.

The district court entered judgment for respondent, Pet. App. 114a-144a, and permanently enjoined the government from "permitting the display of the * * * cross," *id.* at 146a. The court held that respondent has standing because he was "subjected to an unwelcome religious display, namely the cross." *Id.* at 131a. The court then held that the presence of the cross on federal land violates the Establishment Clause because "the primary effect of" the public display of the cross "advances religion." *Id.* at 139a. The court of appeals stayed the district court's injunction "to the extent that the order required the immediate removal or dismantling of the cross." *Id.* at 87a. The government subsequently covered the cross with a large plywood box, and the cross remains so covered. *Id.* at 56a, 88a.

4. While the government's appeal was pending, Congress enacted legislation ordering the Secretary to convey to the VFW "a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by Section 8137 [of the 2002 Act]) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war," in exchange for a privately owned, five-acre parcel of land elsewhere in the Preserve. Department of Defense Appropriations Act, 2004 (2004 Act), Pub. L. No. 108-87, § 8121(a) and (b), 117 Stat. 1100. The legislation directed the Secretary to have the properties appraised and to equalize their values through cash payment, if necessary. § 8121(c) and (d),

117 Stat. 1100. Congress further provided that, "[n]otwithstanding the conveyance of the property * * *, the Secretary shall continue to carry out the responsibilities" set forth in Section 8137 of the 2002 Act and that, if "the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." § 8121(a) and (e), 117 Stat. 1100.

5. The court of appeals affirmed the district court's judgment. Pet. App. 100a-113a. As a threshold matter, the court held that the case had not been rendered moot by the 2004 Act, because "the land transfer could take as long as two years to complete." *Id.* at 103a. Even after the land transfer, the court continued, "the land may revert to the federal government" under the terms of the 2004 Act and other federal statutes allowing the government to accept or acquire ownership of private lands. *Id.* at 103a. "[E]xpress[ing] no view as to whether a transfer completed under section 8121 [of the 2004 Act] would pass constitutional muster," the court "le[ft] th[e] question for another day." *Id.* at 104a.

The court then held that respondent had standing to challenge the cross. Pet. App. 104a-107a. The court reasoned that respondent had suffered a "concrete, personalized injury" rather than "an abstract generalized grievance," because he "will tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing." *Id.* at 105-107a (citation omitted). Accordingly, respondent is "unable to freely use the area of the Preserve around the cross." *Id.* at 107a (internal quotation marks, brackets and citation omitted). The court concluded that respondent's "inability to unreservedly use public land suffices as injury-in-fact." *Ibid.*

On the merits, the court of appeals held that the case was "squarely controlled" by its prior decision in *Separation of Church & State Committee* v. *City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (per curiam), which held that a cross displayed in a city park violated the Establishment Clause. Pet. App. 108a. Although that case involved a "fifty-one foot concrete Latin cross with neon inset tubing" that was first identified as a war memorial more than 30 years after it was erected, *id.* at 108a, the court declared those factual distinctions "of no moment," *id.* at 111a. For the court, the Sunrise Rock cross's "shorter height," "remote location," and "placement by private individuals" made it "no less likely that the Sunrise Rock cross will project a message of government endorsement to a reasonable observer." *Id.* at 111a-112a.

6. On remand, respondent filed a motion to enforce or modify the district court's earlier permanent injunction. He asserted that Congress's transfer of the land was an unlawful attempt to evade that injunction. The district court agreed because, in the court's view, "the government's apparent endorsement of a particular religion has not actually ceased," and "the proposed transfer of the subject property can only be viewed as an attempt to keep the * * * cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." Pet. App. 94a, 97a. The court therefore permanently enjoined the government "from implementing the provisions of Section 8121 of [the 2004 Act]." *Id.* at 99a.

7. a. A panel of the court of appeals affirmed. Pet. App. 1a-34a; see *id.* at 54a-85a. The panel observed that "the Seventh Circuit [had] adopted a presumption that 'a sale of real property is an effective way for a public

body to end its inappropriate endorsement of religion' in the absence of 'unusual circumstances.'" *Id.* at 25a n.13 (quoting *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000) (*Marshfield*)). Nonetheless, the panel "decline[d] to adopt such presumption." *Ibid.* Instead, the panel determined that the 2004 Act violated the permanent injunction granted to respondent because the transfer would not cause "government action endorsing religion [to] actually cease[]." *Id.* at 25a. Accordingly, the panel held that the land transfer "cannot be validly executed without running afoul of the injunction." *Id.* at 33a.

The court of appeals panel relied in part on what it viewed as "continuing government control" of the property following a land transfer. Pet. App. 26a. The 2004 Act provides for the land to revert to the government if the Secretary determines that the VFW is no longer maintaining a war memorial on the site, and the panel construed that provision to require the VFW to maintain a cross at the site. *Id.* at 21a-22a, 28a-29a. In the court's view, the Park Service also would continue to have "general supervisory and managerial responsibilities" and would have an implied easement to enter the property to install a replica of the original plaque pursuant to Section 8137 of the 2002 Act. *Id.* at 26a, 27a.

The court of appeals panel also relied on three other factors: first, that the land exchange was directed by Congress in an appropriations bill rather than initiated by the Park Service pursuant to agency procedures, Pet. App. 29a-30a; second, that Congress transferred the land to the VFW rather than selling it to the general public, *id.* at 30a-31a; and, third, that Congress engaged in repeated legislative efforts between 2001 and 2004 to preserve and maintain the cross, *id.* at 31a-32a. Accord-

ing to the court, those factors demonstrated that "the government's purpose in this case is to evade the injunction and keep the cross in place" "without actually curing the continuing Establishment Clause violation." *Id.* at 31a, 32a (citation omitted).

b. After the government filed a petition for rehearing, the court of appeals panel amended its opinion to delete the portion that expressly acknowledged a conflict with the Seventh Circuit. Pet. App. 35a-37a; see *id.* at 54a-85a. As amended, the opinion now states that, "to the extent that [the Seventh Circuit's decision in] *Marshfield* can be read to adopt a presumption of the effectiveness of a land sale to end a constitutional violation, we decline to adopt such a presumption." *Id.* at 36a; see *id.* at 77a n.13.

c. With five judges dissenting, the court of appeals denied en banc review. Pet. App. 37a-53a. Judge O'Scannlain's dissent, joined by four other judges, explained that "[t]he opinion in this case announces the rule that Congress cannot cure a government agency's Establishment Clause violation by ordering sale of the land upon which a religious symbol previously was situated." *Id.* at 37a. In the dissenters' view, that "novel rule contravenes governing Supreme Court precedent, creates a split with the Seventh Circuit on multiple issues, and invites courts to encroach upon private citizens' rights under both the speech and religion clauses of the First Amendment." *Ibid.*

SUMMARY OF ARGUMENT

I. Respondent lacks standing under the Establishment Clause to challenge Congress's land transfer. As an initial matter, respondent objects to the display of a cross on public property, but Congress remedied that

asserted injury when it transferred the land into private hands. In any event, respondent objects to displaying the cross on public property only because that property is not an open forum on which other people may erect other displays. Respondent's asserted injury is therefore *not* that he has been subjected to unwelcome religious exercises, indirect coercion, or exclusion from the political community. His alleged injury is only that he must observe government conduct (the use of land for a specific war memorial) with which he disagrees. That alleged injury is insufficient to confer Article III standing. Moreover, prudential considerations counsel against hearing this suit, because respondent seeks only to assert the rights of others to erect displays. His lack of interest in putting up any displays himself renders him an inappropriate plaintiff in this litigation.

II. On the merits, respondent is incorrect that the government must remove a longstanding display that serves important secular purposes. Congress's transfer of the land ends any endorsement of the cross, because henceforth any display on the land will not be attributable to the government. At the least, Congress's transfer of the land presumptively ends any endorsement: in the absence of evidence suggesting that the divestment is not genuine, the transfer should be held to remove any First Amendment issue. There is no such evidence here. Congress acted appropriately in the wake of the district court's injunction: it ended any endorsement of the cross in the way that best promoted the significant governmental objectives of showing respect for this country's fallen service members and avoiding social conflict and divisiveness.

III. A. The court of appeals erred in ascribing any illegitimate purpose to the government. The secular

purpose of the statute is apparent on its face: preservation of a war memorial. There is no evidence that this stated justification is a sham. To find even a hint of such evidence, the court had to look to earlier statutes involving the memorial. But these prior legislative acts are neither relevant nor indicative of anything other than the same secular goal.

