No. 08-472

In the Supreme Court of the United States

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

FRANK BUONO

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

More than 70 years ago, the Veterans of Foreign Wars (VFW) erected a cross as a memorial to fallen service members in a remote area within what is now a federal preserve. After the district court held that the presence of the cross on federal land violated the Establishment Clause and the court permanently enjoined the government from permitting the display of the cross, Congress enacted legislation directing the Department 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 where 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, even 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 Dirk Kempthorne, 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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The Solicitor General, on behalf of Dirk Kempthorne, Secretary of the Interior, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 54a-85a, 100a-113a) are reported at 527 F.3d 758 and 371 F.3d 543. The opinions of the district court (App., *infra*, 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 (App., *infra*,

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, and on August 28, 2008, Justice Kennedy further extended the time to and including October 10, 2008. The jurisdiction of this Court is invoked under 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 an appendix to this brief. App., *infra*, 147a-149a.

STATEMENT

1. In 1934, the Veterans of Foreign Wars (VFW) erected a memorial to fallen service members in the form of a wooden cross set atop an outcropping known as Sunrise Rock, which is located on federal land in what is now the Mojave National Preserve (Preserve) in San Bernardino County, California. App., *infra*, 56a, 101a. The cross had 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.

The Preserve contains approximately 1.6 million acres, approximately 90% of which are federally owned. App., *infra*, 3a. The cross, which is located in a "remote location" with few signs of humanity, can be seen from approximately

100 yards away on a secondary road called Cima Road. *Id.* at 111a, 118a, 122a.

In 1999, the National Park Service (NPS) denied a request to erect a Buddhist shrine near the cross and indicated its intention to remove the cross. App., *infra*, 56a-57a. The following year, Congress prohibited the NPS from spending federal funds to remove the cross. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 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 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. 2278-2279.[1]

2. Alleging that the presence of the cross on federal land violates the Establishment Clause, respondent Frank Buono filed this action in March 2001. Respondent lives in Oregon, but alleged that he regularly visits the Preserve, where he was formerly employed as an Assistant Superintendent. App., *infra*, 104a-105a. A practicing Roman Catholic, respondent never complained about the cross during his NPS employment, and he "does not find a cross itself objectionable." *Id.* at 123a. Instead, respondent asserted

[1] Later in 2002, Congress prohibited the spending of any federal funds to remove any World War I memorial. Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8065(b), 116 Stat. 1551.

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." 03-55032 C.A. E.R. 14. Respondent claimed that he would avoid the cross on future visits to the Preserve. App., *infra*, 107a.

The district court entered judgment for respondent, App., *infra*, 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, and that the presence of the cross on federal land violates the Establishment Clause because "the primary effect of" a public display of the cross "advances religion," *id.* at 139a.[2]

3. While the government's appeal was pending, Congress enacted legislation ordering the Department of the Interior 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 Department of the Interior 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]otwith-

[2] 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." App., *infra*, 87a. The government subsequently covered the cross with a large plywood box, and the cross remains so covered. See *id.* at 88a.

standing the conveyance of the property * * *, the Secretary shall continue to carry out the responsibilities" set forth in Section 8137 of the 2002 Act—including the installation of a replica plaque—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.

4. The court of appeals subsequently affirmed the judgment of the district court. App., *infra*, 100a-113a. The court rejected the government's argument that respondent lacks standing to maintain this action because his only asserted injury is an ideological, rather than religious, objection concerning other persons' rights to erect other symbols. *Id.* at 105a-107a. Instead, the court held that respondent had standing under its prior precedents holding "that inability to unreservedly use public land suffices as injury-in-fact." *Id.* at 107a.

On the merits, the court of appeals held that the case is "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. App., *infra*, 108a. "[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] the question for another day." *Id.* at 104a.

5. On remand, respondent asked the district court to hold that the land transfer would violate the court's permanent injunction and the Establishment Clause. See App., *infra*, 86a-99a. The court determined that the 2004 Act was an unlawful attempt to evade its injunction because, in the court's view, "the government's apparent endorsement of a particular religion has not actually ceased," and "the pro-

posed 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." *Id.* at 94a, 97a. As such, the court permanently enjoined the government "from implementing the provisions of Section 8121 of [the 2004 Act]." *Id.* at 99a.

6. a. A panel of the court of appeals affirmed. App., *infra*, 54a-85a. The panel observed that "the Seventh Circuit 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)). Nonetheless, the panel "decline[d] to adopt such presumption." *Ibid.* Instead, the court determined that the 2004 Act violated the permanent injunction because the land transfer would not cause "government action endorsing religion [to] actually cease[]." *Id.* at 76a. Accordingly, the court held that the land transfer "cannot be validly executed without running afoul of the injunction." *Id.* at 85a.

The court of appeals panel relied in part on what it viewed as "continuing government control" of the property following a land transfer. App., *infra*, 78a. The 2004 Act provides for the land to revert to the government if the Secretary of the Interior determines that the VFW is no longer maintaining a *war memorial* on the site, and the court of appeals construed that provision to require the VFW to maintain a *cross* at the site. *Id.* at 73a-74a, 80a. In the court's view, NPS would also 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 78a, 79a.

The court of appeals panel also relied on two other factors: the government's "long-standing efforts to preserve and maintain the cross," App., *infra*, 83a; and the fact that the land exchange was not initiated by NPS pursuant to the procedures that govern agencies' decisions to exchange lands within their jurisdictions, but instead was directed by Congress in an appropriations bill, *id.* at 81a-82a. In the court's view, 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 83a, 84a.[3]

b. After the government filed a petition for rehearing, the court of appeals panel amended its opinion to delete the portion of its decision that expressly acknowledged a conflict with the Seventh Circuit. App., *infra*, 35a-37a. As amended, the opinion now states that, "to the extent [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. App., *infra*, 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

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[3] The court of appeals also determined that the dispute was ripe for review, in part because the government began the land exchange before the district court enjoined it, and the government had intended to complete the exchange. App., *infra*, 67a. That ruling is not challenged here.

Court precedent" and "creates a split with the Seventh Circuit on multiple issues." *Ibid.*

Judge O'Scannlain explained that—as the panel had initially acknowledged, App., *infra*, 25a n.13—the panel opinion "squarely contradicts" the Seventh Circuit's holdings in *City of Marshfield* and *Mercier* v. *Fraternal Order of Eagles*, 395 F.3d 693 (2005). App., *infra*, 41a. Because there is no evidence that the government will "maintain or support the Sunrise Rock cross after the land transfer," the dissenters saw no basis to impugn the Act of Congress directing the land transfer. *Id.* at 43a.

The dissenters further determined that the cross "serves the secular purpose of memorializing fallen soldiers." App., *infra*, 47a. Indeed, "[a]s was the case in *Van Orden* [v. *Perry*, 545 U.S. 677 (2005)], the Sunrise Rock memorial was constructed by a private, secular organization * * * away from a captive audience, and * * * packaged with a 'nonsectarian text' evincing a clearly secular purpose." *Ibid.* (quoting *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment)). Further, Judge O'Scannlain suggested, "the lack of *any* challenge to the Sunrise Rock memorial for *seven decades* surely demonstrates that the public understands and accepts its secular commemorative purpose." *Id.* at 48a.

Finally, Judge O'Scannlain "fail[ed] to see why the government's past, unsuccessful efforts" with respect to the cross "should foreclose it from pursuing [the] further *legitimate* efforts" at issue here. App., *infra*, 52a. Indeed, considering that the court of appeals had previously held that the display of the cross was unconstitutional because it was on public land, the dissent thought that the panel's decision faulting the government for transferring ownership of the land was "nothing short of a judicial 'bait-and-switch.'" *Id.* at 53a. "If anything," Judge O'Scannlain explained, "trans-

ferring the land was the obvious next step in attempting to cure the violation" identified by the Ninth Circuit in the prior appeal. *Ibid.*

REASONS FOR GRANTING THE PETITION

Over the dissent of five judges from the denial of rehearing en banc, the Ninth Circuit has held invalid a land transfer mandated by an Act of Congress and required the federal government to tear down a cross that has stood for 70 years as a memorial to fallen service members. As the dissenting judges recognized, Congress's decision to transfer an acre of land including the Sunrise Rock war memorial to the VFW was an eminently sensible and constitutionally permissible way of resolving any Establishment Clause problem presented by the continued display of the cross on federal land while, at the same time, avoiding the appearance of hostility toward either religion or the memorial to fallen service members. In addition, as the dissenters also observed, the court of appeals' decision conflicts with Seventh Circuit precedents authorizing such land transfers as legitimate means of curing Establishment Clause violations.

Moreover, the court of appeals issued its decision effectively invalidating—by refusing to give effect to—an Act of Congress in a case where the sole plaintiff lacked standing because he testified that, as a practicing Roman Catholic, he does *not* generally object to displays of crosses, but instead has only the ideological objection that public lands on which crosses are displayed should also be public fora on which *other* persons may display *other* symbols. By stretching to find standing and then requiring the government to tear down a 70-year-old war memorial instead of giving effect to the congressionally mandated land transfer, the court deviated from this Court's decisions, overrode an Act of Congress, and unnecessarily fostered the very divi-

siveness that the Establishment and Free Exercise Clauses are supposed to prevent. Such an unsettling exercise of judicial power warrants this Court's review.

I. THE COURT OF APPEALS' STANDING HOLDING WARRANTS REVIEW

Standing requirements impose important "constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004) (quoting *Allen* v. *Wright*, 468 U.S. 737, 750 (1984)); see *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 340-342 (2006). They do so in part by ensuring that "the decision to seek review" "is not to be 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 (SCRAP)*, 412 U.S. 669, 687 (1973)). That is particularly important in the Establishment Clause context, where tearing down longstanding symbols can "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden* v. *Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment); see *id.* at 699.

Here, it is undisputed that tearing down the cross, which has stood as a memorial to fallen service members for over 70 years, "could lead to significant public opposition." App, *infra*, 120a-121a. Nonetheless, the court of appeals ordered the government to do just that at the request of a plaintiff who raised no spiritual objection to the display of the cross (a symbol of his own religion), but only an ideological objection concerning the rights of *others* to display *other* symbols. The court of appeals' erroneous standing holding warrants review because it is important in its own

right, it oversteps judicial bounds in the course of refusing to give effect to an Act of Congress, and the courts of appeals are divided on the correct interpretation of this Court's Establishment Clause standing cases.[4]

A. The Ninth Circuit's Standing Ruling Conflicts With This Court's Precedent

1. 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, and "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). Among the additional "prudential dimensions" of standing are "the general prohibition on a litigant's raising another person's legal rights * * * and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Elk Grove*, 542 U.S. at 12

[4] The government challenged respondent's standing through the first appeal in this case, see App., *infra*, 104a-105a, but did not raise standing again on remand or during the second appeal because the government's arguments had already been considered and rejected by the court of appeals, see *id.* at 104a-107a. The Court has "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *MLB Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001). Congress's enactment of the legislation directing the land transfer does not alter that conclusion because Congress enacted the legislation *before* the first appeal was decided, see App., *infra*, 102a-103a, and respondent's purported injury (from the display of the cross) remained the same. In any event, this Court must consider standing on its own motion even when (unlike here) the question was not raised in the lower courts. *E.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93 (1998).

(quoting *Allen*, 468 U.S. at 751); see *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-475 (1982).

In the Establishment Clause context as in others, that means that an ideological or policy disagreement does not give rise to standing. See *Valley Forge*, 454 U.S. at 485-487. In *School District* 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. This Court has explained that *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., Inc.* v. *Camp*, 397 U.S. 150, 154 (1970) (emphasis added). In *Valley Forge*, however, the Court confirmed that *ideological* objections do not give rise to standing to bring Establishment Clause challenges. In that case, the United States had transferred a parcel of land to a religious organization. 454 U.S. at 468. The Court held that the plaintiffs lacked standing to challenge the transfer under the Establishment Clause 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. 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 in the Establishment Clause context as elsewhere, "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Id.* at 486.

2. So too here, respondent may be "firmly committed to the constitutional principle of separation of church and State," but he has not proven any personal injury "other

than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485, 486. Indeed, respondent has disclaimed any spiritual injury stemming from the display or transfer of the cross. Respondent testified that he is a Roman Catholic, that he attends mass at a church that displays crosses, and that he "[o]bviously" does not "find the cross, itself, offensive." 03-55032 C.A. E.R. 59; see *id.* at 14, 27.

Nor has respondent asserted that he finds the display of a cross on public (as opposed to private) land inherently offensive. Instead, he 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." 03-55032 C.A. E.R. 14. According to respondent, "[t]he presence of the Cross *along with the exclusion of other freestanding, permanent displays* adversely affects [his] use and enjoyment of the area." *Ibid.* (emphasis added); see *id.* at 27 ("I do strongly object 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."). Thus, the district court determined that it is "uncontroverted" that respondent "does not find a cross itself objectionable," but instead is "offended by the cross display on public land in an area that is not open to others to put up whatever symbols they choose." App., *infra*, 116a, 123a; see *id.* at 105a. In sum, respondent has asserted only the ideological or legal objection that public lands on which crosses are displayed should also be open forums in which *other* people have the option of displaying *other* symbols. Under *Valley Forge*, that is not a cognizable injury for purposes of establishing standing to bring an Establishment Clause challenge.

Indeed, the ideological nature of respondent's objection is underscored by the fact that he seeks to premise his *own* standing on the asserted rights of *third parties* to participate in an open forum. Making Sunrise Rock available for other symbols would fully redress respondent's asserted grievance, but that does not mean that others *would* erect symbols; it just means that they *could*. As a result, even if the government attempted to redress respondent's asserted psychic injury by making Sunrise Rock an open forum, the cross might well remain alone at that remote desert location, just as it is now. The only difference would be *third parties'* ability to erect additional symbols if they wished to do so. That is an inadequate basis for *respondent* to claim a personal injury. Because "constitutional rights are personal and may not be asserted vicariously," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973), the Court has long "express[ed] a 'reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties." *Sprint Comms. Co., L.P.* v. *APCC Servs., Inc.*, 128 S. Ct. 2531, 2544 (2008) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)); see *Valley Forge*, 454 U.S. at 474; *In re Navy Chaplaincy*, 534 F.3d 756, 760, 763 (D.C. Cir. 2008).[5]

3. The court of appeals construed *Valley Forge* to hold only that the plaintiffs in that case had not established "any personal injury at all, economic or non-economic," that

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[5] This case is therefore unlike *Pleasant Grove City, Utah* v. *Summum*, No. 07-665 (oral argument scheduled for Nov. 12, 2008). In *Pleasant Grove*, a religious group brought suit under the First Amendment's Free Speech Clause challenging a city's refusal to erect a monument of the group's choosing in a public park. Here, in contrast, respondent does not *himself* wish to erect a symbol on Sunrise Rock, and merely objects that *other* people may not erect displays of *their* choosing.

accompanied "'the psychological consequence' plaintiffs experienced in observing 'conduct with which [they] disagree[d].'" App., *infra*, 106a (quoting *Valley Forge*, 454 U.S. at 485). But the only additional injury the court of appeals identified here is respondent's choice to "tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing, even though traveling down Cima Road is often the most convenient means of access to the Preserve." *Id.* at 107a (quoting *id.* at 123a). If respondent cannot premise standing on the psychological consequence of seeing the cross, he certainly cannot premise standing on his own decision *not* to see the cross because of his concerns about other persons' interests.