B. Contrary to the court's contention, the government will not retain any impermissible control over the property. The Park Service cannot require the VFW either to display or to remove the cross; the site's designation as a national memorial confers no regulatory authority on the Park Service; and the reversionary clause only requires maintenance of a war memorial, not display of the cross or any continuing control over the property.

C. The court also was incorrect in impugning the method of effectuating the land transfer. Congress sensibly transferred the memorial for equal value to its original donor, which as a veterans' group is likely to care appropriately for a war memorial. That the land transfer was mandated in a congressional appropriations act casts no doubt whatsoever on its validity.

D. Finally, the court erred in characterizing the property as a single private inholding within a large expanse of federal land. Many private parcels are located within the Preserve, some in close proximity to Sunrise Rock. Accordingly, as respondent concedes, a visitor to the Preserve cannot assume that any particular parcel of land belongs to the government. At the least, the court should have tailored its remedy by remanding for consideration of limited measures, such as fencing or additional signage, to end any continuing endorsement.

ARGUMENT

I. RESPONDENT LACKS STANDING UNDER THE ESTABLISHMENT CLAUSE

Standing requirements ensure that "the decision to seek review" is not "placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) (quoting *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973)). Accordingly, "federal courts [must] satisfy themselves that the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction." *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). That inquiry into standing is "especially rigorous" when, as here, "reaching the merits of the dispute" would require this Court "to decide whether an action taken by one of the other two Branches of the Federal Government [is] unconstitutional." *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997).

To have standing under Article III of the Constitution, a plaintiff must have suffered "an 'injury in fact'—an invasion of a legally protected interest" that was caused by the complained-of conduct. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Among the additional "prudential dimensions" of standing is "the general prohibition on a litigant's raising another person's legal rights." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen* v. *Wright,* 468 U.S. 737, 751 (1984)). Here, respondent cannot demonstrate either constitutional or prudential standing.

A. Respondent Lacks Constitutional Standing Because He Lacks The Requisite Personal Injury

1. The doctrine of constitutional standing "is built on a single basic idea—the idea of separation of powers." *Allen*, 468 U.S. at 752. When the judiciary "is asked to undertake constitutional adjudication, the most important and delicate of its responsibilities, the requirement of concrete injury * * * serves the function of insuring that such adjudication does not take place unnecessarily." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974). "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Defenders of Wildlife*, 504 U.S. at 576.

Respondent's action violates Article III because it seeks not to redress a personal injury, but instead to vindicate a view of the Establishment Clause—one that requires public property to be open to all, if to any, religious symbols. Respondent has expressly disclaimed any injury, including offense or feelings of exclusion, from the public display or transfer of the cross itself. Respondent testified that he is a Roman Catholic, that he regularly attends mass at a church that displays crosses, and that he "[o]bviously" does not "find the cross, itself, offensive." J.A. 85. Respondent's asserted injury is instead that the property "is not open to groups and individuals to erect other freestanding, permanent displays." J.A. 50. According to respondent, he "strongly object[s] to the government allowing a symbol of one religion on government property that is not open to others to place freestanding signs or symbols that express their views or beliefs." J.A. 64.

Of course, the government attempted to remedy that injury by transferring Sunrise Rock to a private party. According to respondent, he "*ha*[*s*] *no objection to Christian symbols on private property*." J.A. 64 (emphasis added); see *ibid.* ("I am a Roman Catholic, attend mass, and obviously have no objection to Christian symbols on private property."). Respondent's objection is to the "display of a Latin Cross on government-owned property," J.A. 50, and if the land transfer at issue in this case is allowed to occur, Sunrise Rock will no longer be owned by the government.

2. Even assuming that respondent's statements do not disclaim standing to challenge the transfer for that reason, they run headlong into this Court's precedents disfavoring Establishment Clause standing based on value or policy disagreements. The relevant principles emerge from two contrasting cases. In *School Dist.* v. *Schempp*, 374 U.S. 203 (1963), the Court held that school children and their parents had standing to challenge mandatory Bible readings in school that "directly affected" them, *id.* at 224 n.9, and that "were contrary to the religious beliefs which they held and to their familial teaching," *id.* at 208 (citation omitted). As this Court has explained, *Schempp* stands for the proposition that "[a] person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause." *Association of Data Processing Serv. Orgs.* v. *Camp*, 397 U.S. 150, 154 (1970).

By contrast, in *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) (*Valley Forge*), the Court made clear that mere views about the appropriate scope of the Establishment Clause, however firmly held, do not confer

standing. In that case, the United States had transferred a parcel of land to a non-profit educational institution operating under the supervision of a religious organization. *Id.* at 468. The Court held that the plaintiffs lacked standing to challenge the transfer because they had not identified a personal injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. "That is not an injury sufficient to confer standing under Art[icle] III," the Court stated, "even though the disagreement is phrased in constitutional terms." *Id.* at 485-486. The Court explained that "[i]t is evident that [the plaintiffs] are firmly committed to the constitutional principle of separation of church and State," but "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Id.* at 486.

3. So too here, respondent may be "firmly committed to the constitutional principle of separation of church and State," but he has not proven any injury "other than the psychological consequence presumably produced by observation of conduct with which [he] disagrees." *Valley Forge*, 454 U.S. at 485, 486. Unlike in *Schempp*, respondent has not been subjected "to unwelcome religious exercises." *Id.* at 487 n.22. Similarly, he has not experienced "indirect coercion" from "religious orthodoxy," *Lee* v. *Weisman*, 505 U.S. 577, 592 (1992), nor been made to feel like an "outsider[]" rather than a "full member[] of the political community," *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (*Capitol Square*) (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). Respondent asserts only that he dislikes the absence of an open forum atop Sunrise Rock (although,

as noted below, he himself has no wish to display a symbol there). That objection, however deeply felt, arises solely from respondent's commitment to certain constitutional views. As in *Valley Forge*, such an objection does not count as a cognizable injury for purposes of standing under the Establishment Clause.

4. Respondent asserts that his "personal injury" lies in his "inability to unreservedly use public land." Pet. App. 107a; see J.A. 65 ("I will try to avoid seeing the cross in my future trips to the preserve, even though it may mean going out of my way to do so."). But if, as *Valley Forge* holds, respondent cannot premise standing on the "psychological consequence"—the dislike, distress, or offense, however genuine—"produced by observation of conduct with which one disagrees," then too he cannot premise standing on the costs he incurs to avoid that observation.

Unlike in *Schempp*, respondent has not been "forced to assume special burdens to avoid" unwelcome religious exercises or other cognizable injury. *Valley Forge*, 454 U.S. at 487 n.22. Rather, respondent has chosen to assume certain burdens (most notably, to take a different, less convenient road) to avoid confronting a governmental policy choice with which he disagrees. Such "self-inflicted" injuries do not establish standing. *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) (per curiam). Otherwise, plaintiffs could confer standing on themselves by incurring some tangible burden to avoid noncognizable injuries. See *Harris* v. *City of Zion*, 927 F.2d 1401, 1420 (7th Cir. 1991) (Easterbrook, J., dissenting) ("If offense is not enough, why is a detour attributable to that offense enough?"), cert. denied, 505 U.S. 1218 (1992). The *Valley Forge* Court nowhere suggested that assuming such a cost would be sufficient.

The standing inquiry must turn on the nature of the underlying harm respondent suffers, not on whether he has assumed some cost to avoid it. If simple exposure to the lack of an open forum constituted a cognizable injury, then a plaintiff's need to take a different route in order to avoid that injury surely would give rise to standing. But when the alleged harm that is fairly traceable to the government's conduct is not cognizable for standing purposes, as is true in this case, plaintiffs cannot bootstrap their way into standing by choosing to inflict on themselves an additional or different injury. See, *e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 228 (2003); *Petro-Chem Processing, Inc.* v. *EPA*, 866 F.2d 433, 438 (D.C. Cir.) (R.B. Ginsburg, J.), cert. denied, 490 U.S. 1106 (1989).[1]

B. Respondent Lacks Prudential Standing Because He Asserts The Rights Of Third Parties

"[P]rudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights." *Newdow*, 542 U.S. at 12 (quoting *Allen*, 468

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[1] The doctrine of taxpayer standing does not provide an alternative basis for standing because respondent (who has not asserted taxpayer standing) does not challenge a congressional enactment that rests on the Taxing and Spending Clause. See *Valley Forge*, 454 U.S. at 478-480; see also *Hein* v. *Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2565-2566 & n.5, 2569 (2007) (plurality opinion). Instead, as in *Valley Forge*, the taxpayer-standing doctrine is inapplicable because the land transfer "was an evident exercise of Congress's power under the Property Clause, Art. IV, § 3, cl. 2" of the Constitution. *Valley Forge*, 454 U.S. at 480. Although Congress directed the Secretary to install a replica plaque, see 2002 Act § 8137(c), 115 Stat. 2278, any expenditure of tax funds for that purpose is merely incidental to the exercise of Congress's Property Clause authority. See *Flast* v. *Cohen*, 392 U.S. 83, 102-103 (1968).

U.S. at 751). The requirement that a plaintiff raise only his own rights is based on the "healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed," *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 955, n.5 (1984), courts "would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth*, 422 U.S. at 500.

Even if respondent has constitutional standing, those considerations counsel dismissal of his action. Respondent's suit, in its very essence, seeks to assist the rights of others to participate in an open forum. The action is entirely derivative of what respondent assumes to be other individuals' expressive desires. Respondent has never attempted, nor does he intend to attempt in the future, to erect a display on Sunrise Rock. Respondent complains only that *other* people cannot erect *their own* symbols if they so choose. But nothing prevents those third parties from bringing suit, if and when they are excluded from Sunrise Rock. Rather than await such a suit, should it ever arise, respondent invites this Court to reach out and decide an "abstract question[] of wide public significance" concerning the ways in which the government may cure an Establishment Clause violation. *Warth*, 422 U.S. at 500. The Court should decline respondent's invitation for two reasons.

First, adjudicating disputes brought by plaintiffs who have been directly affected by the challenged government action "assure[s] that concrete adverseness which sharpens the presentation of issues." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). "By focusing on the fac-

tual situation" presented when parties assert their own legal rights, this Court ensures that it "face[s] flesh and blood legal problems with data relevant and adequate to an informed judgment." *Los Angeles Police Dep't* v. *United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) (internal quotation marks and citation omitted); see *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978).

In this case, respondent brought suit after someone he knew was denied permission to erect a religious symbol. See Pet. App. 109a. But in many derivative cases of this kind, plaintiffs will have no knowledge of how the challenged policy has been or might be applied. And in this case, the prior application only underscores the presence of other potential plaintiffs who have been or might be directly affected by the challenged conduct. Even if a plaintiff has some familiarity with an application of the policy, courts are better served by placing litigation in the hands of those actually affected, who will present a case with all the "concrete adverseness" that facilitates judicial decisionmaking. *Baker*, 369 U.S. at 204.

Second, and even more important, declining to decide cases involving derivative assertions of rights safeguards the limited role of courts by preventing them from addressing issues that are entirely speculative. Here, no other person or entity may want to erect another display on Sunrise Rock. If that is true, then "judicial intervention [is] unnecessary to protect individual rights." *Warth*, 422 U.S. at 500. This Court should not adjudicate what amounts to a purely hypothetical dispute, especially when it is being urged to declare invalid an act of a coordinate Branch. See *Raines*, 521 U.S. at 819-820; *Valley Forge*, 454 U.S. at 473-474.

For that reason, courts commonly deny standing to plaintiffs who object to governmental action that has not directly affected them, but that has purportedly denied someone else a right secured by the Constitution.[2] Respondent is in no different situation. Allowing him to piggyback on others' potential harms not only would disregard this Court's requirement that a plaintiff suffer personal injury, but also would threaten to "transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders." *Allen*, 468 U.S. at 756 (internal quotation marks and citation omitted).

II. CONGRESS'S TRANSFER OF THE LAND TO A PRIVATE PARTY WILL REMEDY THE ESTABLISHMENT CLAUSE VIOLATION

Even if respondent has standing, he is incorrect that the federal government must tear down a cross that has stood for three-quarters of a century as a memorial to fallen service members. Faced with the district court's decision that the presence of the cross on federal land violated the Establishment Clause, Congress had two alternatives: removal of the cross or divestment of the land. Of those two, Congress reasonably elected to di-

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[2] See, *e.g.*, *In re Navy Chaplaincy*, 534 F.3d 756, 760, 763-765 (D.C. Cir. 2008) (chaplain lacked standing to claim that other chaplains were being discriminated against on the basis of their religion, in violation of the Establishment Clause), cert. denied, 129 S. Ct. 1918 (2009); *Higgason* v. *Farley*, 83 F.3d 807, 810 (7th Cir. 1996) (per curiam) (inmate lacked standing to claim that other prisoners were being denied the right to attend religious services, in violation of the Free Exercise Clause); *Osediacz* v. *City of Cranston*, 414 F.3d 136, 142-143 (1st Cir. 2005) (resident lacked standing to claim that other residents were being subjected to a prior restraint on speech, in violation of the Free Speech Clause).

vest itself of the land by transferring it to the private organization—the VFW—that erected the memorial decades ago. Congress's transfer not only will cure any constitutional violation by ending the government's endorsement of the cross, but also will promote the significant governmental objectives of showing respect for this country's fallen service members and avoiding social conflict and divisiveness. The First Amendment does not prohibit such a sensible and sensitive balance of values.

1. Congress's transfer of the land is a constitutionally permissible way to cure the Establishment Clause violation, because it ends any governmental endorsement of the cross. It is a fundamental tenet of this Court's jurisprudence that private action is immune from the strictures of the First and Fourteenth Amendments, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974), and thus that "an Establishment Clause violation must be moored in government action of some sort," *Capitol Square*, 515 U.S. at 779 (O'Connor, J., concurring). For constitutional purposes, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 302 (2000) (quoting *Board of Ed.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)).

Congress respected that "crucial difference" between public and private expressive activity when it attempted to transfer the land on which the cross sits to the VFW. By placing that land in private hands, Congress ended any endorsement of the cross. If the district court's injunction is lifted and the transfer is consummated, the

federal government will be neither financing the cross, *Donnelly*, 465 U.S. at 671, nor displaying the cross on public land, *McCreary County* v. *ACLU*, 545 U.S. 844, 851 (2005); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 579-587 (1989) (plurality opinion). Following the transfer, a privately financed and designed memorial will be displayed on privately held land. Cf. *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring in the judgments) ("In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use.").

This Court recently addressed the distinction between government speech and private speech under the First Amendment's Free Speech Clause. See *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009). It observed that "government-commissioned and government-financed monuments speak for the government." *Id.* at 1133. So do "privately financed and donated monuments that the government accepts and displays to the public on government land," this Court said, because "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf." *Ibid.* Whether the government commissions or finances a memorial, or displays a memorial on its own land, "there is little chance that observers will fail to appreciate the identity of the speaker." *Ibid.*

The converse, of course, is equally true: where, as here, a private party commissions or finances a memorial, and displays that memorial on its own land, observers will not attribute the display to the government. See *City of Ladue* v. *Gilleo*, 512 U.S. 43, 56 (1994) ("Pre-

cisely because of their location, such signs provide information about the identity of the 'speaker.'"); *Capitol Square*, 515 U.S. at 786 (Souter, J., concurring in part and concurring in the judgment) ("[A]n unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands."); *id.* at 800 (Stevens, J., dissenting) ("[T]he location of the sign is a significant component of the message it conveys."). Rather, observers will attribute the speech to the private party who owns the land, and thus there will be no unconstitutional endorsement.

Those general principles are fully applicable in this case. The property's location in the Preserve will not lead observers to assume that the government is the landowner. Approximately 86,000 acres in the Preserve are privately owned, Pet. App. 55a, and those private lands are intermingled with public ones. Respondent himself testified that when he first saw the cross, he did not know whether it was on federal land. J.A. 79. To be sure, a reasonable observer will not know for certain that the land in question is *not* owned by the government. But some such uncertainty exists in many cases, and it cannot be thought to divest private owners, like the VFW, of their expressive rights. Moreover, if Congress's intentions as to this land are carried out, the uncertainty about ownership will diminish. In the 2002 Act, Congress provided for the installation of a replica plaque on Sunrise Rock stating that the cross was "Erected in Memory of the Dead of All Wars" and "Erected 1934 by Members of" the VFW. Pet. App. 56a. Such a plaque will indicate to observers that the cross has a private, secular origin and thus that the property is likely to be privately rather than publicly owned.

2. At the least, Congress's transfer of the land is a presumptively permissible way to cure the Establishment Clause violation. Because "there is a presumption of legitimacy accorded to the Government's official conduct," *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004), this Court should presume that Congress's transfer of the land is genuine rather than pretextual: in the absence of evidence that the transfer does not comply with applicable federal law, that the government will not receive reasonable compensation for its property, or that the private recipient will not assume the traditional duties of ownership, the Court should accept a land transfer as remedying any constitutional violation arising from the display of a religious symbol on public property.