The government did not require respondent to drive along a different route when he visits the Preserve; respondent made that decision on his own. And such "self-inflicted" injuries do not establish standing. *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976); accord *McConnell* v. *FEC*, 540 U.S. 93, 228 (2003). Otherwise, the plaintiffs in *Valley Forge* could have conferred standing on themselves by paying to consult a psychiatrist or making some other symbolic sacrifice (or even by relying on the costs of petitioning the government for a redress of their grievances, cf. *Steel Co.*, 523 U.S. at 107-108). 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?").

To be sure, if exposure to the cross constituted a cognizable injury, a plaintiff's need to take a different route in order to avoid that injury could give rise to standing. But when the alleged direct injury that is fairly traceable to the government's conduct is not cognizable for standing purposes, plaintiffs cannot bootstrap themselves into standing by choosing to inflict an additional or different injury on

themselves. See, *e.g.*, *McConnell*, 540 U.S. at 228; *Petro-Chem Processing, Inc.* v. *EPA*, 866 F.2d 433, 438 (D.C. Cir.) (Ginsburg, J.), cert. denied, 490 U.S. 1106 (1989).[6]

B. The Courts Of Appeals Are Divided On The Correct Interpretation Of This Court's Establishment Clause Standing Cases

The court of appeals' standing holding reflects a fundamental disagreement among the courts of appeals on the correct interpretation of *Valley Forge*. The circuit courts have long found "the concept of injury for standing purposes [to be] particularly elusive in Establishment Clause cases." *Saladin* v. *City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987); accord *Murray* v. *City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991), cert. denied, 505 U.S. 1219 (1992). That confusion is reflected in a circuit split, because "[t]he circuit courts have interpreted *Valley Forge* in different ways." *Foremaster* v. *City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989), cert. denied, 495 U.S. 910 (1990); accord *Suhre* v. *Haywood County*, 131 F.3d 1083, 1087-1088 (4th Cir. 1997).

Some courts of appeals have held that, to establish standing, a plaintiff need only show that he had "direct personal contact with the offensive action." *Foremaster*, 882 F.2d at 1490; accord *Suhre*, 131 F.3d at 1086-1088. The

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[6] 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' power under the Property Clause, Art. IV, § 3, cl. 2" of the Constitution. *Valley Forge*, 454 U.S. at 480.

Ninth Circuit also appears to follow that standard. See App., *infra*, 107a ("We have repeatedly held that inability to unreservedly use public land suffices."); see *id.* at 133a (citing cases). One circuit has gone farther by not even requiring such contact; the Eleventh Circuit held that plaintiffs had standing to challenge the display of a cross even though they had never seen it or visited its location, and thus did not have the direct, personal contact required by other circuits. See *ACLU* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1107 & n.17 (1983).

In contrast, the Seventh Circuit has held that direct, personal contact with a religious symbol does not ordinarily suffice for standing, because it amounts to no more than "[t]he psychological harm that results from witnessing conduct with which one disagrees." *Freedom from Religion Found, Inc.*, v. *Zielke*, 845 F.2d 1463, 1467 (1988). Instead, in the Seventh Circuit, only plaintiffs who have "altered their behavior" in response to a religious symbol ordinarily have standing. *Id.* at 1468; see *ACLU* v. *City of St. Charles*, 794 F.2d 265, 268 (7th Cir.), cert. denied, 479 U.S. 961 (1986).[7] In the Third Circuit, then-Judge Alito also noted that the psychological consequences of unwelcome contact with a religious display are arguably insufficient to confer standing, but found it unnecessary to resolve the question in that case. *ACLU* v. *Township of Wall*, 246 F.3d 258, 265-266 (2001).

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[7] Further deepening the doctrinal complexity, the Seventh Circuit has carved out an exception by recognizing standing for a plaintiff who must come into contact with a religious symbol in order "to participate fully as [a] citizen[] . . . and to fulfill . . . legal obligations," such as by attending a proceeding at a courthouse. *Books* v. *Elkhart County*, 401 F.3d 857, 861 (2005) (quoting *Books* v. *City of Elkhart*, 235 F.3d 292, 299 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001)).

The basic disagreement among the courts of appeals centers on how to distinguish between mere psychological injuries resulting from the observation of conduct with which one disagrees, on the one hand, and additional injuries that could give rise to standing for Establishment Clause purposes, on the other. The stark facts of this case show that at least one crucial question is the nature of the plaintiff's asserted grievance (here, an ideological one). Thus, this case provides an opportunity to clarify the meaning of *Valley Forge* and the types of asserted injuries that do and do not give rise to standing in the Establishment Clause context. And the standing issue is particularly important here because respondent seeks to invalidate—and thus far has successfully emasculated—an Act of Congress seeking to remedy an Establishment Clause issue and prevent the destruction of a 70-year-old war memorial.

II. THE COURT OF APPEALS' EFFECTIVE INVALIDATION OF AN ACT OF CONGRESS WARRANTS REVIEW

On the merits, the court of appeals' decision warrants review for numerous reasons.

A. The Court Of Appeals Refused To Give Effect To An Act Of Congress And Required The Government To Tear Down A 70-Year-Old Memorial To Fallen Service Members

The court of appeals rendered invalid an Act of Congress by affirming the district court's permanent injunction barring the government "from implementing the provisions of Section 8121 of [the 2004 Act]." App., *infra*, 99a; see *id.* at 54a. Indeed, that injunction itself is based on the district court's conclusion "that the proposed transfer of the subject property to the VFW [mandated by the Act of Congress] is invalid." *Id.* at 98a. The invalidation of an Act of Congress is ordinarily a sufficient ground to warrant this Court's review, and the backhanded manner in which the Ninth

Circuit invalidated—by refusing to give effect to—the Act in this case calls for no different treatment.

Moreover, the court of appeals did not override just any Act of Congress. Instead, it refused to give effect to one that reflects Congress's considered judgment about how to balance competing interests in a particularly sensitive context. The federal government did not erect the cross. Instead, the VFW did so more than 70 years ago in a remote location as a memorial to fallen service members. App., *infra*, 56a. When Congress was faced with the district court's decision holding that the presence of the cross on federal land violated the Establishment Clause, it could have torn down the cross, but that could have been viewed as demonstrating hostility toward religion and dishonoring the memory of the service members who have long been memorialized on Sunrise Rock. Indeed, the district court found that it is undisputed that tearing down the cross "could lead to significant public opposition." *Id.* at 120a. Thus, Congress reasonably chose not to tear down the cross, but instead to transfer the land to the private, secular organization—the VFW—that had erected the memorial in the first place more than 70 years ago.

By divesting itself of the privately erected memorial, the government remedied any Establishment Clause issue in an eminently sensible manner. The Court has long held that the Establishment Clause does not require hostility toward religion (much less toward a longstanding memorial to fallen service members). *Van Orden*, 545 U.S. at 683-684 (plurality opinion); *id.* at 698-699, 704 (Breyer, J., concurring in the judgment); *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Instead, the government has discretion to accommodate religion within the "play in the joints" between the Establishment and Free Exercise Clauses. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970); see *Cutter* v. *Wilkinson*,

544 U.S. 709, 719-720 (2005); cf. *International Soc'y for Krishna Consciousness* v. *Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring) ("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."). Because the court of appeals' decision upsets Congress's judgment in this important and sensitive area, and requires the government to tear down a cross that has stood for more than 70 years as a memorial to fallen service members, this Court's review is warranted.[8]

B. The Court Of Appeals' Holding Conflicts With Holdings Of The Seventh Circuit

Because application of the Establishment Clause is intensely fact-dependent, see, *e.g.*, *McCreary County* v. *ACLU*, 545 U.S. 844, 867-868 (2005), the absence of a square circuit split would not detract from the need for this Court's review of the important constitutional question presented here. The court of appeals' decision does, however, "squarely contradict[]" decisions of the Seventh Circuit. App., *infra*, 41a (O'Scannlain, J., dissenting). That provides all the more reason for this Court's review.

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[8] As the dissenters from denial of rehearing explained, "there are many monuments on public land that use the cross to commemorate the sacrifice of fallen soldiers, particularly those in World War I." App., *infra*, 47a n.6. Whether the display of a cross on public land violates the Establishment Clause turns on a contextual inquiry that looks to many factors, including whether the cross, as is the case here, has been displayed for a long period in its current form without objection. See *Van Orden*, 545 U.S. at 701-703 (Breyer, J., concurring in the judgment). In any event, this petition does not present the question whether the display of a cross in connection with the war memorial at Sunrise Rock violates the Establishment Clause, but rather whether Congress's efforts to resolve any Establishment Clause problem by transferring the land to private hands may be given effect.

In stark contrast to the decision below, the Seventh Circuit has twice held that, "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487, 491 (2000); accord *Mercier* v. *Fraternal Order of Eagles*, 395 F.3d 693, 701 (7th Cir. 2005). In *City of Marshfield*, a city accepted a statue of Jesus Christ as a gift and placed it in a public park. 203 F.3d at 489. After a suit was brought challenging the display of the statue as violating the Establishment Clause, the city sold 0.15 acres on which the statue stood to a private religious organization. *Id.* at 489-490. The court upheld the sale because the owner of land is presumably responsible for any expressive conduct on its property. *Id.* at 491. The "facial result" of transferring government property to private ownership, the court explained, is to transfer any challenged religious expression "from a public seller onto a private buyer." *Ibid.* Moreover, the land transfer "effectively ended state action" because there would be no "continuing and excessive involvement between the government and private citizens." *Id.* at 492.

Similarly, in *Mercier*, a private organization had obtained a city's permission to install on public land a monument inscribed with the Ten Commandments and other religious and secular symbols. 395 F.3d at 694-695. After an Establishment Clause suit was filed, the city sold the parcel of land on which the monument stood—a parcel that measured approximately 20 feet by 22 feet—to the private organization that had installed the monument. *Id.* at 697. As in *City of Marshfield*, the plaintiffs argued that "because the [city] knew that the sale would keep the monument in its challenged location, the sale itself favored the religious purpose of the monument, and thus that act was

unconstitutional." *Id.* at 702. And as in *City of Marshfield*, however, the Seventh Circuit upheld the sale because there were "no unusual circumstances surrounding the sale of the parcel of land so as to indicate an endorsement of religion." *Ibid.* See also *Utah Gospel Mission* v. *Salt Lake City Corp.*, 425 F.3d 1249, 1259-1260 (10th Cir. 2005) (holding that government cured First Amendment issue by selling land that had been public forum to church); *Paulson* v. *City of San Diego*, 262 F.3d 885 (9th Cir. 2001) (holding that sale of public land on which cross stood cured Establishment Clause issue), vacated on other grounds, 294 F.3d 1124 (9th Cir. 2002) (en banc) (holding that sale violated California Constitution), cert. denied, 538 U.S. 978 (2003).

The panel's original opinion candidly acknowledged the conflict by stating that, "[a]lthough the Seventh Circuit 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,' we decline to adopt such presumption." App., *infra*, 25a n.13 (citation to *City of Marshfield* omitted). In response to the government's rehearing petition, the panel amended the opinion to state that, "to the extent that *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; accord *id.* at 76a-77a. As the dissenters from the denial of rehearing explained, the panel was correct in its initial opinion that its decision conflicts with decisions of the Seventh Circuit. *Id.* at 37a, 41a. None of the minor amendments to the opinion (see *id.* at 36a-37a) eliminate that conflict.[9]

[9] The panel decision also departs from *City of Marshfield* concerning the proper remedy for any continuing endorsement of religion following a land transfer. The Seventh Circuit upheld the land transfer at issue in that case (which consisted of a portion of a public park), but reman-

C. The Court Of Appeals Failed To Accord Proper Respect To An Act Of Congress

The court of appeals rendered the Act of Congress invalid only by departing from well-settled interpretive principles. Because "there is a presumption of legitimacy accorded to the Government's official conduct," *NARA* v. *Favish*, 541 U.S. 157, 174 (2004), "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*, 545 U.S. at 864. Of course, such deference is 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 to it." App., *infra*, 44a (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Moreover, as this Court has repeatedly admonished, courts should read statutes to avoid constitutional difficulties, not to create them. *E.g.*, *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

As Judge O'Scannlain observed, the court of appeals "flout[ed]" those fundamental principles by relying on insignificant considerations that the Seventh Circuit had correctly rejected and by misreading the relevant statutes in a way that introduced constitutional difficulties that do not actually exist. See App., *infra*, 45a; see also *id.* at 49a-53a

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ded for the district court to require additional measures, such as fencing and signs around the transferred land, that would inform a reasonable observer that the statute was on private land and was not endorsed by the government. See *City of Marshfield*, 203 F.3d at 497. Here, in contrast, the court of appeals simply invalidated the land transfer itself, instead of imposing conditions designed to avoid what the court viewed as a continuing endorsement of religion following the land transfer.

& nn.8, 10. Because the Ninth Circuit impugned the purpose of a co-equal Branch, and rendered an Act of Congress inoperative based on the court's unfair assessment of that purpose, this Court's review is warranted.[10]

1. The court of appeals levied the serious charge that Congress used the VFW as "a straw purchaser" to disguise the fact that the government would continue to control the war memorial. App., *infra*, 82a-83a. As the dissent observed, that is incorrect. *Id.* at 50a-51a. Indeed, as Judge O'Scannlain explained, "altogether missing in this case is *any* evidence that the government * * * will maintain or support the Sunrise Rock cross after the land transfer." *Id.* at 43a.

a. At the outset, the court of appeals criticized Congress's decision to transfer the memorial to the VFW, the organization that originally erected a cross on the site in 1934. App., *infra*, 81a-82a. "[H]ere again," as Judge O'Scannlain observed, the panel opinion "shrugs off the

[10] The court of appeals also erred insofar as it framed the question presented as being 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." App., *infra*, 75a (heading); see *id.* at 66a ("We agree that the exchange effectuated by § 8121 violates the injunction."). Indeed, the court even said that it was reviewing the district court's decision effectively invalidating an Act of Congress for abuse of the district court's (as opposed to Congress's) discretion. *Id.* at 65a, 66a. Congress's constitutional authority is not, however, subject to district courts' discretion, and the court of appeals identified no authority for that startling proposition. More fundamentally, 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. To the extent that the court of appeals believed that the previously issued injunction itself barred the Act of Congress at issue, its decision conflicts with decisions of this Court and warrants review.

conflicting holdings in *Marshfield* and *Mercier*." *Id.* at 51a n.10. In *Mercier*, for example, the Seventh Circuit upheld the sale to the organization that had donated the Ten Commandments monument to the City, 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 *City of Marshfield*, 203 F.3d at 492. So too here, the VFW is "the logical purchaser," *Mercier*, 395 F.3d at 705, because it is the nonsectarian organization that erected the cross as a war memorial and its mission is perfectly consistent with the maintenance of a war memorial.