Such an approach is illustrated by the Seventh Circuit's decision in *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487 (2000). In that case, the City of Marshfield, Wisconsin accepted a 15-foot high statue of Jesus Christ as a gift from a local council of the Knights of Columbus and placed the statue in a public park, where it remained unchallenged for nearly 40 years. *Id.* at 489. After suit was filed challenging the display of the statue under the Establishment Clause, the City sold the parcel of land on which the statue stood to a private group organized to preserve the statue. *Id.* at 489-490.

The Seventh Circuit held that the transfer cured any Establishment Clause violation. "Because it is assumed that a property owner controls expression conducted on its property," the court recognized that "the effect of formal transfer of legal title to property" was "a transfer of imputed expression from a public seller onto a private buyer." *Marshfield*, 203 F.3d at 491. Accord-

ingly, "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Ibid.* Looking to the "substance of the transaction as well as its form," *ibid.*, the court found that no such unusual circumstances existed. The private purchaser "ha[d] performed the necessary formalities to effect a transfer of property, paid a fair price and assumed the traditional duties of ownership," and thus "th[e] sale validly extinguished any government endorsement of religion." *Id.* at 492.[3]

The same result should apply in this case. In the 2004 Act, Congress directed the Secretary to transfer to the VFW one acre of land that includes the Sunrise Rock cross, in exchange for a privately owned, five-acre parcel of land elsewhere in the Preserve. § 8121(a) and (b), 117 Stat. 1100. Congress further directed the Secretary to have the properties appraised and to equalize their values through cash payment, if necessary. § 8121(c) and (d), 117 Stat. 1100. By definition then, the transfer of Sunrise Rock will occur in exchange for equal value. Moreover, there is no evidence that the Secretary will fail to "perform[] the necessary formalities to effect a transfer of property," *Marshfield*, 203 F.3d at 492, or

[3] Other courts have upheld the divestment of land to cure potential Establishment Clause violations in similar circumstances. See, *e.g.*, *Chambers* v. *City of Frederick*, 373 F. Supp. 2d 567, 572 (D. Md. 2005) (upholding sale of land that included a Ten Commandments monument to the monument's original donor, the Fraternal Order of Eagles); accord *Mercier* v. *Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005) (same). Cf. *Utah Gospel Mission* v. *Salt Lake City Corp.*, 425 F.3d 1249, 1259-1262 (10th Cir. 2005) (sale of easement to the Church of Jesus Christ of Latter-Day Saints in response to Free Speech Clause challenge; upholding sale against, *inter alia*, Establishment Clause challenge).

that Congress is using the VFW "merely as a straw purchaser, with the intention of continuing to exercise the duties of ownership," *ibid.* To the contrary, the 2004 Act accomplishes a bona fide transfer of the Sunrise Rock cross into private hands.

3. The court of appeals declined to adopt a presumption that "a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion" in the absence of "unusual circumstances." Pet. App. 76a n.13 (quoting *Marshfield*, 203 F.3d at 491). According to the court of appeals, this Court's "Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry in this area." *Id.* at 77a n.13. That is, of course, true. But the need to evaluate the *facts* of each case does not answer what *legal standard* should be applied to those facts. Thus, although the Seventh Circuit applies a presumption, that court also has "emphasized the case-by-case nature of a court's review of an alleged Establishment Clause violation." *Mercier*, 395 F.3d at 702. A court can presume that public officials act legitimately when they divest land to cure an Establishment Clause violation, while also examining the form and substance of the transaction "to determine whether government action endorsing religion has actually ceased." *Marshfield*, 203 F.3d at 491.

The court of appeals asserted that this Court's "'public function' cases * * * suggest that constitutional violations are not presumptively cured when control is transferred from public to private hands." Pet. App. 77a n.13 (citing *Evans* v. *Newton*, 382 U.S. 296, 301 (1966), and *Terry* v. *Adams*, 345 U.S. 461, 469 (1953) (opinion of Black, J.)). *Evans* and *Terry*, however, do not address how the transfer of real property to private parties af-

fects analysis under the Establishment Clause of the First Amendment. Rather, *Evans* and *Terry* address whether the performance of governmental functions by private parties can constitute state action for purposes of the Fourteenth Amendment. Those cases hold that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans*, 382 U.S. at 299; see *Terry*, 345 U.S. at 469-470 (opinion of Black, J.). Because Congress has not transferred any "powers or functions governmental in nature" to the VFW, those cases are not relevant here.

In any event, those decisions make clear that a nominally private entity may be treated as a state actor only in very rare circumstances. This Court later explained the holding in *Evans*, which concerned the status of a park under the state action doctrine, as resting on the "extraordinary circumstance[]" that the park's transfer "had not * * * eliminated the actual involvement of the [government] in the daily maintenance and care of the park." *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 159 n.8 (1978). That characterization fully comports with other precedent establishing that private parties are presumed private for purposes of constitutional analysis. See *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) ("[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'") (quoting *Jackson*, 419 U.S. at 351). This Court has set a high bar for imputing state action to a private party, and, at a minimum, the court of ap-

peals should have set a similarly high bar for imputing government speech to a private party.

4. Divestment of the Sunrise Rock cross not only cures any Establishment Clause violation, but also promotes the important governmental objectives of respecting this Nation's fallen service members and those who seek to honor them and preventing social conflict and divisiveness. While respondent views the cross as a religious symbol, many members of the local and, indeed, national community, most notably veterans and their loved ones, view it as a symbol of the sacrifices of fallen soldiers, and they have been deeply opposed to its removal. Congress sensibly accounted for both points of view by attempting to transfer property that might be thought to convey a religious message and yet to preserve a longstanding war memorial—and in so doing, "to avoid that divisiveness based upon religion that promotes social conflict." *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment).

In the circumstances of this case, Congress reasonably believed that destroying a public war memorial would "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment). In 1999, when the Park Service denied a request to erect a Buddhist shrine on Sunrise Rock, it simultaneously indicated its intention to remove the cross. Pet. App. 56a-57a. According to local citizens, removal of the cross was likely to generate "significant public opposition." *Id.* at 120a. Despite that opposition, the Park Service maintained its plan to remove the cross. *Id.* at 120a-121a. At that point, recognizing the probability that the Park Service's proposed action would engender social conflict, Congress intervened—

first by preventing the use of federal funds to remove the cross, then by designating the cross as a national memorial, and finally by transferring the site to the VFW. *Id.* at 57a-62a, 121a.

As in *Van Orden*, Congress was faced with a longstanding, privately donated memorial on public land that communicates a secular message (here, of memoralizing persons killed in battle) and that engendered no opposition through many decades of display. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment). And as in *Van Orden*, removal of that memorial would have imposed social costs, and indeed perhaps even "exhibit[ed] a hostility toward religion that has no place in our Establishment Clause traditions." *Id.* at 704; see *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 845-846 (1995). Congress therefore elected to transfer the memorial to the private organization that had erected it, as a means of averting unnecessary social conflict and avoiding disrespect to the Nation's war dead. "[B]y any realistic measure," that transfer "create[s] none of the dangers which [the Establishment Clause] is designed to prevent" and "do[es] not so directly or substantially involve the state * * * in the favoring of religion as to have meaningful or practical impact." *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring).

Indeed, if the Establishment Clause permits the government to *display* a longstanding memorial with a predominantly secular message, *Van Orden*, 545 U.S. at 691-692 (plurality opinion); *id.* at 703-704 (Breyer, J., concurring in the judgment), *a fortiori* it permits the government to *transfer* such a memorial to a bona fide private recipient. Unlike in *Van Orden*, in the present case the government does not seek to communicate a message with some religious content. Rather, the gov-

ernment seeks to *not* communicate such a message—but without conveying any disrespect to the people for whom the symbol is significant or incurring the substantial social costs of appearing to do so. Certainly if the government itself may display some monuments that recognize our Nation's religious heritage, *id.* at 683-84 (plurality opinion); *id.* at 699-700 (Breyer, J., concurring in the judgment), then it may enable a private party to do so. The Establishment Clause does not demand destruction of a cross that has stood for 75 years as a memorial to those who have given their lives in defense of this Nation—and that will stand in the future on purely private ground.