The court of appeals also observed that the land exchange was not initiated by an administrative agency through normal agency procedures, and instead was directed by Congress in an appropriations bill. App., *infra*, 81a-82a. But the land transfers in *Mercier* and *City of Marshfield* were not made through normal competitive-bidding processes either, and the Seventh Circuit expressly rejected the plaintiffs' reliance on that factor. *City of Marshfield*, 203 F.3d at 492; see *Mercier*, 395 F.3d at 696-697, 702. As Judge O'Scannlain explained, no precedent requires Congress to adhere to an agency's procedural rules or "disparag[es] a land transfer for having been enacted in an appropriations bill." App., *infra*, 51a. If anything, the fact that the land transfer was mandated in an Act of Congress should reinforce, not undermine, its validity. In any event, Congress required that the exchanged parcels of land have equal value or be equalized through a monetary payment. See 2004 Act § 8137(c) and (d), 117 Stat. 1100. That alone ensured that the government would receive "a fair market price for the land." *City of Marshfield*, 203 F.3d at 492.

b. The court of appeals also asserted that, if the VFW took down the cross, the land would automatically revert to

the United States. App., *infra*, 73a-74a, 80a. Not so. See *id.* at 39a (O'Scannlain, J., dissenting). Congress provided 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. While that provision calls for reversion if the VFW does not maintain "a war memorial," *ibid.*, it does not require the VFW to display a cross. The court of appeals correctly noted that the 2002 Act had designated the cross and surrounding land as a war memorial, App., *infra*, 73a, but the 2004 Act only requires the VFW to maintain "a" war memorial, not "the" war memorial that had been designated in the 2002 Act. See 2004 Act § 8121(e), 117 Stat. 1100. Indeed, nothing in the 2004 Act even mentions a cross, much less explicitly directs that VFW must display a cross.

As the dissent observed, the court of appeals' misinterpretation of the reversion clause underscores not only its error, but also the extent of its disagreement with the Seventh Circuit. App., *infra*, 43a n.4, 50a n.8. In *City of Marshfield*, the government similarly conditioned a sale of land on a restrictive covenant that required the property to be used for a specific purpose (a public park). 203 F.3d at 492-492. In contrast to the decision below, the Seventh Circuit considered the restrictive covenant irrelevant, in part because it is "relate[d] to the conduct of the parties following the sale of the property," not to the legitimacy of the transfer itself. *Id.* at 493.

c. The court of appeals also asserted that the 2004 Act grants the government "an easement or license over the subject property," App., *infra*, 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, in turn, had di-

rected 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." 2002 Act § 8137(c), 115 Stat. 2279. Because the NPS can install a replica plaque before the land exchange is complete, that provision does not require any ongoing federal involvement in the memorial, much less control over the property. Moreover, the plaque would underscore the memorial's secular purpose by stating that the VFW erected the cross in memory of fallen service members. See, *e.g.*, *Van Orden*, 545 U.S. at 701-702 (Breyer, J., concurring in the judgment).[11]

As Judge O'Scannlain correctly observed, the panel also erred in concluding that the NPS would retain general management authority over the property even after the land is transferred to private ownership. App., *infra*, 49a. The panel relied on statutes that govern the management of federal, not private, land. See, *e.g.*, 16 U.S.C. 1 (stating that the NPS "shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations"). In that respect as well, the panel misconstrued statutes to create constitutional difficulties that do not actually exist.

2. The court of appeals also objected 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." App., *infra*, 85a. But the land within the Preserve

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[11] While the 2002 Act required NPS to acquire replicas of the cross and plaque, it required NPS to install only the replica plaque, not the cross, at Sunrise Rock. § 8137(c), 115 Stat. 2278. Thus, the provision concerning a replica cross is not relevant to the question presented here. In any event, NPS does not intend to acquire a replica cross, much less to install it at Sunrise Rock. 05-55852 Gov't C.A. Br. 39.

is not entirely federal—approximately 10% is not federally owned, including 86,000 privately owned acres. *Id.* at 55a. Indeed, two private ranches and several corrals are within two miles of the cross. 03-55032 C.A. E.R. 34. And in the American West, it is not unusual for private land to be 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). Under the congressionally mandated land transfer, therefore, Sunrise Rock would be better described as one of many holes in a vast slice of Swiss cheese, not as a tiny donut hole. 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 federal land. 03-55032 C.A. E.R. 53, 54. Instead, 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." *Id.* at 53. In this respect as well, the court of appeals improperly stretched to invalidate an Act of Congress.[12]

3. The court of appeals panel also erred in relying on what it viewed as "the government's long-standing efforts to preserve and maintain the cross atop Sunrise Rock." App., *infra*, 83a. In its earlier decision in this case, the court of appeals held that the government's past efforts to preserve the cross *on federal land* violated the Establishment Clause. But as Judge O'Scannlain observed, the question here is not whether there had been a violation; instead, it is whether the government can prospectively cure any violation through a land exchange. *Id.* at 52a. Pointing to

[12] At a minimum, the court of appeals erred in invalidating the Act of Congress and land transfer altogether, as opposed to requiring (if necessary) that the replica plaque or some other sign make clear that the memorial is located on private land. See p. 23 note 9, *supra*.

past conduct does not answer that question and does not diminish the conflict with the Seventh Circuit's decisions recognizing that "a sale of real property is an effective way for a public body *to end its inappropriate endorsement of religion*." *City of Marshfield*, 203 F.3d at 491 (emphasis added); accord *Mercier*, 395 F.3d at 701.

Nonetheless, the court of appeals asserted that in the *prior* appeal concerning the legality of the cross's presence on *federal* land, the court had "necessarily already considered th[e] question" "whether the improper governmental endorsement of religion has ceased." App., *infra*, 84a. In the court's view, the prior opinion determined that the cross at Sunrise Rock endorsed religion. *Ibid.* As Judge O'Scannlain observed, however, that is "nothing short of a judicial 'bait-and-switch,'" because the court of appeals' prior opinion relied on the cross's presence on federal land and expressly reserved the question presented here. *Id.* at 53a; see *id.* at 104a. In any event, the court of appeals thereby made clear that its decision did not ultimately turn on the contextual issues discussed above, but instead turned on the court's view that a land transfer is not a valid means of curing an Establishment Clause violation. Thus, as the dissent explained, the decision below effectively "announces the rule that Congress cannot cure a government agency's Establishment Clause violation by ordering the sale of the land upon which a religious symbol previously was situated," and thereby "recklessly splits from the Seventh Circuit and announces a broad and unprecedented rule that should not be allowed to stand." *Id.* at 37a, 46a.

* * * * *

The upshot is that the Ninth Circuit, in conflict with the Seventh Circuit, and over a five-judge dissent from denial of rehearing en banc, rendered an Act of Congress invalid and required the government to tear down a cross that has

stood without incident for 70 years as a memorial to fallen service members. That seriously misguided decision warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2008

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55852

FRANK BUONO, PLAINTIFF-APPELLEE

v.

DIRK KEMPTHORNE,[*] SECRETARY OF THE INTERIOR, IN HIS OFFICIAL CAPACITY; JONATHAN B. JARVIS, REGIONAL DIRECTOR, PACIFIC WEST REGION, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, IN HIS OFFICIAL CAPACITY; DENNIS SCHRAMM, SUPERINTENDENT, MOJAVE NATIONAL PRESERVE, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, IN HIS OFFICIAL CAPACITY, DEFENDANTS-APPELLANTS

Argued and Submitted: Apr. 9, 2007
Filed: Sept. 6, 2007

Before: B. FLETCHER AND M. MARGARET MCKEOWN, Circuit Judges, and RONALD M. WHYTE,[**] District Judge.

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[*] Dick Kempthorne is substituted for his predecessor Gail Norton as Secretary of the Department of the Interior. Dennis Schramm is substituted for his predecessor Mary Martin as the Superintendent of the Mojave National Preserve. See Fed. R. App. P. 43(c)(2).

[**] The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

MCKEOWN, Circuit Judge

A Latin cross sits atop a prominent rock outcropping known as "Sunrise Rock" in the Mojave National Preserve ("Preserve"). Our court previously held that the presence of the cross in the Preserve—which consists of more than 90 percent federally-owned land, including the land where the cross is situated—violates the Establishment Clause of the United States Constitution. *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004). We affirmed the district court's judgment permanently enjoining the government "from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."

During the pendency of the first appeal, Congress enacted a statute directing that the land on which the cross is situated be transferred to a private organization in exchange for a parcel of privately-owned land located elsewhere in the Preserve. *See* Pub. L. No. 108—87, R. 12.1, 12.4 § 8121(a)-(f), 117 Stat. 1100 (2003). That land exchange is already in progress and would leave a little donut hole of land with a cross in the midst of a vast federal preserve. The issue we address today is whether the land exchange violates the district court's permanent injunction. We conclude that it does, and affirm the district court's order permanently enjoining the government from effectuating the land exchange and ordering the government to comply with the original injunction.

BACKGROUND[1]

I. THE MOJAVE NATIONAL PRESERVE

The Preserve encompasses approximately 1.6 million acres, or 2,500 square miles, of primarily federally-owned land in the Mojave Desert, located in Southeastern California. In 1994, the Bureau of Land Management ("BLM") transferred the land to the National Park Service ("NPS"); both the BLM and the NPS are federal agencies under the Department of the Interior ("DOI"). Within the Preserve, approximately 86,000 acres of land are privately owned and 43,000 acres belong to the State of California. Thus, slightly more than 90 percent of the land in the Preserve is federally owned. The Preserve is a "unit of the National Park System" and is given "statutory protection as a national preserve." 16 U.S.C. § 410*aaa*—41, 410*aaa*—42; *id*. § 1(c). The Preserve is under NPS jurisdiction and authority. *Id*. § 410*aaa*—46.

II. THE CROSS

The current incarnation of the cross atop Sunrise Rock is between five and eight feet tall and is constructed out of four-inch diameter metal pipes painted white. It is a Latin cross, meaning that it has two arms, one horizontal and one vertical, at right angles to one another. It is undisputed that "[t]he Latin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion." *Buono I,* 212 F. Supp. 2d at 1205.

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[1] Further background detail is found in the district court's order and our prior opinion on the merits of the Establishment Clause challenge. *See generally Buono v. Norton,* 212 F. Supp. 2d 1202 (C.D. Cal. 2002) ("*Buono I*"); *Buono,* 371 F.3d 543 (9th Cir. 2004) ("*Buono II* ").

Historic records reflect that a wooden cross was built on that location as early as 1934 by the Veterans of Foreign Wars ("VFW") as a memorial to veterans who died in World War I. Photographs depict the wooden cross and signs near it stating: "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members of Veterans of Foregin [sic] Wars, Death Valley post 2884." The wooden signs are no longer present, and the original wooden cross, which is no longer standing, has been replaced by private parties several times since 1934. The cross has been an intermittent gathering place for Easter religious services since as early as 1935, and regularly since 1984.

The current version of the cross was built by Henry Sandoz, a local resident, sometime in 1998. When NPS investigated the history of the cross, Sandoz explained that he drilled holes into Sunrise Rock to bolt the cross in place, making it difficult to remove. Sandoz did not receive a permit from NPS to construct the cross.

Following *Buono I*'s injunction against display of the cross, the cross has been covered by a plywood box. When uncovered, the cross is visible from vehicles traveling on Cima Road, which passes through the Preserve, from a distance of approximately 100 yards away. No sign indicates that the cross was or is intended to act as a memorial for war veterans.

III. Litigation over the Cross and the Congressional Response

The current controversy surrounding the cross surfaced in 1999, when NPS received a request from an individual seeking to build a "stupa" (a dome-shaped Buddhist shrine) on a rock outcropping at a trailhead

located near the cross. NPS denied that request, citing 36 C.F.R. § 2.62(a)[2] as prohibiting the installation of a memorial without authorization. A hand-written note on the denial letter warns that "[a]ny attempt to erect a stupa will be in violation of Federal Law and subject you to citation and/or arrest." The letter also indicates that "[c]urrently there is a cross on [a] rock outcrop located on National Park Service lands. . . . It is our intention to have the cross removed."

In 1999, NPS undertook a study of the history of the cross. NPS determined that neither the cross nor the property on which it is situated qualifies for inclusion in the National Register of Historic Places. Specifically, NPS recognized that the cross itself "has been replaced many times and the plaque that once accompanied it (even though it is not known if it is original) has been removed." Also, the property does not qualify as an historical site because, among other things, "the site is used for religious purposes as well as commemoration."

Following the announcement by NPS of its intention to remove the cross, the United States Congress passed a series of laws, described below, to preserve the Sunrise Rock cross. The first piece of legislation, enacted in December 2000, provided that no government funds could be used to remove the cross. *See* Pub. L. No. 106—554 § 133, 114 Stat. 2763A—230 (2000) (hereafter "§ 133").[3]

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[2] The regulation provides that: "The installation of a monument, memorial, tablet, structure, or other commemorative installation in a park area without the authorization of the Director is prohibited." 36 C.F.R. § 2.62(a).

[3] "None of the funds in this or any other Act may be used by the Secretary of the Interior to remove *the five-foot-tall white cross* located

A. *BUONO I*

Frank Buono[4] filed suit in March 2001 against the Secretary of the DOI, the Regional Director of NPS, and the Superintendent of the Preserve (collectively, "NPS" or "Defendants"). The district court concluded that the presence of the cross in the Preserve violates the Establishment Clause. *See Buono I,* 212 F. Supp. 2d at 1215-17. In July 2002, the court entered a permanent injunction ordering that the "Defendants, their employees, agents, and those in active concert with Defendants, are hereby permanently restrained and enjoined from permitting display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."[5]

B. DESIGNATION OF THE CROSS AS A NATIONAL MEMORIAL

In January 2002, while this matter was pending in district court, Congress passed a defense appropriations bill, which included a section designating the Sunrise

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within the boundary of the Mojave National Preserve in southern California first erected in 1934 by the Veterans of Foreign Wars along Cima Road approximately 11 miles south of Interstate 15." § 113 (emphasis added).

[4] Buono is a retired NPS employee who worked for the agency from 1972 to 1997. From September 1994 to December 1995, Buono worked as the Assistant Superintendent of the Preserve.

[5] We granted the government's motion to stay the injunction pending appeal, insofar as the injunction required NPS to immediately remove or dismantle the cross. The stay did not apply to any "alternative methods" for complying with, or additional obligations imposed by, the district court's order. *See Buono II,* 371 F.3d at 545 n.1 (discussing stay orders). During the appeal, NPS covered the cross, first with a large tarpaulin and later with a plywood box, which the government asserts will remain in place pending resolution of this action.

Rock cross as a "national memorial." *See* Pub. L. No. 107—117 § 8137, 115 Stat. 2278-79 (2002), *codified at* 16 U.S.C. § 410*aaa*—56 (note) (hereafter "§ 8137"). That section provides:

> (a) DESIGNATION OF NATIONAL MEMORIAL.—*The five-foot-tall white cross* first erected by the Veterans of Foreign Wars of the United States in 1934 along Cima Road in San Bernardino County, California, and now located within the boundary of the Mojave National Preserve, as well as a limited amount of adjoining Preserve property to be designated by the Secretary of the Interior, *is hereby designated as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.*
>
> (b) LEGAL DESCRIPTION.—The memorial cross referred to in subsection (a) is located at latitude 35.316 North and longitude 115.548 West. The exact acreage and legal description of the property to be included by the Secretary of the Interior in the national World War I memorial shall be determined by a survey prepared by the Secretary.
>
> (c) REINSTALLATION OF MEMORIAL PLAQUE.—The Secretary of the Interior shall use not more than *$10,000 of funds* available for the administration of the Mojave National Preserve to *acquire a replica of the original memorial plaque and cross placed at the national World War I memorial* designated by subsection (a) and to install the plaque in a suitable location on the grounds of the memorial.

Id. (emphases added). The cross is designated the "White Cross World War I Memorial." 16 U.S.C. § 431 (note).

NPS is statutorily charged with "the supervision, management, and control of the several national parks and national monuments." 16 U.S.C. § 2. National "memorials" fall within the broader category of national "monuments." *See* 16 U.S.C. § 431 (note) (identifying recognized national monuments, including various categories of "national monuments" and "national memorials").

In October 2002, less than three months after the district court's injunction, in legislation aimed at the Sunrise Rock cross, Congress passed a defense appropriations bill that included a provision barring the use of federal funds "to dismantle national memorials commemorating United States participation in World War I." Pub. L. No. 107—248 § 8065(b), 116 Stat. 1551 (2002) (hereafter "§ 8065").

C. *BUONO II* AND PASSAGE OF § 8121

The government appealed the district court's order and injunction. In September 2003, one month after oral argument before a panel of our court but before a decision issued, Congress enacted another defense appropriations bill that included a land exchange agreement regarding the Sunrise Rock cross. *See* Pub. L. No. 108—87 § 8121(a)-(f), 117 Stat. 1100 (2003), *codified at* 16 U.S.C. § 410*aaa*—56 (note), (hereafter "§ 8121"). The statute provides:

> (a) EXCHANGE REQUIRED.—*In exchange for the private property described in subsection (b),* the Secretary of the Interior *shall convey* to the Veterans Home of California—Barstow, Veterans of Foreign Wars Post # 385E (in this section referred to as the "recipient"), all right, title, and interest of the United States in and to *a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated* (by section 8137 of the Department of Defense Appropriations Act, 2002 (Public Law 107—117; 115 Stat. 2278)) *as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.* Notwithstanding the conveyance of the property under this subsection, *the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137.*
>
> (b) CONSIDERATION.—As consideration for the property to be conveyed by the Secretary under subsection (a), Mr. and Mrs. Henry Sandoz of Mountain Pass, California, have agreed to convey to the Secretary a parcel of real property consisting of approximately five acres, identified as parcel APN 569—051—44, and located in the west 1/2 of the northeast 1/4 of the northwest 1/4 of the northwest 1/4 of section 11, township 14 north, range 15 east, San Bernardino base and meridian.

§ 8121(a)-(b) (emphases added). The government retains a reversionary interest in the property as follows:

> (e) REVERSIONARY CLAUSE.—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 and honoring the American veterans of that war. *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(e) (emphasis added). The cross-reference in § 8121(a) to § 8137 pertains to use of federal funds to acquire a replica cross and plaque. *See* § 8197(c). The land transfer was under-way when the district court enjoined its enforcement, as described below.

In June 2004, in affirming the district court's permanent injunction, we held that the presence of the cross in the Preserve violates the Establishment Clause, agreeing with the district court that this case is "squarely controlled" by *Separation of Church and State Committee v. City of Eugene,* 93 F.3d 617 (9th Cir. 1996) ("*SCSC*"). *Buono II,* 371 F.3d at 548. In *SCSC*, we reasoned that the presence of a cross on city land, even where it bore a plaque dedicating the cross as a war memorial to veterans, 93 F.3d at 618, violated the Establishment Clause because "the presence of the cross may reasonably be perceived as governmental endorsement of Christianity." *Id*. at 620.

The government's several attempts to distinguish *SCSC* were not persuasive. For example, we held that it was "of no moment" that the cross in *SCSC* was significantly taller, located in an urban area, or illuminated during certain holidays:

> Though not illuminated, the cross here is bolted to a rock outcropping rising fifteen to twenty feet above

> grade and is visible to vehicles on the adjacent road from a hundred yards away. Even if the shorter height of the Sunrise Rock cross means that it is visible to fewer people than was the *SCSC* cross, this makes it no less likely that the Sunrise Rock cross will project a message of government endorsement . . . . Nor does the remote location of Sunrise Rock make a difference. That the Sunrise Rock cross is not near a government building is insignificant—neither was the *SCSC* cross. What is significant is that the Sunrise Rock cross, like the *SCSC* cross, sits on public park land. *National parklands and preserves embody the notion of government ownership as much as urban parkland, and the remote location of Sunrise Rock does nothing to detract from that notion.*

Buono II, 371 F.3d at 549-50 (emphasis added).

We also held that a reasonable observer, even without knowing whether Sunrise Rock is federally owned, *would believe—or at least suspect*—that the cross rests on public land because of the vast size of the Preserve, more than 90 percent of which *is* federally owned. *Id.* at 550 (citing reasonable observer test set forth in *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 780-81, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring)). A reasonably informed observer aware of the history of the Sunrise Rock cross would know not only that the cross was erected by private individuals (which the government argued favored its view), but also that Congress has taken various measures to preserve the cross, i.e., designating it a war memorial, prohibiting use of federal funds to remove it, and denying similar access for a Buddhist shrine. *Id.*

Acknowledging the passage of § 8121 while the appeal was pending, we addressed the government's challenge that § 8121 rendered the appeal moot or would soon do so. We rejected the government's mootness challenge for two reasons: First, we held that the case was not moot because the land transfer had not yet taken effect. *Id.* at 545. Second, because "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case," we held that *even if* the land transfer had taken effect, the government still had not carried its heavy burden to show mootness. *Id.* at 546. Even if the land were transferred under § 8121(a), it *may revert* to the government under § 8121(e), or as provided in other statutes. In particular, we noted that 16 U.S.C. § 431 authorizes relinquishment of lands containing "national monuments" to the federal government, and 16 U.S.C. § 410*aaa*—56 authorizes the Department of the Interior to "acquire all lands and interest in lands within the boundary of the [Mojave] preserve by donation, purchase, or exchange." *Id.* at 546 (discussing § 8121, 16 U.S.C. §§ 431, 410*aaa*—56).

D. *BUONO III*

Despite the injunction against display of the cross in the Preserve, the government began moving forward with the mechanics of the land exchange under § 8121. Buono then moved to enforce the district court's prior injunction, or modify it to prohibit the land exchange as a violation of the Establishment Clause. In April 2005, the district court granted Buono's motion to enforce the injunction, and denied as moot the request to amend the permanent injunction. *See Buono v. Norton,* 364 F. Supp. 2d 1175, 1177, 1182 & n.8 (C.D. Cal. 2005) ("*Buono III* "). According to the district court, "the transfer of

the Preserve land containing the Latin Cross which as [a] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunrise Rock." *Id.* at 1182 (citation and quotation marks omitted). The district court deemed the exchange "invalid" and permanently enjoined the government "from implementing the provisions of Section 8121 of Public Law 108—87" and ordered the government "to comply forthwith with the judgment and permanent injunction entered by th[e] court on July 24, 2002." *Id.* It is that decision that the government now appeals.

STANDARD OF REVIEW

We review for abuse of discretion the district court's order enforcing its prior injunction. *Paulson v. City of San Diego,* 294 F.3d 1124, 1128 (9th Cir. 2002). A district court abuses its discretion in this regard if "it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.*

ANALYSIS

In the district court, Buono advanced two alternative arguments challenging the land exchange under § 8121. First, Buono argued that the land exchange is an attempt to evade the permanent injunction. Alternatively, he argued that the land exchange itself violates the Establishment Clause because it is an improper governmental endorsement of religion. The district court's holding is grounded only on the first basis, i.e., that the land exchange is a sham transaction with the purpose of permitting continued display of the cross in violation of

the permanent injunction. On appeal, the government contends that § 8121 was a bona fide attempt by Congress to comply with the injunction. The government also argues that because it was not given the opportunity to fully effectuate the transfer, there are unknown facts that render this controversy "unripe" for judicial review.

Turning first to the government's ripeness challenge, we conclude that this controversy is ripe for review. As to the second question, the district court did not abuse its discretion in enforcing the injunction. We agree that the exchange effectuated by § 8121 violates the injunction, which prohibits the display of the Latin cross because it runs afoul of the Establishment Clause.

I. RIPENESS

Ripeness is a justiciability requirement that seeks to avoid premature litigation of disputes. *Thomas v. Union Carbide Agr. Products Co.,* 473 U.S. 568, 579-81, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985) ("[R]ipeness is peculiarly a question of timing.") (citations omitted). The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.,* 509 U.S. 43, 57 n.18, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993); *accord Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1138-42 (9th Cir. 2000) (en banc) (discussing constitutional and prudential components of ripeness). The ripeness question we address is whether it is premature to consider a violation of the injunction before completion of the land exchange.

A. Constitutional Component of Ripeness

The constitutional component of ripeness—that there be an Article III "case or controversy"—requires a concrete impact upon the parties arising from the dispute. *Union Carbide,* 473 U.S. at 579, 105 S. Ct. 3325. This analysis is similar to the injury-in-fact inquiry under the standing doctrine. *See Anchorage Equal Rights Comm'n,* 220 F.3d at 1138-39.

The government argues that before litigation proceeds, it should be given an opportunity to try to execute the land exchange in compliance with the prior injunction and the government's constitutional obligations. Buono responds that the "concrete" injury ripe for review is that the land transaction's very structure evidences its lack of a secular purpose and its effect continues the government's improper endorsement of religion that we already held exists.

This case can best be described as an ongoing controversy about the cross, the specifics of which shift with successive congressional enactments. The controversy is neither premature nor will it go away on its own. Given the specifics of § 8121, it is no answer to say that the land exchange is not complete. It is, as the district court notes, "already in progress," and the government intends to complete it. *Buono III,* 364 F. Supp. 2d at 1178. Buono's challenge to the present terms of the exchange is not a "hypothetical request[ ] for an advisory opinion." *Anchorage Equal Rights Comm'n,* 220 F.3d at 1141.

The Supreme Court has held that pre-enforcement review of a statute is appropriate where the governmental purpose in enacting the statute evidences an improper endorsement of religion in violation of the Estab-

lishment Clause. *See Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 313-14, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000). It is no legal leap to conclude that pre-enforcement review is similarly appropriate where the purpose of a statute is to evade an injunction intended to end an ongoing Establishment Clause violation.

In *Santa Fe,* the Supreme Court considered the ripeness of a facial challenge to a school district's policy purportedly allowing school prayer. *Id.* The policy permitted students (a) to vote on whether there should be a student-delivered invocation given at the start of high school football games, and (b) to later vote to select the one student who would deliver the invocation at all games throughout the year. *Id.* at 297-98, 120 S. Ct. 2266. The school district argued that it was premature to review the policy because there "can be no certainty that any of the statements or invocations will be religious." *Id.* at 313, 120 S. Ct. 2266. Rejecting that challenge, the Court concluded that while forcing a student "to participate in religious worship" was a serious constitutional injury, so too was the "mere passage by [the school district] of a policy that has the purpose and perception of government establishment of religion . . . . [and] the implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote." *Id.* at 313-14, 120 S. Ct. 2266 (recognizing that "the Constitution also requires that we keep in mind 'the myriad, subtle ways in which Establishment Clause values can be eroded.' ") (quoting *Lynch v. Donnelly,* 465 U.S. 668, 694, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O'Connor, J., concurring)). Thus, the mere enactment of the policy, particularly in light of the school district's conduct, was a sufficient constitutional injury to warrant pre-enforcement review, and ultimately an

injunction against implementation of the policy. *Id*. at 316.[6] Importantly, in analyzing ripeness, the Court looked to the history of the school district's conduct in enacting the policy and the true purpose of the policy. *Id*. at 314-15.

The analogy to *Santa Fe* is apt. Here, both the district court and this court have concluded that a grave constitutional injury *already exists.* The permitting display of the Sunrise Rock cross in the Preserve is an impermissible governmental endorsement of religion. *See Buono II,* 371 F.3d at 548-50. As discussed further below, the constitutional injury will persist after—and as a result of—the land exchange effectuated under § 8121. This is so because (among other things) § 8121 and other applicable statutes[7] permit the government's significant *ongoing control* of and involvement with the cross and the property on which it is situated. *See Santa Fe,* 530 U.S. at 314-15, 120 S. Ct. 2266 (concluding that

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[6] Our cases have similarly held that passage of a statute and putting it into effect (even if the effect is not complete) gives rise to a dispute ripe for judicial review. In *Saint Elizabeth Community Hospital v. NLRB,* 708 F.2d 1436 (9th Cir. 1983), a church-run hospital challenged the National Labor Relations Board's jurisdiction over it as a violation of the Establishment Clause. *Id*. at 1440. Congress had amended the National Labor Relations Act expressly conferring jurisdiction over nonprofit hospitals without excepting those run by religious institutions. We concluded that the question of NLRB's jurisdiction was ripe for review. *Id*. In *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil & Gas Conservation of the State of Montana,* 792 F.2d 782 (9th Cir. 1986), we held that the claim of Indian tribes challenging the validity of a cooperative agreement regarding agency jurisdiction to advise the tribes about oil and gas rights was sufficiently ripe where the final cooperative agreement had been placed into operation by the agreeing agencies. *Id*. at 788-89.

[7] *See* § 8137(a)-(c), 16 U.S.C. §§ 431, 410*aaa*—56.

the text of the school district's policy alone reveals the extent of school involvement in the election of the student speaker and the content of the message to be delivered). And, the government's repeated actions in preserving the cross (and forestalling enforcement of the injunction) further evidence its goal of keeping the cross in place, *see* §§ 133, 8137, 8056(b), 8121, just as the school district in *Santa Fe* acted with the purpose of maintaining a school policy permitting prayer at school events. *Santa Fe,* 530 U.S. at 314-15, 120 S. Ct. 2266.[8]

Buono has alleged a sufficient constitutional injury to overcome any argument that his challenge to § 8121 is unripe. *See Santa Fe,* 530 U.S. at 314-15, 120 S. Ct. 2266. The challenge in this case presents a concrete injury, rather than an "imaginary" or "speculative" one.[9]

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[8] The various governmental actions are discussed in further detail *infra* § II.A.3.

[9] The government can hardly rely, as a predicate for a ripeness challenge, on its attempt to temporarily comply with the permanent injunction by covering the cross with a wooden box. If that were the final compliance mechanism, the district court could determine whether it is sufficient. Significantly, however, the government is proceeding with the land exchange. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1,*—U.S.—, 127 S. Ct. 2738, 2751, 168 L. Ed. 2d 508 (2007) (holding that school district's voluntary cessation of use of racial tiebreaker pending outcome of litigation did not negate Article III standing of plaintiff group members challenging policy, as the school continued to vigorously defend the policy in court); *Friends of Earth, Inc. v. Laidlaw Envt'l Svcs. (TOC), Inc.,* 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (holding that voluntary cessation of wrongful conduct, either by defendant's achievement of substantial compliance with its permit requirements or its shutdown of offending facility, did not moot controversy over defendant's compliance with Clean Water Act because the offending conduct had not permanently ceased).

B. Prudential Component of Ripeness

Even where a concrete case or controversy is present, we consider whether, because of prudential concerns, we should decline to exercise jurisdiction. *See Union Carbide,* 473 U.S. at 581, 105 S. Ct. 3325; *Anchorage Equal Rights Comm'n,* 220 F.3d at 1141. We evaluate two interrelated factors: (a) the hardship that the party seeking relief will suffer from withholding judicial action, and (b) the fitness of the issues in the record for judicial review. *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

This case easily satisfies both prudential components. As to the harm, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Union Carbide,* 473 U.S. at 581, 105 S. Ct. 3325 (internal quotations and citations omitted).[10] The hardship resulting from the continuation of an Establishment Clause violation enjoined by the court is sufficient.