III. THE COURT OF APPEALS' REASONS FOR ENJOINING THE LAND TRANSFER LACK MERIT

At the outset, the court of appeals erred by framing the question presented as whether Congress attempted to evade the district court's injunction and whether the land transfer mandated by Congress would be a "violation of the permanent injunction." Pet. App. 75a; see also *id.* at 66a. Indeed, the court even said that it was reviewing the district court's decision invalidating an Act of Congress for abuse of the district court's discretion. *Id.* at 65a, 66a. Congress's constitutional authority is not, however, subject to the discretion of district courts. 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). Nor could it divest Congress of its authority to legislate a remedy for any Establishment Clause violation. Simply put, the previously issued injunction did not bar the Act of Congress at issue.

The actual question presented to the court of appeals was whether the Establishment Clause bars the Act of Congress at issue.[4] It does not. The court of appeals relied on four factors in reaching the contrary conclusion: (A) the government's efforts to preserve Sunrise Rock as a war memorial; (B) the government's supposed control over Sunrise Rock following the transfer; (C) the government's method of effectuating the transfer; and (D) the government's creation of a private inholding within the Preserve. None of those factors renders unconstitutional Congress's decision to remove any Establishment Clause violation in a way that would simultaneously convey respect to fallen members of the armed services and avoid religious and social divisiveness.

A. Congress's Efforts To Preserve Sunrise Rock As A War Memorial Do Not Undermine The Transfer's Validity

The court of appeals enjoined the land transfer in part because of "the government's long-standing efforts to preserve and maintain the cross." Pet. App. 83a. According to the court, those efforts lead "to the undeniable conclusion that the government's purpose in this case is to evade the injunction and keep the cross in place," *ibid.*, "without actually curing the continuing Establishment Clause violation," *id.* at 84a (citation omitted). The court's reasoning ignores the legitimate secular purpose that is set forth in the 2004 Act, and instead focuses on the purposes underlying earlier stat-

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[4] That question, the parties agree, is subject to de novo review. See Gov't C.A. Br. 12 ("The district court's underlying legal determinations are reviewed de novo, as is the district court's conclusion that the United States violated the Establishment Clause.") (internal quotation marks and citation omitted); Resp. C.A. Br. 10 ("Plaintiff agrees with Defendants' statement of the standard of review.").

utes. And indeed, even those earlier statutes had the same secular purpose as the 2004 Act: the preservation of a longstanding memorial dedicated to the remembrance of fallen service members.

1. The court of appeals' analysis began from a mistaken premise: that the 2004 Act is part of the government's "long-standing efforts to preserve and maintain the cross" in order "to evade the injunction." Pet. App. 83a. In 2001, Congress prohibited the use of federal funds to remove the cross, see 2001 Act App. D, § 133, 114 Stat. 2763A-230; and in 2002, Congress designated the "five-foot-tall white cross first erected by the Veterans of Foreign Wars of the United States in 1934 * * * as well as a limited amount of adjoining Preserve property" as a "national memorial commemorating United States participation in World War I and honoring the American veterans of that war," 2002 Act § 8137(a), 115 Stat. 2278. Those two statutes, however, predate the district court's permanent injunction preventing display of the cross.

Only after the district court enjoined the government from displaying the cross, did Congress pass the 2004 Act under review. That Act directs the Secretary to convey to the VFW "a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by Section 8137 [of the 2002 Act]) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war," in exchange for a privately owned, five-acre parcel of land elsewhere in the Preserve. 2004 Act § 8121(a) and (b), 117 Stat. 1100. In the event that "the Secretary determines that the conveyed property is no longer being maintained *as a war memorial*, the property shall revert to the ownership

of the United States." § 8121(e), 117 Stat. 1100 (emphasis added).

On its face, the 2004 Act does nothing "to preserve and maintain the cross." Pet. App. 83a. 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. See 2004 Act § 8121(e), 117 Stat. 1100 ("The conveyance under subsection (a) shall be subject to the condition that the recipient maintain the conveyed property as a memorial commemorating United States participation in World War I."). Moreover, the memorial that was designated in the 2002 Act included both the "five-foot-tall white cross" and "a limited amount of adjoining Preserve property." § 8137(a), 115 Stat. 2278. By contrast, in the 2004 Act, Congress required only that the "parcel of real property"—not the cross—be maintained as a war memorial. § 8121(a), 117 Stat. 1100; see § 8121(e), 117 Stat. 1100 (requiring that "the conveyed property" be maintained as a war memorial). The court of appeals was therefore squarely mistaken that "the cross itself is the memorial" and "[n]othing permits the VFW to * * * remove the cross." Pet. App. 73a. The 2004 Act does not mention a cross, let alone require the VFW to display one. To the contrary, once the property is conveyed, how to commemorate World War I veterans will be up to the VFW; and whether the VFW elects to display the cross or other symbols (or both), its choice will no longer be attributable to the government. See pp. 22-23, *supra*.

2. The court of appeals surmised on the basis of "historical evidence of the governmental responses aimed at preserving the cross" that "the government's purpose in this case is to evade the injunction and keep the cross in place." Pet. App. 83a-84a. In other words,

the court determined Congress's purpose in enacting the 2004 legislation by harking back to previous congressional efforts and imputing the motivations it found there to the different legislation at issue in this case. Moreover, the court took that approach even though no evidence relating to the 2004 Act itself indicated any illegitimate purpose. That course of reasoning departs from settled interpretive principles and manifests disrespect for a coordinate Branch of government.

a. The court of appeals erred by invalidating the 2004 Act based on speculation about Congress's purpose. In light of the presumption that public officials act within constitutional bounds, *Favish*, 541 U.S. at 174, in the Establishment Clause context "the Court is normally deferential to [the government's] articulation of a secular purpose." *Edwards* v. *Aguillard*, 482 U.S. 578, 586 (1987); see *McCreary County*, 545 U.S. at 864. Such deference is, of course, not limitless, *id.* at 864-865, but as the dissent observed, "Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." Pet. App. 44a (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

In the present case, a legitimate secular purpose appears on the face of the 2004 Act: to preserve "a national memorial commemorating United States participation in World War I and honoring the American veterans of that war." 2004 Act § 8121(a), 117 Stat. 1100; see 2004 Act § 8121(e), 117 Stat. 1100 (requiring that the VFW "maintain the conveyed property as a memorial commemorating United States participation in World

War I"); *Paulson* v. *City of San Diego*, 294 F.3d 1124, 1132 (9th Cir. 2002) (en banc) (recognizing "the undeniably appropriate secular purpose of ensuring the presence of a war memorial" on a public site), cert. denied, 538 U.S. 978 (2003). Instead of speculating about potential illegitimate purposes, the court of appeals should have presumed that Congress acted for the legitimate secular purpose set forth in the 2004 Act.

b. Nor does any evidence rebut the presumption that Congress acted constitutionally. This Court has held that an examination of legislative purpose in the Establishment Clause context looks to "readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." *McCreary County*, 545 U.S. at 862. The inquiry is whether an "objective observer" would find a "predominantly religious purpose" based on "the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *Ibid.* (internal quotation marks and citation omitted). The Court has noted that the inquiry into legislative purpose "has not been fatal very often, presumably because government does not generally act unconstitutionally." *Id.* at 863. Unless the secular justification is a "sham" or "merely secondary to a religious objective," the Court defers to the government's professed purpose. *Id.* at 864.

In the present case, there is no "traditional external sign[]" that Congress's secular justification for the 2004 Act is a sham or a pretense. The Act's text does not suggest a predominantly religious purpose; the Act is unaccompanied by any legislative history; and the Act's implementation was enjoined before the property could be conveyed to the VFW. For those reasons, neither the court of appeals nor respondent has pointed to any evi-

dence that Congress enacted the 2004 Act for a predominantly religious purpose. See Pet. App. 77a; Br. in Opp. 27. Looking at the 2004 Act, an objective observer would conclude that Congress divested itself of an unconstitutional display—which served the joint secular aims of curing an Establishment Clause violation while preserving a national memorial to fallen service members.