A claim is "fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Exxon Corp. v. Heinze,* 32 F.3d 1399, 1404 (9th Cir. 1994) (citations omitted). These requirements are satisfied here.

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[10] Unlike in *Anchorage Equal Rights Comm'n*, where the plaintiffs sought review of a housing law "in a vacuum and in the absence of any particular victims of discrimination," 220 F.3d at 1142, in this case there is a concrete victim—Buono—and the statutes are not being analyzed in a vacuum. *See, e.g., Buono III,* 364 F. Supp. 2d at 1181-82 (discussing history of government's preservation efforts regarding the cross).

The key issue is primarily a question of law, i.e., whether the land exchange under § 8121 violates the district court's order permanently enjoining the government from permitting display of the cross in the Preserve. *See, e.g., Santa Fe,* 530 U.S. at 314, 120 S. Ct. 2266 (permitting facial challenge to school district's policy prior to enforcement of the policy based largely on the Court's ability to construe the constitutionality of the policy's purpose as a legal matter); *Union Carbide,* 473 U.S. at 581, 105 S. Ct. 3325 (granting pre-enforcement review of constitutionality of administrative scheme requiring registrants to participate in binding arbitration of disputes with limited judicial review because party's challenge raised solely legal issues).

Next, we assess the state of the factual record, an inquiry that overlaps with (and in this case collapses into) the third component, the finality of the decision. *Friedman Bros. Inv. Co. v. Lewis,* 676 F.2d 1317, 1319 (9th Cir. 1982). The government argues that the record is incomplete because certain factual scenarios, as yet unknown, could occur at some time in the future. The government illustrates its claim by positing two potential scenarios that may occur rendering decision on this appeal premature. Upon examination, neither proposed scenario persuades us that we should delay decision in this matter.

First, the government argues that once the land exchange is complete the VFW *might* at some point in the future *remove* the cross, but continue to maintain the property as a "war memorial" as provided under § 8121. Thus, according to the government, the court should not decide whether the injunction is violated unless and until the land exchange is complete and the VFW has an

opportunity to decide whether to maintain or remove the cross.

Under the government's construction, the dispute would never be ripe because, even if the transfer occurred, the government or the VFW could always argue that removal of the cross could occur at some point in the future. Such gamesmanship is not sanctioned by our prudential ripeness doctrine.

The government's view is also at odds with two statutes related to the Sunrise Rock cross, which, when read together, demonstrate that the VFW cannot remove the cross without forfeiting the property to the government. Section 8137(a) designates "*the five-foot-tall white cross*" . . . as a "national memorial." § 8137(a) (emphasis added); *see also* § 8137(b) (referring to "[t]he memorial cross"); 16 U.S.C. § 431 (note) (listing "national memorial" titled "White Cross World War I Memorial"). In other words, the cross itself is the memorial. Section 8121(e) conditions transfer of the land on the VFW's agreement to "maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war." § 8121(e). Section 8121(e) further provides that if "the conveyed property is no longer being maintained as a war memorial, the property *shall revert* to the ownership of the United States." *Id*. (emphasis added). Under these two statutes, the VFW's removal of the cross from Sunrise Rock would trigger the reversionary clause of § 8121(e) and the land would revert to the United States. Nothing permits the VFW to destroy a national memorial, remove the cross, and erect a substitute memorial. The entire scheme is directed to preservation of the cross.

To suggest that we do not yet know enough facts to decide this dispute ignores the practical reality of these statutory mandates. In *Santa Fe,* the Court rejected the school district's similarly implausible explanations for its conduct, based on the history and context of the school district's actions:

> The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. *We refuse to turn a blind eye to the context in which this policy arose,* and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

Santa Fe, 530 U.S. at 315, 120 S. Ct. 2266 (emphasis added).

The government also argues that DOI might never exercise the reversionary clause, even if the cross is removed. Again, this argument fails as § 8121(e) itself provides that the property "shall revert" if the property is no longer maintained as a "war memorial," i.e., *the cross* under § 8137. Countenancing this argument would also render the claim perpetually unripe, bringing to mind the Rule Against Perpetuities. Although the rule surely does not apply in this context, common sense should.

Even though the transfer itself is not complete, the certainty of the governmental action taking place is suf-

ficiently ripe to allow review. *See, e.g., Friedman,* 676 F.2d at 1318-19 (concluding that challenge to agency's action as violating National Environmental Policy Act was ripe where agency had granted funds for project and exempted it from certain of NEPA's requirements, despite that formal action to acquire the subject property by condemnation had not yet commenced). Thus, none of the prudential ripeness concerns weigh against our rendering a decision.[11]

II. VIOLATION OF THE PERMANENT INJUNCTION

We next address whether the district court abused its discretion in concluding that "transfer of the Preserve land containing the Latin Cross, which 'as [a] sectarian war memorial carries an inherently religious mes-

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[11] The government raises, for the first time on appeal, a second challenge under the guise of "ripeness." It argues that the district court exceeded its power by issuing a second injunction in the face the government's effort to comply with the original injunction. This is not a true ripeness consideration, but a challenge to the propriety of the district court's exercise of its equitable power to enforce its prior injunction. Because this issue is not one of justiciability or jurisdiction, the government waived the argument by failing to challenge the scope of the district court's action before that court. *See, e.g., Ritchie v. United States,* 451 F.3d 1019, 1026 & n.12 (9th Cir. 2006) (concluding that failure to raise an issue before district court resulted in waiver on appeal, particularly where the issue involved district court's broad discretion and district court "might have been able to address the problem" if raised). Even assuming no waiver, the district court acted within its broad equitable powers to enforce its prior injunction. *See, e.g., Ellis v. City of La Mesa,* 990 F.2d 1518, 1530-31 (9th Cir. 1993) (per curiam) (noting, in dispute over religious symbols on public land, that in light of changed circumstances of ownership of land (or a planned change in ownership), district court has broad equitable powers "to modify, fashion or enforce appropriate equitable relief" in assessing compliance with its prior injunction).

sage and creates an appearance of honoring only those servicemen of that particular religion' . . . is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunset Rock." *Buono III*, 364 F. Supp. 2d at 1182 (citation omitted).

A. GOVERNMENT ACTION

In *Buono II*, we noted that "the presence of a religious symbol on once-public land that has been transferred into private hands may still violate the Establishment Clause." *Buono II*, 371 F.3d at 546 (citing *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 496 (7th Cir. 2000)).[12] But we left for another day the question of "whether a transfer completed under section 8121 would pass constitutional muster." *Id.* In considering that question, we examine both the form and substance of the transaction to determine

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[12] In *Marshfield*, it was undisputed that a white, marble, fifteen-foot statue of Jesus Christ situated on city park land violated the Establishment Clause. *Id.* at 489. To remedy the violation, the city sold the statue and a small parcel of land (0.15 acres) beneath the statute to a private organization that agreed to maintain the land and the statue, including paying for the electrical service used to light the statue. *Id.* at 490. After concluding that the sale properly ended the government action with respect to the statue and the property, the court determined that the statue's presence still violated the Establishment Clause. *Id.* at 495. Based on the historic association of the land with the public park, the dedication of the land to use as a public park through a restrictive covenant, and the physical location and visual perception of the now-private property within the public park, the court concluded that a reasonable observer would perceive that the statue was on city park property and that it "constitute[d] a City endorsement of religion." *Id.* at 495-96.

whether the government action endorsing religion has actually ceased. *See Marshfield,* 203 F.3d at 491.[13]

As did the district court, based on the circumstances of this case, we consider three aspects of the land exchange under § 8121: (1) the government's continuing oversight and rights in the site containing the cross after the proposed land exchange; (2) the method for effectuating the land exchange; and (3) the history of the government's efforts to preserve the cross.

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[13] Although the Seventh Circuit 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," *Marshfield,* 203 F.3d at 491, we decline to adopt such presumption. The Supreme Court's Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry in this area. *Compare McCreary County v. American Civil Liberties Union of Kentucky,* 545 U.S. 844, 884-85, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (holding unconstitutional postings of Ten Commandments at county courthouses on the basis that counties' purpose in erecting displays demonstrated impermissible governmental endorsement of religion), *with Van Orden v. Perry,* 545 U.S. 677, 700, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005) (upholding "passive monument" inscribed with Ten Commandments on Texas State Capitol grounds based on analysis of monument's and nation's history) (Rehnquist, C.J.) (plurality opinion). *See also Van Orden,* 545 U.S. at 685 nn.4 & 5, 125 S. Ct. 2854 (citing cases under the Establishment Clause over the preceding 25 years of Supreme Court jurisprudence). Moreover, the "public function" cases discussed in *Marshfield* suggest that constitutional violations are not presumptively cured when control is transferred from public to private hands. *Evans v. Newton,* 382 U.S. 296, 301, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966) ("[W]here the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector."); *Terry v. Adams,* 345 U.S. 461, 469, 73 S. Ct. 809, 97 L. Ed. 1152 (1953) (lack of formal public control over election primary "immaterial" to analysis of constitutional violation).

1. Continuing Government Oversight and Control Over the Cross and Preserve Property

Although Congress sought to transfer the property to the VFW, a private entity, the various statutes, when read as a package, evince continuing government control. The following summary highlights that control:

- NPS retains overall management and supervision of the Preserve.
- NPS is responsible for "the supervision, management, and control" of national memorials.
- The "five-foot-tall white cross" in the Mojave National Preserve is designated as a "national memorial."
- The transfer of land to the VFW is conditioned on the VFW's maintenance of the conveyed property as a memorial to World War I veterans.
- The Secretary must carry out its duties under § 8137, which provides $10,000 for NPS to acquire and install replicas of the original cross and plaque.
- The property "shall revert" to government ownership if "it is no longer being maintained as a war memorial."

The government retains various rights of control over the cross and the property. NPS is granted statutory powers of "supervision, management, and control" of national memorials. *See* 16 U.S.C. §§ 2, 431. Thus, NPS's general supervisory and managerial responsibilities with respect to the cross remain, despite a land

transfer. *See, e.g.,* 16 U.S.C. § 1 (providing that the newly created NPS is responsible for regulating and promoting "national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose" of conservation); 16 U.S.C. § 3 ("The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of [NPS].").[14]

In addition, § 8121(a) expressly reserves NPS's management responsibilities under § 8137. *See* § 8121(a) ("Notwithstanding the conveyance of the property under this subsection, the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137."). Section 8137 not only designates the cross a national memorial, but provides for $10,000 in funds for NPS to acquire and install replicas of the original plaque and cross located at the site. *See* § 8137(a)-(c). The district court found that these provisions gave the government an easement or license over the subject property for this particular purpose. *Buono III,* 364 F. Supp. 2d at 1180. Such an easement or license reflects ongoing control over the property requiring compliance with constitutional requirements on that land. *See, e.g., First Unitarian Church of Salt Lake v. Salt Lake,* 308 F.3d 1114, 1122 (10th Cir. 2002) (holding that where the government sells land to a private religious organization but maintains a pedestrian easement on the land, the First

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[14] The government does not dispute that the Preserve is under NPS's jurisdiction as a unit of the national park system. *See* 16 U.S.C. §§ 1(c), 410*aaa*—41, 410*aaa*—42, 410aaa—46.

Amendment speech clause applies even though the private party holds title to the land).

The district court also focused on the significance of the government's retention of a reversionary interest in the property under § 8121(e). *See Hampton v. City of Jacksonville,* 304 F.2d 320, 322-23 (5th Cir. 1962) (holding that the inclusion of a reversionary clause in deeds to segregated golf courses conveyed by the city to private parties was sufficient state action to bring the golf courses within the Fourteenth Amendment because the reversionary clauses allowed the city to exercise "complete present control" over the golf courses); *Eaton v. Grubbs,* 329 F.2d 710, 714 (4th Cir. 1964) (holding that a reverter clause in a deed of trust allowed the city to effectively exercise control of the facility to ensure that it was always used "as a hospital," and that such ongoing city control over use of property constituted sufficient state action to subject the hospital to the Fourteenth Amendment's prohibitions against racial discrimination). As in *Hampton* and *Eaton,* the reversionary clause in § 8121(e) results in ongoing government control over the subject property, even after the transfer.

Although the government argues that reversionary interests are run-of-the mill clauses in contracts with the government, the commonality of such clauses does not diminish their power or effect. The fact remains that the government has an *automatic* reversionary interest in the property if it determines that the property is no longer being used as a "war memorial," which, at this juncture, is the cross itself. *See* § 8137. *See also Buono II,* 371 F.3d at 546 (noting the importance of the government's reversionary interest, and various other mechanisms by which the government can acquire public

lands, in concluding that the dispute had not been rendered moot by passage of § 8121).

As it did with respect to ripeness, the government argues that the court must await exercise of the reversionary interest before determining whether it is a real factor in government control over the property. We reiterate the import of the reversionary interest; it shows the government's ongoing control over the property and that the parties will conduct themselves in the shadow of that control. The courts in *Hampton* and *Eaton* found dispositive the ongoing control resulting from the reversionary interest; their analysis is persuasive here.

Based on the government's ongoing supervisory, maintenance and oversight responsibilities with respect to the cross and the property, coupled with the reversionary interest, the district court found that the government retains important property rights in, and "will continue to exercise substantial control over," the property on which Sunrise Rock is located, even after the land exchange. *Id*. at 1179. The government has failed to show that this determination is either clearly erroneous or an abuse of discretion.

2. METHOD FOR EFFECTUATING THE LAND EXCHANGE

Next, we examine the method of sale by which § 8121 transfers the property to a private buyer outside the normal NPS procedures for transfer of parklands. The Secretary of DOI is authorized to exchange federal land for non-federal land under its jurisdiction. *See* 16 U.S.C. § 460*l*—22(b); *see also* § 410*aaa*—56 (authorizing the Secretary to "acquire all lands and interest in lands within the boundary of the [Mojave] preserve by donation, purchase, or exchange"). In this case, however, the

decision to exchange the land was made by Congress and authorized by a provision buried in an appropriations bill. The government did not hold a hearing before enacting such exchange. *E.g., id.* § 460l—22(b) (providing that upon request, "prior to such exchange the Secretary . . . shall hold a public hearing in the area where the lands to be exchanged are located"). Nor did the government open bidding to the general public. *E.g., id.* § 460*l*—22(a). Rather, § 8121 directs that the land be transferred to the VFW, the organization that originally installed a cross on Sunrise Rock some years ago and desires the continued presence of the current cross in the Preserve. The private land being exchanged for the federal property is owned by the Sandozes, who constructed the present cross and who have actively sought to keep the cross on Sunrise Rock. *Buono III,* 364 F. Supp. 2d at 1180.

The government argues that, of all parties, the VFW is the "logical purchaser" because it originally erected the cross at the site more than seventy years ago. The government cites *Marshfield* and another Seventh Circuit case, *Mercier v. Fraternal Order of Eagles,* 395 F.3d 693 (7th Cir. 2005). In both cases, the respective courts upheld the sale of property to a private party without an open market bidding process for the land. *Marshfield,* 203 F.3d at 489-90; *Mercier,* 395 F.3d at 694-95, 702-03.

Although neither the exclusion of other purchasers, nor the fact that Congress acted outside the scope of normal agency procedures for disposing of federal park land is dispositive, both acts demonstrate the government's unusual involvement in this transaction. These facts, coupled with the government's selection of benefi-

ciaries of the land exchange who have a significant interest and personal investment in preserving the cross that has been ordered removed, provide additional evidence that the government is seeking to circumvent the injunction in this case. We see no basis to upset the district court's conclusion that the VFW was a straw purchaser. *Id*. at 1181.

3. History of the Government's Preservation Efforts

Finally, the government's long-standing efforts to preserve and maintain the cross atop Sunrise Rock lead us to the undeniable conclusion that the government's purpose in this case is to evade the injunction and keep the cross in place. In brief, when litigation was first threatened against NPS, Congress banned the use of government funds to remove the cross (§ 133), the first step in forestalling inevitable enforcement of a federal injunction. After litigation commenced, Congress designated the cross and adjoining Preserve property as a national memorial commemorating World War I (§ 8137). Congress also appropriated up to $10,000 for NPS to acquire replicas of the original cross and plaque at the site (*id*.), once more trying to bolster the presence of the cross. Once the district court enjoined display of the cross in *Buono I,* Congress again prohibited the use of federal funds to remove any World War I memorials (which, obviously, includes the cross) (§ 8056(b)); and, while the appeal was pending in *Buono II*, Congress enacted § 8121, directing the transfer of the subject property to a private organization, but maintaining effective government control over the memorial and the use of that property.

The government does not contest these legislative responses to various stages of the litigation in this case, or their purpose aimed at preserving the cross. Rather, the government attempts to diminish their importance. For example, the government argues that § 8137(c), which earmarks funds for the replica plaque and cross, was passed before the district court's injunction and that after the injunction, DOI has taken no action to acquire the replicas. While this may be true, when Congress enacted § 8121, it specifically incorporated the Secretary's duty to carry out the responsibilities set out in § 8137; Congress did not repeal the funding provisions, or any other provision permitting ongoing government control. The funding provisions offer historical evidence of the governmental responses aimed at preserving the cross, as well as ongoing legislative authorizations. In that context, it does not matter whether DOI has exercised its powers to obtain such replicas; the important fact is that Congress directed that it do so, further showing its intent to preserve and maintain the cross.

We agree with the district court that the government engaged in "herculean efforts" to preserve the cross atop Sunrise Rock. *Buono III,* 364 F. Supp. 2d at 1182. We also agree that "the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin Cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." *Id*.

B. Continuing Governmental Endorsement of Religion

Our inquiry into a purported cure of an Establishment Clause violation must also analyze whether the improper governmental endorsement of religion has ceased. *See, e.g., Marshfield,* 203 F.3d at 493-96. Be-

cause of the procedural posture of this case, we have necessarily already considered that question. We previously held that the presence of the cross in the Preserve violates the Establishment Clause. *See Buono II*, 371 F.3d at 548-50. We also concluded that a reasonable observer aware of the history of the cross would know of the government's attempts to preserve it and the denial of access to other religious symbols. *Id*. at 550. Even a less informed reasonable observer would perceive governmental endorsement of the message, given that "[n]ational parklands and preserves embody the notion of government ownership," that the Sunrise Rock area is used as a public campground, and finally, because of "the ratio of publicly-owned to privately-owned land in the Preserve." *Id*. Nothing in the present posture of the case alters those earlier conclusions. Under the statutory dictates and terms that presently stand, carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with the cross atop it—will do nothing to minimize the impermissible governmental endorsement. Nor does the proposed land exchange under § 8121 end the improper government action. Such a transfer cannot be validly executed without running afoul of the injunction.

In sum, the government has not shown the district court's factual findings to be clearly erroneous. Nor has the government shown that the district court applied erroneous legal standards. Finally, the district court's decision does not reflect any clear error of judgment. The district court did not abuse its discretion in enjoining the government from proceeding with the land exchange under 16 U.S.C. § 8121 and ordering the government to otherwise comply with its prior injunction that

it not permit the display of the Sunrise Rock cross in the Preserve.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-55852

FRANK BUONO, PLAINTIFF-APPELLEE

v.

DIRK KEMPTHORNE,[1] SECRETARY OF THE INTERIOR, IN HIS OFFICIAL CAPACITY; JONATHAN B. JARVIS, REGIONAL DIRECTOR, PACIFIC WEST REGION, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, IN HIS OFFICIAL CAPACITY; DENNIS SCHRAMM, SUPERINTENDENT, MOJAVE NATIONAL PRESERVE, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, IN HIS OFFICIAL CAPACITY,
DEFENDANTS-APPELLANTS

Argued and Submitted: Apr. 9, 2007
Filed: Sept. 6, 2007
Amended: May 14, 2008

Before: B. FLETCHER and M. MARGARET MCKEOWN, Circuit Judges, and RONALD M. WHYTE,[2] District Judge.

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[1] Dirk Kempthorne is substituted for his predecessor Gail Norton as Secretary of the Department of the Interior. Dennis Schramm is substituted for his predecessor Mary Martin as the Superintendent of the Mojave National Preserve. See Fed. R. App. P. 43(c)(2).

[2] The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

ORDER AMENDING OPINION AND
AMENDED OPINION

ORDER

The opinion filed September 6, 2007, slip op. 11793, and appearing at 502 F.3d 1069, is amended as follows:

1. At slip op. 11816 [502 F.3d at 1082], footnote 13, delete "Although the Seventh Circuit 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," *Marshfield*, 203 F.3d at 491, we decline to adopt such presumption. The Supreme Court's Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry in this area" and substitute: "The Seventh Circuit stated that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion. We are aware, however, that adherence to a formalistic standard invites manipulation. To avoid such manipulation, we look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased." *Marshfield*, 203 F.3d at 491. Read as a whole, the Seventh Circuit position looks at the issue on a transaction-by-transaction basis. We agree with this approach. However, to the extent that *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. The Supreme Court's Establishment Clause jurisprudence

recognizes the need to conduct a fact-specific inquiry in this area."

With this amendment, the panel has voted to deny Defendants-Appellants petition for panel rehearing. Judge McKeown votes to deny the petition for rehearing en banc and Judges B. Fletcher and Whyte so recommend.

The full court has been advised of Defendant-Appellant's petition for rehearing en banc, and a judge of this court requested a vote on whether this case should be reheard en banc; however, a majority of the active judges did not vote in favor of en banc consideration. Fed. R. App. P. 35. Judge Reinhardt was recused from considering the en banc issues in this case and did not participate in the court's decision.

The petition for panel rehearing and the petition for rehearing en banc are denied. No further petitions for rehearing will be entertained.

O'SCANNLAIN, Circuit Judge, dissenting from the denial of rehearing en banc, joined by TALLMAN, BYBEE, CALLAHAN, and BEA, Circuit Judges:

The 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. Because such a 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, I respectfully dissent from our order rejecting rehearing *en banc*.

I

Seventy-four years ago, the Veterans of Foreign Wars ("VFW") erected atop Sunrise Rock in the Mojave National Preserve[1] a memorial to veterans who died in World War I. *Buono v. Kempthorne,* 502 F.3d 1069, 1072 (9th Cir. 2007) ("*Buono IV*"). The memorial took the form of a cross, by which stood a wooden sign stating, "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members of Veterans of Fore[ig]n Wars, Death Valley post 2884." *Id.* The sign has since disappeared, and the cross has been replaced several times, most recently in 1998. *Id.* Each incarnation of the memorial was created and installed by private citizens; there is no indication in the record that the citizens ever received permission from the National Park Service ("NPS") to construct the memorial. *Id.*

In 2002, Frank Buono, a retired NPS employee, brought suit against the Department of the Interior, seeking to enjoin the continued presence of the cross on federal land. *Buono v. Norton,* 212 F. Supp. 2d 1202, 1204 (C.D. Cal. 2002) (*Buono I*). The district court determined that the presence of the cross on federal land violated the Establishment Clause, and entered an injunction ordering the government to remove the cross. *Id.* at 1217.

During the pendency of the appeal from *Buono I*, Congress enacted legislation ordering the Secretary of the Interior to convey a one-acre parcel of land including Sunrise Rock to the VFW in exchange for a parcel of

[1] The Mojave National Preserve is a national park that encompasses approximately 1.6 million acres of land in Southern California, approximately 90 percent of which is owned by the federal government. *Buono IV,* 502 F.3d at 1072.

privately-owned land of equal value. Pub. L. No. 108—87, § 8121(a)-(f), 117 Stat. 1054, 1100 (2003) ("Section 8121"). The transfer was conditioned on the VFW's obligation to "maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war."[2] § 8121(e). Under the terms of the statute, the government retained a reversionary interest in the property "[i]f the Secretary determines that the conveyed property is no longer being maintained as a war memorial." *Id*. Critically, however, section 8121 did not mention the existence of a cross on Sunrise Rock, nor did it require that the VFW retain the cross as part of the memorial.

The agreement also provided that "the Secretary shall continue to carry out the responsibilities of the Secretary under" Pub. L. No. 107—117 § 8137, 115 Stat. 2230 (2002). § 8121(a). Section 8137 required the Secretary to "use not more than $10,000 of funds available for the administration of the Mojave National Preserve to acquire a replica of the original memorial plaque and cross placed at the national World War I memorial." Section 8137 does not confer any other authority or obligation on the government.

Soon after the enactment of section 8121, but before the land exchange had been carried out, we affirmed the

[2] In legislation previously enacted in 2002, Congress designated "[t]he five-foot-tall white cross first erected by the [VFW] in 1934" a "national memorial commemorating United States participation in World War I and honoring the American veterans of that war." Pub. L. No. 107—117, § 8137, 115 Stat. 2230, 2278-79 (2002) ("Section 8137"); *see also* Pub. L. No. 107—248, § 8065(b), 116 Stat. 1519, 1551 (2002) (barring the use of federal funds "to dismantle national memorials commemorating United States participation in World War I").

district court's determination that the presence of the cross on federal land violated the Establishment Clause. *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004) ("*Buono II*"). However, we expressly refused to consider "whether a transfer completed under section 8121 would pass constitutional muster." *Id*. at 546.

Following *Buono II*, the government completed the land exchange. Buono then brought the present action, arguing that section 8121 violated the district court's injunction or, in the alternative, that the land transfer itself violated the Establishment Clause. *See Buono v. Norton*, 364 F. Supp. 2d 1175, 1177 (C.D. Cal. 2005) ("*Buono III*"). The district court held that the government continued to violate the injunction following the land transfer, even though ownership of the cross and the underlying land had been transferred to a private party. *See id*. at 1182. Significantly, the district court therefore concluded that "it need not consider [Buono's] other contention that the land transfer itself is an independent violation of the Establishment Clause." *Id.* at 1182 n.8.

The *Buono IV* panel affirmed, holding that the predivestment injunction remained enforceable because the government continued impermissibly to endorse religion despite the transfer of Sunrise Rock. *Buono IV*, 502 F.3d at 1086. The panel determined that such endorsement existed because: (1) the government purportedly retained control and oversight over Sunrise Rock, *id*. at 1082-83; (2) the government failed to hold an open bidding process for the land, *id*. at 1084-85; (3) the government purportedly had engaged in "long-standing efforts to preserve and maintain the cross," *id*. at 1085; and (4)

the government continued to endorse religion by permitting the cross at the site, *id*. at 1085-86.[3]

II

Buono IV squarely contradicts two Seventh Circuit opinions holding that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Freedom from Religion Found., Inc. v. City of Marshfield,* 203 F.3d 487, 491 (7th Cir. 2000) (upholding the sale of a portion of a municipal park on which stood a statue of Jesus with arms extended); *see also Mercier v. Fraternal Order of Eagles,* 395 F.3d 693, 702-03 (7th Cir. 2005) (upholding the sale of a portion of a municipal park with monument of Ten Commandments). The Seventh Circuit properly applied the principle that once publicly-owned land is transferred to a private party, government action ceases, and the Establishment Clause violation necessarily goes with it. *Marshfield,* 203 F.3d at 491 ("Because of the difference in the way we treat private speech and public speech, the determination of whom we should impute speech onto is critical.").

The "unusual circumstances" exception noted by the Seventh Circuit therefore merely incorporated well-established Supreme Court precedent concerning when state action may be imputed to private parties despite the transfer of once-public land: a continuation of state

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[3] I note that the constitutionality of the transfer itself is not at issue in this case. Because the district court solely concluded that state action persisted and therefore expressly declined to consider whether "the land transfer itself is an independent violation of the establishment clause," *Buono III,* 364 F. Supp. 2d at 1182 n.8, the *Buono IV* opinion presupposes that the transfer is not independently violative.

action may be found "when a set of unusual facts and circumstances demonstrate[ ] that the government remain[s] intimately involved in exclusively public functions that ha[ve] been delegated to private organizations." *Id*. at 492 (citing *Evans v. Newton,* 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966); *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L. Ed. 1152 (1953); *Marsh v. Alabama,* 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946)). That is, state action may be imputed to private parties in the "extraordinary circumstance[ ]" that the "transfer [has not] eliminated the actual involvement of the [government] in the daily maintenance and care of the [property]." *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 159 n. 8, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978) (discussing *Evans,* 382 U.S. at 301, 86 S. Ct. 486); *see Marshfield,* 203 F.3d at 492.

Under such precedent, the only relevant issue is whether there is continuing state action, absent which the government's intent or any atypical circumstances are of no consequence. *See Marshfield,* 203 F.3d at 491; *see also Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 779, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring) ("[A]n Establishment Clause violation must be moored in government action of some sort."); *Bd. of Educ. v. Mergens,* 496 U.S. 226, 250, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990) (plurality opinion) ("[T]here 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.") (emphasis in original). Indeed, the court in *Marshfield* upheld the relevant land sale despite the appellants' contention that it was a "'sweetheart deal' . . . concocted to circumvent the govern-

ment action requirement," precisely because the sale extinguished state action. 203 F.3d at 491; see also *Mercier*, 395 F.3d at 702 (rejecting the argument that the transfer was unconstitutional because "[t]he City Council knew that it was faced with a lawsuit seeking the removal of the Monument").

Nevertheless, the *Buono IV* opinion splits from the Seventh Circuit's rule and from binding Supreme Court precedent by creating an "unusual circumstances" test that extends well beyond the limited circumstances in which state action persists. That is, *Buono IV* improperly faults the government for:

- (1) Having the purported authority to control Sunrise Rock, despite the utter lack of evidence that it would actually contribute to the maintenance and care of the memorial;
- (2) Possessing the intent to preserve the Sunrise Rock memorial, even though such consideration is irrelevant absent state action; and
- (3) Failing to hold an open bidding process, even though *Marshfield* and the *Evans* line of cases demonstrate that state action ceases once Sunrise Rock is privately owned.

What is altogether missing in this case is *any* evidence that the government has maintained or will maintain or support the Sunrise Rock cross after the land transfer.[4] See *Evans,* 382 U.S. at 301, 86 S. Ct. 486 (relying on the fact that, following the government's resignation as

[4] As *Marshfield* plainly suggests, the reversionary clause in section 8121 does not constitute state action where the government has not "made any effort to enforce [it]." 203 F.3d at 492-93.

trustee over the relevant land, "there has been no change in municipal maintenance and concern over [it]," such that "[w]hether these public characteristics will in time be dissipated is wholly conjectural"); *Marshfield,* 203 F.3d at 493 (declining to conjecture on "the conduct of the parties following the sale of [the] property").