Since *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), this Court has not invalidated an Act of Congress under the Establishment Clause as lacking a secular purpose. On the occasions when the Court has invalidated state statutes, it has done so because the statute's text or history indicated a religious purpose, *McCreary County*, 545 U.S. at 862, or because "the object" of the statute was "patently religious." *Ibid.* The transfer of a war memorial, however, is a far cry from the conscious injection of religion into public schools, whether through mandating prayer, *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); teaching creationism, *Edwards*, *supra*; requiring Bible study, *Schempp*, *supra*; or posting the Ten Commandments, *Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam). The present case bears none of the indicia that Congress's secular justification is a sham.

c. The court of appeals pointed, however, to the 2001 and 2002 Acts as evidence that the 2004 Act bears a predominantly religious purpose. Pet. App. 78a, 83a-84a. As an initial matter, those previous statutes did not themselves have a predominantly religious purpose. In the 2001 Act, Congress prevented the Park Service from spending federal funds to remove the cross. *Id.* at 57a. There is no evidence of Congress's purpose, but the obvious effect of the Act was to maintain the status quo while Congress considered whether or how to take ac-

tion regarding the cross. In the 2002 Act, Congress designated the cross and adjoining property as a national memorial, but stated that the cross had been "erected by the Veterans of Foreign Wars of the United States in 1934" and that the purpose of the memorial was to "commemorat[e] United States participation in World War I and honor[] the American veterans of that war." § 8137(a), 115 Stat. 2278. Like the 2004 Act, the 2002 Act declares its secular purpose on its face.

In the 2002 Act, Congress also directed the Secretary to acquire and install a replica plaque, § 8137(c), 115 Stat. 2278, which the court of appeals took as evidence of a religious purpose. See Pet. App. 84a.[5] But the original plaque stated: "'The Cross, Erected in Memory of the Dead of All Wars,' * * * 'Erected 1934 by Members of Veterans of Foregin [sic] Wars, Death Valley post 2884.'" *Id.* at 56a. Accordingly, a replica plaque would make clear that the cross has a private, secular origin and purpose. The court of appeals faulted Congress for "not repeal[ing] the funding provisions" when it passed the 2004 Act, *id.* at 84a, but nothing is amiss in Congress's providing that the plaque be installed prior to a conveyance of the property to the VFW. If anything, as noted above, the plaque lessens

[5] While the 2002 Act requires the Park Service to acquire a replica cross, it requires the Secretary to install at Sunrise Rock only the replica plaque, not the replica cross. § 8137(c), 115 Stat. 2278. Accordingly, the provision concerning a replica cross is not relevant to the question presented here. Even assuming it were relevant and constitutionally problematic, the remainder of the statute would be capable "of functioning independently" and thus severable. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987). In any event, the Secretary does not intend to acquire a replica cross, much less to install one at Sunrise Rock. Gov't C.A. Br. 39.

any danger that a reasonable observer would attribute the display to the government following the transfer.

Later in 2002, Congress prohibited the spending of any federal funds to remove any World War I memorial. 2003 Act § 8065(b), 116 Stat. 1551. While that Act accomplished nothing new with respect to Sunrise Rock, it served to prevent the destruction of all other World War I memorials on federal land—without regard to whether those memorials incorporate any imagery with religious significance. Thus, although the court of appeals relied on the Act as further evidence of Congress's illegitimate religious purpose, see Pet. App. 83a, the opposite is more nearly true: the Act provides evidence that Congress acted for the legitimate secular purpose of preserving displays with a specific and important cultural and historical meaning.

In sum, both the 2001 and 2002 Acts bear an obvious secular purpose. As the dissent noted, "there are many monuments on public land that use the cross to commemorate the sacrifice of fallen soldiers, particularly those in World War I." Pet. App. 47a n.6. Among them are "the Argonne Cross Memorial and the Canadian Cross of Sacrifice in Arlington National Cemetery; the French Cross Monument in the Cypress Hill National Cemetery; the Peace Cross in Bladensburg, Maryland; the Unknown Soldiers Monument in Prescott National Cemetery; and the Wall of Honor at the Pennsylvania Military Museum." *Ibid.* The purpose of these various monuments, memorials and symbols is to commemorate the war dead, not to endorse a religious message.

Respondent disagrees because in his view the Latin cross is "exclusively a symbol of Christiantity," Resp. C.A. Br. 22-23, and thus is "so intrinsically religious," *id.* at 20, that its display cannot possibly have a legitimate

secular purpose. *Id.* at 20-23. This Court, however, recently rejected the notion that "a monument can convey only one 'message.'" *Summum*, 129 S. Ct. at 1135. A display with some religious significance "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Ibid.*; see *id.* at 1136 ("[I]t frequently is not possible to identify a single 'message' that is conveyed by an object or structure."); *Van Orden*, 545 U.S. at 692 (plurality opinion) (recognizing that the Ten Commandments have "a dual significance, partaking of both religion and government"); *id.* at 701 (Breyer, J., concurring in the judgment). In context, the historical and cultural significance of the cross as a symbol of the sacrifices of fallen service members is not lost on—indeed, is profoundly familiar to—reasonable members of the public. And unless the designation of a cross as a war memorial, such as occurred in the 2002 Act, lacks a secular purpose, it cannot possibly be evidence that the transfer of that same memorial fails the purpose inquiry.

Even assuming, however, that the 2001 and 2002 Acts lacked a secular purpose (which as suggested above would cast constitutional doubt on many public war memorials), they are not evidence that the 2004 Act lacked a secular purpose. Those former Acts predated the injunction against display of the cross. Pet. App. 57a-59a. Faced with that injunction, Congress should be presumed to have selected a legitimate remedy, *i.e.*, a bona fide transfer of the property rather than a sham transaction. By attributing to the 2004 Act a predominantly religious purpose, simply on the basis of Congress's earlier efforts to maintain the memorial, the court of appeals effectively held that Congress's "past actions forever taint any effort on [its] part to deal with the subject

matter." *McCreary County*, 545 U.S. at 873-874. To the contrary, Congress's purpose in the 2004 Act was a legitimate, secular one: to respond to a court's finding an Establishment Clause violation while continuing to remember America's fallen service members.

B. Congress Did Not Reserve Continuing Control Over Sunrise Rock

The court of appeals also enjoined the land transfer in part because of "continuing government oversight and control over the cross and preserve property." Pet. App. 78a (emphasis omitted). The court relied on three factors: (1) the Park Service's general authority over federal lands; (2) Sunrise Rock's designation as a national memorial; and (3) Sunrise Rock's reversion to the government if it is no longer maintained as a war memorial. *Id.* at 78a-81a. None of those factors demonstrates an impermissible level of control. Following the transfer, the government will have essentially the same limited authority over the transferred property that it has over other private inholdings in the Mojave Preserve, and its limited authority will not amount to endorsement of the display or excessive entanglement with religion.

1. The Park Service's "general supervisory and managerial responsibilities" over the Preserve are not relevant to this case. Pet. App. 78a. The Park Service is charged with the duty to "promote and regulate the use of [certain] Federal areas known as national parks, monuments, and reservations." 16 U.S.C. 1. The Preserve is a unit of the national park system and thus within the Park Service's general jurisdiction. 16 U.S.C. 410aaa-42, 410aaa-43 and 410aaa-46. Accordingly, the Park Service may make rules and regulations to govern the use and management of the Preserve. 16 U.S.C. 3.

With respect to the Preserve, however, those statutes do not vest the Park Service with plenary authority over private inholdings. The Park Service has authority over private inholdings within the boundaries of the Preserve only to the extent that activities on those inholdings affect park property. See U.S. Const. Art. IV, § 3, Cl. 2; 16 U.S.C. 1, 2-3, 4; *Hale* v. *Norton*, 476 F.3d 694, 699 (9th Cir.), cert. denied, 128 S. Ct. 804 (2007); *Free Enter. Canoe Renters Ass'n* v. *Peters*, 711 F.2d 852, 855-856 (8th Cir. 1983). That limited and incidental authority does not allow the Park Service to require the VFW (or any other private landowner) to display the cross (or any other symbol) on the VFW's land. Respondent points to nothing remotely suggesting otherwise. Br. in Opp. 20-21. Simply put, once the land is transferred, the decision whether to display or remove the cross will belong to the VFW, not the government.[6]

2. The court of appeals also thought relevant that Congress designated the cross and adjoining property as a national memorial. Pet. App. 78a. That designation, however, has no legal significance. Congress may declare a national memorial on either federal or private land. See, *e.g.*, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1031, 118 Stat. 2044 (America's National World War I Museum); National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1080, 110 Stat. 2670 (National D-Day Memorial); Act of Oct. 25, 1972, Pub. L. No. 92-551, 86 Stat. 1164 (Benjamin

[6] In specific circumstances, the Park Service has additional statutory authority to regulate particular types of inholdings. See 16 U.S.C. 460*l*-22(c) (solid waste disposal sites); 16 U.S.C. 1902 (valid existing mineral rights). Those statutes are not relevant here, and respondent has not argued otherwise.