Accordingly, while the *Buono IV* opinion pays lip service to the "unusual circumstances" exception mandated by the *Evans* line of cases, it has bestowed upon judges the extraordinary authority to enjoin private parties from displaying religious symbols on their own land based solely on the government's pre-divestment conduct, absent any showing that the government would remain "intimately involved" in the care and maintenance of privately-owned land.

Moreover, the deference owed to Congress forecloses us from striking down legislation based upon a presumption that the government will violate the Constitution in the future. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council,* 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) ("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."); *see also Wash. State Grange v. Wash. State Republican Party,*—U.S.—, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."); *INS v. St. Cyr,* 533 U.S. 289, 300 n. 12, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001) ("[T]he elementary rule is that every reasonable con-

struction must be resorted to, in order to save a statute from unconstitutionality.") (internal quotation marks omitted). By holding that the district court could invalidate section 8121 without a finding that the government would remain "intimately involved" in the maintenance and care of the Sunrise Rock memorial post-divestment, the *Buono IV* opinion flouts such "fundamental principle of judicial restraint." *Wash. State Grange,* 128 S. Ct. at 1191.

III

Buono IV also splits from the Seventh Circuit on a second, equally important issue. After holding that the government failed the *Lynch* endorsement test by inadequately distancing itself from the Sunrise Rock memorial, the opinion upholds a remedy compelling the VFW to sacrifice *its* private rights in Sunrise Rock to cure the *government*'s constitutional violation. *Buono IV,* 502 F.3d at 1085-86; *see also Buono II,* 371 F.3d at 548-49 (discussing *Lynch v. Donnelly,* 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984)).

Yet the Seventh Circuit correctly held that a private party's rights may not be brushed aside to remedy the government's violative conduct; rather, the only proper remedy is to enjoin the government's improper conduct. *See Marshfield,* 203 F.3d at 497 ("[E]ither the Fund, a private land owner, must be estopped from exercising its right to free exercise and freedom of speech on its own property, or some way must be found to differentiate between property owned by the Fund and property owned by the City. The latter—not the former—is the appropriate solution."). Indeed, on remand in *Marshfield,* the district court required that the government erect a fence around the statue; the statue, however, was permitted to

remain on the now-private property, precisely because of the protection owed to the private landowner under the First Amendment. *See Freedom From Religion Found., Inc. v. Marshfield,* No. 98—C—270—S, 2000 WL 767376 (W.D. Wis. May 9, 2000).

By holding that a private citizen's rights may be infringed simply because his land was publicly owned in the past, or because it presently sits next to publicly-owned land, or because a hypothetical viewer might mistakenly confuse it with such land, the *Buono IV* opinion recklessly splits from the Seventh Circuit and announces a broad and unprecedented rule that should not be allowed to stand.[5]

IV

Moreover, while the *Buono IV* opinion concludes that the government will continue to endorse religion even after transferring Sunrise Rock to the VFW, the opinion fails even to *mention* the government's argument that the pre-divestment injunction was mooted by the Supreme Court's intervening decisions in *McCreary County v. ACLU,* 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005), and *Van Orden v. Perry,* 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005). Because the central considerations in *Van Orden* are almost entirely on point with the facts of *Buono IV,* such precedent forecloses the continued enforcement of the injunction.

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[5] Indeed, such reasoning equally applies to the *Buono IV* opinion's conclusion that the government retained authority to control Sunrise Rock. The appropriate remedy would be to enjoin such alleged government control, rather than to require the removal of the memorial despite the VFW's private ownership of it.

As was the case in *Van Orden,* the Sunrise Rock memorial was constructed by a private, secular organization—indeed, the memorial in this case was installed without government permission—away from a captive audience, and both were packaged with a "nonsectarian text" evincing a clearly secular purpose. *Van Orden,* 545 U.S. at 701-02, 125 S. Ct. 2854 (Breyer, J., concurring). Moreover, just as Justice Breyer's controlling concurrence in *Van Orden* found dispositive that the Ten Commandments statue had existed for 40 years before the underlying suit, the Sunrise Rock cross has existed for nearly *double* that amount of time. *See id.* at 702, 125 S. Ct. 2854 ("As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged . . . [T]hose 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting . . . to a government effort to favor a particular religious sect, primarily to promote religion . . . ."); *compare McCreary,* 545 U.S. at 851, 125 S. Ct. 2722 (Ten Commandments statues were put in place by government officials in 1999).

While the cross at Sunrise Rock takes the form of an ordinarily religious symbol, it serves the secular purpose of memorializing fallen soldiers.[6] Of course, the

[6] Indeed, there are many monuments on public land that use the cross to commemorate the sacrifice of fallen soldiers, particularly those in World War I. To name some examples: 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. These monuments surely honor sol-

monument in *Van Orden* was also an ordinarily religious symbol, but that fact alone was insufficient to constitute a violation of the Establishment Clause. *See Van Orden*, 545 U.S. at 703, 125 S. Ct. 2854 (concluding that the monument "serv[ed] a mixed but primarily nonreligious purpose"). Additionally, while the statue in *Van Orden* was placed in a "large park" with other monuments, the lack of *any* challenge to the Sunrise Rock memorial for *seven decades* surely demonstrates that the public understands and accepts its secular commemorative purpose. *See id.* at 701-02, 125 S. Ct. 2854; *Card v. City of Everett*, 520 F.3d 1009, 1021 (9th Cir. 2008) (noting that public complaints "did not surface until the monument had been in place for over thirty years").[7]

By altogether ignoring the dispositive considerations in *Van Orden*, the *Buono IV* opinion vitiates the Supreme Court's caution against applying the endorsement test in a manner that has "radical implications for our public policy." *Pinette*, 515 U.S. at 768, 115 S. Ct. 2440 (1995) (plurality opinion); *see also Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) ("There is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.") (internal quotation marks omitted).

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diers of all creeds, and no reasonable viewer would conclude that they exclude or discount the sacrifice of non-Christians.

[7] *Van Orden* certainly may not be construed as narrowly requiring such a clustering of monuments; Justice Breyer's concurrence explicitly cited other factors in determining that its presence on state land did not violate the Establishment Clause. *See Van Orden*, 545 U.S. at 701-02, 125 S. Ct. 2854.

V

In addition to discussing the foregoing inter-circuit and precedential conflicts, I must voice my strong disagreement with the merits of the *Buono IV* opinion.

A

First, *Buono IV* concludes that "the various statutes" involved in this case, "when read as a package, evince continuing government control." *Buono IV,* 502 F.3d at 1082. However, while the NPS Director, under the supervision of the Secretary of the Interior, is responsible for overall management and supervision of the Mojave National Preserve, including "the supervision, management, and control of national monuments," 16 U.S.C. § 2, such authority applies only to *federal* land, *see* 16 U.S.C. § 431 (authority to declare national monuments expressly limited to objects "situated upon the lands owned or controlled by the Government of the United States"); *see also* 16 U.S.C. § 1 ("The service thus established shall promote and regulate the use of the *Federal* areas known as national parks, monuments, and reservations hereinafter specified . . . ."") (emphasis added). Additionally, while § 431 provides that the Secretary of the Interior may accept relinquishment of privately-owned property to provide "the proper care and management" of monuments, it does not authorize government officials forcibly to take private property to provide such care or to enter private land.

Section 8121(a), likewise, provides little support for the opinion's conclusion, as it merely requires the Secretary of the Interior to carry out the duties set forth in section 8137. Section 8137 very clearly delineates the limited obligations owed by the Secretary, namely that the Secretary "acquire a replica of the original memorial

plaque and cross placed at the national World War I memorial," and "install the plaque in a suitable location on the grounds of the memorial." Simply put, if Congress wanted to retain the broad oversight suggested by the *Buono IV* opinion, it would have said as much, particularly if it was so firmly committed to ensuring that the Sunrise Rock memorial will retain its present form.[8] Indeed, it is telling that the district court came to precisely the same conclusion. *See Buono III,* 364 F. Supp. 2d at 1180 (finding that section 8121 "[gave] the Secretary access to the subject property in the form of an easement or license for a particular purpose," namely, to make a replica of the statue and install a replica of the plaque). I fail to see how such trivial, fleeting duties constitute "intimate involvement" sufficient to strike down section 8121.

B

Second, *Buono IV* faults the government for failing to hold a hearing before transferring the land to the VFW, determining that such conduct constituted the improper "exclusion of other purchasers." 502 F.3d at 1084-85. The opinion cites 16 U.S.C. § 460*l*-22 in support, but that statute is wholly irrelevant, as it solely concerns land transfers initiated by the Secretary of Interior, whereas the land exchange in question here was directly authorized by Congress. *See id*. Contrary to the suggestion in *Buono IV,* under § 460 *l*—22(b), the

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[8] Likewise, as noted, the reversionary clause in section 8121 cannot constitute state action absent an attempt by the government to exercise it. *See Marshfield,* 203 F.3d at 491-93 (holding that a covenant requiring that the transferred land be used as a public park "will not affect the validity of the transfer" because "[t]he plaintiffs do not contend that the City has made any effort to enforce this restrictive covenant").

Secretary is required to hold an open bidding process *only* "[u]pon request of a State or a political subdivision thereof, or of a party in interest, prior to such exchange." There is no indication in the record that any such party requested a hearing in this case. Thus, even if Congress is somehow bound by subordinate administrative rules, the transfer of Sunrise Rock was perfectly appropriate under the plain language of § 460*l*—22(b).[9]

In any event, the *Buono IV* opinion comes to the perplexing conclusion that Congress's failure to comply with "agency procedures" binding solely the Secretary of Interior demonstrates that *Congress* acted inappropriately in its failing to hold an open bidding process. *Buono IV,* 502 F.3d at 1085. I am unaware of any precedent suggesting that *congressional* action is in any way suspect where it fails to adhere to an *agency*'s procedural rules. I also am unaware of any precedent disparaging a land transfer for having been enacted in an appropriations bill, nor does the *Buono IV* opinion cite to *any* caselaw in support of such consideration. 502 F.3d at 1084.[10]

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[9] Even assuming that 16 U.S.C. § 460 *l*—22 is relevant to its decision, *Buono IV* errs in discussing § 460 *l*—22(a). As the district court found and the parties expressly conceded on appeal, the land exchange in this case would have been governed solely by § 460 *l*—22(b) had it been authorized by the Secretary of the Interior rather than mandated by Congress. *See Buono III,* 364 F. Supp. 2d at 1181.

[10] Moreover, here again the opinion shrugs off the conflicting holdings in *Marshfield* and *Mercier,* which "upheld the sale of property to a private party without an open market bidding process." *Buono IV,* 502 F.3d at 1084-85; *see also Marshfield,* 203 F.3d at 492-93; *Mercier,* 395 F.3d at 702-03. Indeed, as in those cases, the Sunrise Rock memorial was transferred to the most "logical purchaser," namely the organization that constructed the memorial in the first place. *Buono IV,* 502 F.3d at 1084-85. The panel fails to provide any reason for diverging

C

Third, the opinion points to "the government's long-standing efforts to preserve and maintain the cross atop Sunrise Rock" as supporting the conclusion "that the government's purpose in this case is to evade the injunction and keep the cross in place." *Buono IV,* 502 F.3d at 1085. Whether the government sought to evade the injunction in the past is collateral to the issue before us; the only relevant issue is whether the transfer rendered the injunction moot by divestment of Sunrise Rock to a private party. *See Paulson v. City of San Diego,* 475 F.3d 1047, 1048 (9th Cir. 2007) (holding that an injunction prohibiting, under the California Constitution, the continued existence of a cross on municipal property was rendered moot when the municipality transferred the land to the federal government, which is not bound by state law); *cf. Staley v. Harris County,* 485 F.3d 305, 308-09 (5th Cir. 2007) (en banc) (holding that an injunction ordering the removal of a religious monument was mooted by the municipality's decision to temporarily remove the statue). Of course, the government may moot an injunction by *curing* the violation that spurred it; *Paulson,* as well as common sense, compel no less. Accordingly, *Buono IV* faults the government for engaging in conduct that was perfectly permissible. I fail to see why the government's past, unsuccessful efforts to cure the Establishment Clause violation should foreclose it from pursuing further *legitimate* efforts.

In any event, given our opinion in *Buono II,* it is easy to understand why the government would conclude that carrying out the land transfer was an appropriate re-

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from the Seventh Circuit's holdings, short of discussing the purported conflict with "normal agency procedures."

sponse: we based our holding that the Sunrise Rock cross violated the Establishment Clause on its having been situated on "publicly-owned land," and we expressly refused to address the constitutionality of a land transfer under section 8121. *Buono II,* 371 F.3d at 548-49. Accordingly, the government reasonably concluded that we *condoned* the land transfer, notwithstanding a subsequent decision on the constitutionality of section 8121; to fault the government for carrying out section 8121 is nothing short of a judicial "bait-and-switch." If anything, transferring the land was the obvious next step in attempting to cure the violation while ensuring the continued presence of a 74-year-old war memorial. *See Mercier,* 395 F.3d at 705 ("The City is able to extricate itself completely from the implied endorsement of the purpose and content of the religious symbol, yet the Monument can remain in the location it has occupied for many years.").

VI

The *Buono IV* opinion contravenes binding Supreme Court precedent, creates a split from the Seventh Circuit on multiple issues, invests judges with the dangerous and unprecedented authority to infringe upon fundamental private rights, and rests on patently flawed reasoning. I sympathize with my colleagues' frustration that a court can lose control of its injunction by the enjoined party's unanticipated abdication of ownership, thus mooting the case. But such risk is inherent in our trade, and for good reason.

I therefore respectfully dissent from our unfortunate decision not to rehear this case *en banc.*

OPINION

MCKEOWN, Circuit Judge:

A Latin cross sits atop a prominent rock outcropping known as "Sunrise Rock" in the Mojave National Preserve ("Preserve"). Our court previously held that the presence of the cross in the Preserve—which consists of more than 90 percent federally-owned land, including the land where the cross is situated—violates the Establishment Clause of the United States Constitution. *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004). We affirmed the district court's judgment permanently enjoining the government "from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."

During the pendency of the first appeal, Congress enacted a statute directing that the land on which the cross is situated be transferred to a private organization in exchange for a parcel of privately-owned land located elsewhere in the Preserve. *See* Pub. L. No. 108—87, R. 12.1, 12.4 § 8121(a)-(f), 117 Stat. 1100 (2003). That land exchange is already in progress and would leave a little donut hole of land with a cross in the midst of a vast federal preserve. The issue we address today is whether the land exchange violates the district court's permanent injunction. We conclude that it does, and affirm the district court's order permanently enjoining the government from effectuating the land exchange and ordering the government to comply with the original injunction.

BACKGROUND[1]

I. THE MOJAVE NATIONAL PRESERVE

The Preserve encompasses approximately 1.6 million acres, or 2,500 square miles, of primarily federally-owned land in the Mojave Desert, located in Southeastern California. In 1994, the Bureau of Land Management ("BLM") transferred the land to the National Park Service ("NPS"); both the BLM and the NPS are federal agencies under the Department of the Interior ("DOI"). Within the Preserve, approximately 86,000 acres of land are privately owned and 43,000 acres belong to the State of California. Thus, slightly more than 90 percent of the land in the Preserve is federally owned. The Preserve is a "unit of the National Park System" and is given "statutory protection as a national preserve." 16 U.S.C. § 410*aaa*—41, 410*aaa*—42; *id*. § 1(c). The Preserve is under NPS jurisdiction and authority. *Id*. § 410*aaa*-46.