Franklin National Memorial). Such a declaration, standing alone, does not transfer any regulatory authority over private property to the government.

For that reason, respondent is incorrect that "[i]n light of 18 U.S.C. § 1369, the VFW may well be required to maintain the cross." Br. in Opp. 23. Section 1369 prohibits the destruction of "any structure, plaque, statue, or other monument *on public property* commemorating the service of any person or persons in the armed forces." 18 U.S.C. 1369(a) (emphasis added). Following the transfer, the cross atop Sunrise Rock will not be on public property. Nor is respondent correct that the property will be "under the jurisdiction of" the federal government, 18 U.S.C. 1369(b)(2), because the property is located within the boundaries of the Preserve. Br. in Opp. 23. The Park Service will be able to regulate Sunrise Rock only insofar as activities on those inholdings affect the purposes of federally owned lands.

At the very least, this Court should construe Section 1369—as with the statutes governing the Park Service's authority—to avoid casting constitutional doubt on Congress's transfer of the land. See, *e.g.*, *Edward J. DeBartolo Corp.*, 485 U.S. at 575 ("[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.") (quoting *Hooper* v. *California*, 155 U.S. 648, 657 (1895)). None of those statutes, fairly interpreted, confers on the federal government any authority to require the VFW to maintain the cross following the transfer.

3. The court of appeals incorrectly concluded that the reversionary clause in the 2004 Act "results in ongoing government control over the subject property, even after the transfer." Pet. App. 80a. That clause provides that if "the Secretary determines that the conveyed

property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." 2004 Act § 8121(e), 117 Stat. 1100. As a threshold matter, the dissent correctly observed that the panel should not even have considered that provision, because the clause "does not constitute state action where the government has not 'made any effort to enforce [it].'" Pet. App. 43a n.4 (quoting *Marshfield*, 203 F.3d at 492-493).

In any event, the determination whether the VFW has ceased to maintain a war memorial on the site will be in the discretion of the Secretary of the Interior. Pet. App. 92a. This Court should presume that the Secretary will exercise his discretion consistently with the Establishment Clause. See *Favish*, 541 U.S. at 174. That is particularly true here for two reasons. First, respondent concedes that the Secretary may interpret the reversionary clause to require only a war memorial, not a cross. See Resp. C.A. Br. 14 n.5 ("[Respondent] is not * * * relying on the possibility that a future government official will interpret the reversionary clause to require a cross remain on the property."). Second, reversionary clauses are common in land transfers.[7] There is no reason to think that the Secretary will ignore constitutional constraints on the exercise of a well-understood authority.

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[7] For example, federal law requires the inclusion of reversionary clauses in deeds disposing of surplus property recommended for use as a public park or recreation area. 40 U.S.C. 550(e)(4). Moreover, reversionary clauses are common where the government wishes to transfer land, but to do so in a manner that preserves the use and character of the land—for instance, as a public park, *Marshfield*, 203 F.3d at 490; or as landscaped space, *Utah Gospel Mission*, 425 F.3d at 1253.

In arguing to the contrary that the reversionary clause makes the Act unlawful, the court relied on a pair of cases dealing with racial discrimination in the 1960s: *Eaton* v. *Grubbs*, 329 F.2d 710 (4th Cir. 1964), and *Hampton* v. *City of Jacksonville*, 304 F.2d 320 (5th Cir.), cert. denied, 371 U.S. 911 (1962). Pet. App. 80a. In both *Eaton* and *Hampton*, courts held that although municipalities had transferred racially segregated facilities to private parties, the operation of those facilities continued to constitute state action for purposes of the Fourteenth Amendment. *Eaton*, 329 F.2d at 715; *Hampton*, 304 F.2d at 322-323.

Even assuming that cases concerning state action are relevant here, but see pp. 26-27, *supra*, they are readily distinguishable. In both *Eaton* and *Hampton*, the local governments were "inextricably intertwined with the ongoing operations of the private entity." *Utah Gospel Mission*, 425 F.3d at 1257.[8] The facts in those cases "demonstrate[d] the pervasive nature of the state's role

[8] Under traditional state action principles, the degree of governmental control following the transfer will not be remotely sufficient to justify treating the VFW's oversight and maintenance of the property as state action. For instance, in *Eaton*, the hospital transferred to a private party was heavily regulated by the state, 329 F.2d at 713; had received a tax exemption, *ibid.*; had exercised the governmental power of eminent domain; *ibid.*; had received state and federal subsidies, *id.* at 713-714; and had given equipment to a state-owned hospital, *id* at 715. No such involvement exists here. And in *Hampton*, after the City of Jacksonville was enjoined from operating racially segregated golf courses, it offered those courses to private parties "on terms very favorable to any prospective purchaser." 304 F.2d at 320. The court distinguished cases in which public facilities "had been sold in a bona fide sale to private parties." *Id.* at 322 (citing *Eaton* v. *Board of Managers of the James Walker Mem'l Hosp.*, 261 F.2d 521 (4th Cir. 1958), cert. denied, 359 U.S. 984 (1959)). Here, the government engaged in a bona fide transfer for equal value to a private party.

in the functioning of" the private facilities, *Eaton*, 329 F.2d at 715, and thus amounted to "extraordinary circumstances" that the "transfer[s] had not * * * eliminated the actual involvement of the [government] in the daily maintenance and care of the [properties]." *Flagg Bros*, 436 U.S. at 159 n.8. Here, the mere fact of the reversionary clause does not inextricably intertwine the government with the daily maintenance and care of Sunrise Rock, nor does other evidence suggest that any such involvement will occur.

Finally, the court of appeals asserted that the 2004 Act grants the government "an easement or license over the subject property," Pet. App. 79a, because it directs the Secretary to "continue to carry out [his] responsibilities * * * under [Section 8137 of the 2002 Act]." 2004 Act § 8121(a), 117 Stat. 1100. Section 8137 of the 2002 Act, in turn, had directed the Secretary, among other things, "to acquire a replica of the original memorial plaque and cross * * * and to install the plaque in a suitable location on the grounds of the memorial." § 8137(c), 115 Stat. 2279. But that provision does not require any ongoing federal control over the memorial following the transfer. The Park Service can install a replica plaque before conveying the property to the VFW. Far from entangling the government with religion, installation of the plaque will underscore the memorial's secular origin and purpose. See, e.g., *Van Orden*, 545 U.S. at 701-702 (Breyer, J., concurring in the judgment).

C. Congress's Method Of Transferring Sunrise Rock Does Not Undermine The Transfer's Validity

The court of appeals reasoned that (1) the transfer of the land to the cross's original donor (2) via a congressional appropriations bill "demonstrate[s] the government's unusual involvement in this transaction." Pet. App. 82a. Neither fact, however, is relevant.

1. The court of appeals levied the serious charge that Congress used the VFW, the organization that originally erected a cross on the site in 1934, as "a straw purchaser" in an effort to "circumvent the injunction in this case." Pet. App. 82a-83a. But as the dissent from the denial of rehearing observed, the panel ignored the logic of transferring the memorial back to its original donor and thus "shrug[ged] off the conflicting holdings in *Marshfield* and *Mercier*." *Id.* at 51a n.10. In *Mercier*, for example, the Seventh Circuit upheld the sale of land that included a Ten Commandments monument to the monument's original donor, in part because doing so "makes practical sense" and recognizes the group's "long-standing and important relationship with the Monument." 395 F.3d at 703; see *Marshfield*, 203 F.3d at 492. Similarly here, the VFW is "the logical purchaser," *Mercier*, 395 F.3d at 705, because it is the organization that erected the cross as a war memorial decades ago and continues to value it highly.

Respondent has proposed two remedies other than transfer of the land, but they illustrate, if anything, the essential reasonableness of what the government chose to do in this case. First, respondent has argued that the government could transfer the cross, but not the land on which it stands, to the VFW. See Resp. C.A. Opp. to Pet. for Reh'g 3. Rather than trade property, respondent contends that the government must remove the

cross—so that the VFW may erect it elsewhere. On this view, nothing prevents the VFW from placing the cross within the Preserve—for instance, on the parcel to be received by the government as part of the exchange. Indeed, on respondent's view, the government presumably could remove the cross and then sell the land to the VFW, at which point the VFW could erect an identical cross. This Court should be wary of an approach that treats the Establishment Clause "not as the embodiment of a grand principle, but rather as empty formalism." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 831 (1995). If respondent's proposed remedies are constitutionally permissible, surely the government's chosen course is permissible as well.

Second, respondent has argued that the government could sell the land to the highest bidder. But nothing in either law or logic requires the government to adopt that approach. Respondent does not cite any authority for the proposition that, to dissipate an endorsement of religion, the government must transfer real property as part of a competitive bidding process. The 2004 Act requires that the government receive market value in the exchange, see § 8121(a), (b) and (c), 117 Stat. 1100; it should make no difference whether that compensation comes through an open sale or a closed exchange. And even assuming the government could realize some marginal additional value from a competitive sale, that does not mean that a transfer for fair value is necessarily a sham transaction. The government may have a strong interest, for example, in transferring a memorial for fallen service members to a party that is likely to maintain it with appropriate care and respect.

What both respondent and the court of appeals really mean in calling for an open, competitive sale is that such

an interest is illegitimate—that the government cannot choose to transfer a war memorial to the VFW rather than to some other party on the view that the VFW will prove an especially good custodian. But this proposition rests on either an unduly narrow view of legitimate governmental interests or on an unduly expansive understanding of the Establishment Clause. In seeking to cure an Establishment Clause violation caused by the religious symbolism involved in a memorial for American war dead, the government may well have to divest itself of the memorial and any continuing participation in its upkeep. But the government may attempt to carry out this divestment in a way that will increase the likelihood that the purchaser will maintain a war memorial in appropriate fashion. The government, that is, can reasonably decide to sell a war memorial not to the highest available bidder, but to veterans willing to pay fair value.

2. The court of appeals also counted as "additional evidence that the government is seeking to circumvent the injunction" the fact that the land exchange was "authorized by a provision buried in an appropriations bill." Pet. App. 81a-83a. The court left unclear whether it was objecting to the simple fact of congressional action on this topic or the choice of an appropriations bill as the legislative vehicle. If the former, the court failed to recognize that congressionally mandated land exchanges are common.[9] If the latter, the court has adopted a

[9] See, *e.g.*, Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, § 101(d), 122 Stat. 758 (Mt. Baker-Snoqualmie National Forest property); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 2845, 122 Stat. 554 (Detroit Coast Guard property); City of Yuma Improvement Act, Pub. L. No. 109-454, § 3, 120 Stat. 3369; Federal and District of Columbia Government Real Prop-

novel criterion for reviewing legislation; as this Court has held, Congress "may amend substantive law in an appropriations statute, as long as it does so clearly." *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992); see Pet. App. 51a (O'Scannlain, J., dissenting from the denial of rehearing en banc) ("I also am unaware of any precedent disparaging a land transfer for having been enacted in an appropriations bill, nor does the [panel] opinion cite to *any* caselaw in support of such consideration."). If anything, the direct involvement of Congress in this land transfer should reinforce, not undermine, its validity.[10]

In directing this land transfer, Congress required that the exchanged parcels of land have equal value or be equalized through a monetary payment. See 2004 Act § 8121(c) and (d), 117 Stat. 1100. Respondent has never disputed that the government will receive equal value as part of the land exchange. That requirement eliminates

erty Act of 2006, Pub. L. No. 109-396, 120 Stat. 2711; Act of Dec. 23, 2004, Pub. L. No. 108-483, § 1, 118 Stat. 3919 (Everglades National Park expansion); Act of Nov. 30, 2004, Pub. L. No. 108-417, § 1, 118 Stat. 2339 (Fort Frederica National Monument land exchange); Chickasaw National Recreation Area Land Exchange Act of 2004, Pub. L. No. 108-389, § 4, 118 Stat. 2240; Tapoco Project Licensing Act of 2004, Pub. L. No. 108-343, § 3, 118 Stat. 1372; Eastern Band of Cherokee Indians Land Exchange Act of 2003, Pub. L. No. 108-108, § 138, 117 Stat. 1271; Glen Canyon National Recreation Area Boundary Revision Act, Pub. L. No. 108-43, § 2, 117 Stat. 841.

[10] Although the panel faulted Congress for "act[ing] outside the scope of normal agency procedures for disposing of federal park land," Pet. App. 82a, the dissent correctly observed that no precedent "suggest[s] that *congressional* action is in any way suspect where it fails to adhere to an *agency's* procedural rules," *id.* at 51a. Congress should not be faulted for taking seriously an Establishment Clause violation and electing itself to cure the harm in a direct and timely manner rather than awaiting the outcome of an agency's procedures.

any concern that the government is granting the VFW "a gift in the form of a sub-market rate sale price." *Marshfield*, 203 F.3d at 492; see *Mercier*, 395 F.3d at 702 (same); *Utah Gospel Mission*, 425 F.3d at 1262 (rejecting plaintiffs' claim that sale was pretextual based on adequacy of compensation paid). In such circumstances, the method of effectuating the land exchange rebuts rather than supports the charge that the government improperly favored or endorsed religion.

D. Congress's Creation Of A Private Inholding Within The Preserve Does Not Undermine The Transfer's Validity

1. The court of appeals found that "carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with [a] cross atop it—will do nothing to minimize the impermissible governmental endorsement." Pet. App. 85a. The court's analogy is flawed. Approximately 10% of the Preserve is not federally owned, with roughly 86,000 acres owned by private individuals and 43,000 acres owned by the State of California. *Id.* at 55a. Indeed, two private ranches with corrals and related facilities are located within two miles of the cross. J.A. 68. That is hardly surprising. In the American West, private land is commonly intermingled with public land. See *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2593 (2007); *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 672, 677-678 (1979). Accordingly, the Act is better viewed as repositioning holes within a slice of Swiss cheese than as creating a tiny donut hole within a large federal expanse.

Even respondent, who worked as an Assistant Superintendent at the Preserve, testified that when he first saw the cross, he did not know whether it was on public or private land. J.A. 79, 81. Respondent explained that,

"[e]xcept in those few instances where there are houses or structures, you don't know whether the lands are not federally owned or federally owned." J.A. 79; see J.A. 81 ("Well, from my initial visit I wasn't sure that it was on government owned land."). Respondent's own testimony makes clear that, following the land exchange, a reasonable observer will not assume that the cross is on federal land. In this respect as well, the court of appeals improperly stretched to invalidate an Act of Congress.

2. Even assuming that the land exchange itself does not cure the Establishment Clause problem, the court of appeals had a duty to tailor its remedy to the nature and scope of the constitutional violation. See, *e.g.*, *Missouri* v. *Jenkins*, 515 U.S. 70, 88 (1995) ("equitable remedies" are "to be determined by the nature and scope of the constitutional violation") (quoting *Milliken* v. *Bradley*, 433 U.S. 267, 280 (1977)); *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 399 (1982) ("[The equitable powers of federal courts] extend no farther than required by the nature and the extent of th[e] violation.").

A tailored remedy in these circumstances would impose conditions designed to avoid any continuing endorsement rather than invalidate the transfer altogether. For instance, in *Marshfield*, the Seventh Circuit upheld the sale of a challenged display to a private organization, 203 F.3d at 492, but concluded that even after the sale a reasonable observer could perceive endorsement because the private property would be "visually indistinguishable" from public property. *Id.* at 495. The court noted, however, that any continuing endorsement could be remedied by differentiating the private property with a "permanent gated fence or wall * * * accompanied by a clearly visible disclaimer," and it there-

fore remanded for the district court to consider such additional measures. *Id*. at 497.

In this case, Congress already has taken steps to end any continuing endorsement, thus obviating any need for a remand. By ordering the Park Service to install a plaque stating that the cross was erected by the VFW to commemorate fallen service members, Congress has required "a clearly visible" statement of the memorial's secular origin and purpose. Instead of counting that fact against the government, Pet. App. 78a, 83a-84a, the court of appeals should have acknowledged that such a plaque ameliorates any constitutional concerns associated with the transfer. See *County of Allegheny*, 492 U.S. at 619 (plurality opinion); *id.* at 635 (O'Connor, J., concurring); *Capitol Square*, 515 U.S. at 776 (O'Connor, J., concurring); *id*. at 794 (Souter, J., concurring).

At most, the court of appeals might have remanded for the district court to consider limited measures that demarcate the boundaries of the property or that otherwise attribute ownership of the property to the VFW. Such limited measures would have been far more appropriate than an order preventing a private landowner "from exercising its right to free exercise and freedom of speech on its own property," *Marshfield*, 203 F.3d at 497, and requiring destruction of a memorial that has stood for three-quarters of a century as a testament to the sacrifices of America's veterans.

CONCLUSION

The judgment of the court of appeals should be reversed and this case remanded with instructions to dismiss.

Respectfully submitted.

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