II. THE CROSS

The current incarnation of the cross atop Sunrise Rock is between five and eight feet tall and is constructed out of four-inch diameter metal pipes painted white. It is a Latin cross, meaning that it has two arms, one horizontal and one vertical, at right angles to one another. It is undisputed that "[t]he Latin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion." *Buono I,* 212 F. Supp. 2d at 1205.

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[1] Further background detail is found in the district court's order and our prior opinion on the merits of the Establishment Clause challenge. *See generally Buono v. Norton,* 212 F. Supp. 2d 1202 (C.D. Cal. 2002) ("*Buono I*"); *Buono,* 371 F.3d 543 (9th Cir. 2004) ("*Buono II*").

Historic records reflect that a wooden cross was built on that location as early as 1934 by the Veterans of Foreign Wars ("VFW") as a memorial to veterans who died in World War I. Photographs depict the wooden cross and signs near it stating: "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members of Veterans of Foregin [sic] Wars, Death Valley post 2884." The wooden signs are no longer present, and the original wooden cross, which is no longer standing, has been replaced by private parties several times since 1934. The cross has been an intermittent gathering place for Easter religious services since as early as 1935, and regularly since 1984.

The current version of the cross was built by Henry Sandoz, a local resident, sometime in 1998. When NPS investigated the history of the cross, Sandoz explained that he drilled holes into Sunrise Rock to bolt the cross in place, making it difficult to remove. Sandoz did not receive a permit from NPS to construct the cross.

Following *Buono I's* injunction against display of the cross, the cross has been covered by a plywood box. When uncovered, the cross is visible from vehicles traveling on Cima Road, which passes through the Preserve, from a distance of approximately 100 yards away. No sign indicates that the cross was or is intended to act as a memorial for war veterans.

III. Litigation over the Cross and the Congressional Response

The current controversy surrounding the cross surfaced in 1999, when NPS received a request from an individual seeking to build a "stupa" (a dome-shaped Buddhist shrine) on a rock outcropping at a trailhead located near the cross. NPS denied that request, citing

36 C.F.R. § 2.62(a)[2] as prohibiting the installation of a memorial without authorization. A hand-written note on the denial letter warns that "[a]ny attempt to erect a stupa will be in violation of Federal Law and subject you to citation and/or arrest." The letter also indicates that "[c]urrently there is a cross on [a] rock outcrop located on National Park Service lands . . . . It is our intention to have the cross removed."

In 1999, NPS undertook a study of the history of the cross. NPS determined that neither the cross nor the property on which it is situated qualifies for inclusion in the National Register of Historic Places. Specifically, NPS recognized that the cross itself "has been replaced many times and the plaque that once accompanied it (even though it is not known if it is original) has been removed." Also, the property does not qualify as an historical site because, among other things, "the site is used for religious purposes as well as commemoration."

Following the announcement by NPS of its intention to remove the cross, the United States Congress passed a series of laws, described below, to preserve the Sunrise Rock cross. The first piece of legislation, enacted in December 2000, provided that no government funds could be used to remove the cross. *See* Pub. L. No. 106—554 § 133, 114 Stat. 2763A—230 (2000) (hereafter "§ 133").[3]

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[2] The regulation provides that: "The installation of a monument, memorial, tablet, structure, or other commemorative installation in a park area without the authorization of the Director is prohibited." 36 C.F.R. § 2.62(a).

[3] "None of the funds in this or any other Act may be used by the Secretary of the Interior to remove *the five-foot-tall white cross* located within the boundary of the Mojave National Preserve in southern Cali-

A. *Buono I*

Frank Buono[4] filed suit in March 2001 against the Secretary of the DOI, the Regional Director of NPS, and the Superintendent of the Preserve (collectively, "NPS" or "Defendants"). The district court concluded that the presence of the cross in the Preserve violates the Establishment Clause. *See Buono I,* 212 F. Supp. 2d at 1215-17. In July 2002, the court entered a permanent injunction ordering that the "Defendants, their employees, agents, and those in active concert with Defendants, are hereby permanently restrained and enjoined from permitting display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."[5]

B. Designation of the Cross as a National Memorial

In January 2002, while this matter was pending in district court, Congress passed a defense appropriations bill, which included a section designating the Sunrise Rock cross as a "national memorial." *See* Pub. L. No. 107-117 § 8137, 115 Stat. 2278-79 (2002), *codified at* 16

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fornia first erected in 1934 by the Veterans of Foreign Wars along Cima Road approximately 11 miles south of Interstate 15." § 113 (emphasis added).

[4] Buono is a retired NPS employee who worked for the agency from 1972 to 1997. From September 1994 to December 1995, Buono worked as the Assistant Superintendent of the Preserve.

[5] We granted the government's motion to stay the injunction pending appeal, insofar as the injunction required NPS to immediately remove or dismantle the cross. The stay did not apply to any "alternative methods" for complying with, or additional obligations imposed by, the district court's order. *See Buono II,* 371 F.3d at 545 n.1 (discussing stay orders). During the appeal, NPS covered the cross, first with a large tarpaulin and later with a plywood box, which the government asserts will remain in place pending resolution of this action.

U.S.C. § 410*aaa*—56 (note) (hereafter "§ 8137"). That section provides:

> (a) DESIGNATION OF NATIONAL MEMORIAL.—*The five-foot-tall white cross* first erected by the Veterans of Foreign Wars of the United States in 1934 along Cima Road in San Bernardino County, California, and now located within the boundary of the Mojave National Preserve, as well as a limited amount of adjoining Preserve property to be designated by the Secretary of the Interior, *is hereby designated as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.*
>
> (b) LEGAL DESCRIPTION.—The memorial cross referred to in subsection (a) is located at latitude 35.316 North and longitude 115.548 West. The exact acreage and legal description of the property to be included by the Secretary of the Interior in the national World War I memorial shall be determined by a survey prepared by the Secretary.
>
> (C) REINSTALLATION OF MEMORIAL PLAQUE.—The Secretary of the Interior shall use not more than *$10,000 of funds* available for the administration of the Mojave National Preserve to *acquire a replica of the original memorial plaque and cross placed at the national World War I memorial* designated by subsection (a) and to install the plaque in a suitable location on the grounds of the memorial.

Id. (emphases added). The cross is designated the "White Cross World War I Memorial." 16 U.S.C. § 431 (note).

NPS is statutorily charged with "the supervision, management, and control of the several national parks and national monuments." 16 U.S.C. § 2. National "memorials" fall within the broader category of national "monuments." *See* 16 U.S.C. § 431 (note) (identifying recognized national monuments, including various categories of "national monuments" and "national memorials").

In October 2002, less than three months after the district court's injunction, in legislation aimed at the Sunrise Rock cross, Congress passed a defense appropriations bill that included a provision barring the use of federal funds "to dismantle national memorials commemorating United States participation in World War I." Pub. L. No. 107—248 § 8065(b), 116 Stat. 1551 (2002) (hereafter "§ 8065").

C. *BUONO II* AND PASSAGE OF § 8121

The government appealed the district court's order and injunction. In September 2003, one month after oral argument before a panel of our court but before a decision issued, Congress enacted another defense appropriations bill that included a land exchange agreement regarding the Sunrise Rock cross. *See* Pub. L. No. 108—87 § 8121(a)-(f), 117 Stat. 1100 (2003), *codified at* 16 U.S.C. § 410*aaa*—56 (note), (hereafter "§ 8121"). The statute provides:

> (a) EXCHANGE REQUIRED.—*In exchange for the private property described in subsection (b),* the Secretary of the Interior *shall convey* to the Veterans Home of California—Barstow, Veterans of Foreign Wars Post # 385E (in this section referred to as the "recipient"), all right, title, and interest of the

> United States in and to *a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated* (by section 8137 of the Department of Defense Appropriations Act, 2002 (Public Law 107—117; 115 Stat. 2278)) *as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.* Notwithstanding the conveyance of the property under this subsection, *the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137.*
>
> (b) CONSIDERATION.—As consideration for the property to be conveyed by the Secretary under subsection (a), Mr. and Mrs. Henry Sandoz of Mountain Pass, California, have agreed to convey to the Secretary a parcel of real property consisting of approximately five acres, identified as parcel APN 569—051—44, and located in the west 1/2 of the northeast 1/4 of the northwest 1/4 of the northwest 1/4 of section 11, township 14 north, range 15 east, San Bernardino base and meridian.

§ 8121(a)-(b) (emphases added). The government retains a reversionary interest in the property as follows:

> (e) REVERSIONARY CLAUSE.—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 and honoring the American veterans of that war. *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(e) (emphasis added). The cross-reference in § 8121(a) to § 8137 pertains to use of federal funds to acquire a replica cross and plaque. *See* § 8197(c). The land transfer was underway when the district court enjoined its enforcement, as described below.

In June 2004, in affirming the district court's permanent injunction, we held that the presence of the cross in the Preserve violates the Establishment Clause, agreeing with the district court that this case is "squarely controlled" by *Separation of Church and State Committee v. City of Eugene*, 93 F.3d 617 (9th Cir. 1996) ("*SCSC*"). *Buono II*, 371 F.3d at 548. In *SCSC*, we reasoned that the presence of a cross on city land, even where it bore a plaque dedicating the cross as a war memorial to veterans, 93 F.3d at 618, violated the Establishment Clause because "the presence of the cross may reasonably be perceived as governmental endorsement of Christianity." *Id*. at 620.

The government's several attempts to distinguish *SCSC* were not persuasive. For example, we held that it was "of no moment" that the cross in *SCSC* was significantly taller, located in an urban area, or illuminated during certain holidays:

> Though not illuminated, the cross here is bolted to a rock outcropping rising fifteen to twenty feet above grade and is visible to vehicles on the adjacent road from a hundred yards away. Even if the shorter height of the Sunrise Rock cross means that it is visible to fewer people than was the *SCSC* cross, this makes it no less likely that the Sunrise Rock cross will project a message of government endorsement. . . . Nor does the remote location of Sunrise Rock make a difference. That the Sunrise Rock cross is

> not near a government building is insignificant—neither was the *SCSC* cross. What is significant is that the Sunrise Rock cross, like the *SCSC* cross, sits on public park land. *National parklands and preserves embody the notion of government ownership as much as urban parkland, and the remote location of Sunrise Rock does nothing to detract from that notion.*

Buono II, 371 F.3d at 549-50 (emphasis added).

We also held that a reasonable observer, even without knowing whether Sunrise Rock is federally owned, *would believe—or at least suspect*—that the cross rests on public land because of the vast size of the Preserve, more than 90 percent of which *is* federally owned. *Id.* at 550 (citing reasonable observer test set forth in *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 780-81, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring)). A reasonably informed observer aware of the history of the Sunrise Rock cross would know not only that the cross was erected by private individuals (which the government argued favored its view), but also that Congress has taken various measures to preserve the cross, i.e., designating it a war memorial, prohibiting use of federal funds to remove it, and denying similar access for a Buddhist shrine. *Id.*

Acknowledging the passage of § 8121 while the appeal was pending, we addressed the government's challenge that § 8121 rendered the appeal moot or would soon do so. We rejected the government's mootness challenge for two reasons: First, we held that the case was not moot because the land transfer had not yet taken effect. *Id.* at 545. Second, because "[m]ere voluntary cessation of allegedly illegal conduct does not moot

a case," we held that *even if* the land transfer had taken effect, the government still had not carried its heavy burden to show mootness. *Id.* at 546. Even if the land were transferred under § 8121(a), it *may revert* to the government under § 8121(e), or as provided in other statutes. In particular, we noted that 16 U.S.C. § 431 authorizes relinquishment of lands containing "national monuments" to the federal government, and 16 U.S.C. § 410*aaa*—56 authorizes the Department of the Interior to "acquire all lands and interest in lands within the boundary of the [Mojave] preserve by donation, purchase, or exchange." *Id.* at 546 (discussing § 8121, 16 U.S.C. §§ 431, 410*aaa*—56).

D. *BUONO III*

Despite the injunction against display of the cross in the Preserve, the government began moving forward with the mechanics of the land exchange under § 8121. Buono then moved to enforce the district court's prior injunction, or modify it to prohibit the land exchange as a violation of the Establishment Clause. In April 2005, the district court granted Buono's motion to enforce the injunction, and denied as moot the request to amend the permanent injunction. *See Buono v. Norton*, 364 F. Supp. 2d 1175, 1177, 1182 & n.8 (C.D. Cal. 2005) ("*Buono III*"). According to the district court, "the transfer of the Preserve land containing the Latin Cross which as [a] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunrise Rock." *Id.* at 1182 (citation and quotation marks omitted). The district court deemed the exchange

"invalid" and permanently enjoined the government "from implementing the provisions of Section 8121 of Public Law 108—87" and ordered the government "to comply forthwith with the judgment and permanent injunction entered by th[e] court on July 24, 2002." *Id.* It is that decision that the government now appeals.

STANDARD OF REVIEW

We review for abuse of discretion the district court's order enforcing its prior injunction. *Paulson v. City of San Diego,* 294 F.3d 1124, 1128 (9th Cir. 2002). A district court abuses its discretion in this regard if "it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.*

ANALYSIS

In the district court, Buono advanced two alternative arguments challenging the land exchange under § 8121. First, Buono argued that the land exchange is an attempt to evade the permanent injunction. Alternatively, he argued that the land exchange itself violates the Establishment Clause because it is an improper governmental endorsement of religion. The district court's holding is grounded only on the first basis, i.e., that the land exchange is a sham transaction with the purpose of permitting continued display of the cross in violation of the permanent injunction. On appeal, the government contends that § 8121 was a bona fide attempt by Congress to comply with the injunction. The government also argues that because it was not given the opportunity to fully effectuate the transfer, there are unknown facts that render this controversy "unripe" for judicial review.

Turning first to the government's ripeness challenge, we conclude that this controversy is ripe for review. As to the second question, the district court did not abuse its discretion in enforcing the injunction. We agree that the exchange effectuated by § 8121 violates the injunction, which prohibits the display of the Latin cross because it runs afoul of the Establishment Clause.

I. RIPENESS

Ripeness is a justiciability requirement that seeks to avoid premature litigation of disputes. *Thomas v. Union Carbide Agr. Products Co.,* 473 U.S. 568, 579-81, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985) ("[R]ipeness is peculiarly a question of timing.") (citations omitted). The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.,* 509 U.S. 43, 57 n.18, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993); *accord Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1138-42 (9th Cir. 2000) (en banc) (discussing constitutional and prudential components of ripeness). The ripeness question we address is whether it is premature to consider a violation of the injunction before completion of the land exchange.

A. CONSTITUTIONAL COMPONENT OF RIPENESS

The constitutional component of ripeness—that there be an Article III "case or controversy"—requires a concrete impact upon the parties arising from the dispute. *Union Carbide,* 473 U.S. at 579, 105 S. Ct. 3325. This analysis is similar to the injury-in-fact inquiry under the standing doctrine. *See Anchorage Equal Rights Comm'n,* 220 F.3d at 1138-39.

The government argues that before litigation proceeds, it should be given an opportunity to try to execute the land exchange in compliance with the prior injunction and the government's constitutional obligations. Buono responds that the "concrete" injury ripe for review is that the land transaction's very structure evidences its lack of a secular purpose and its effect continues the government's improper endorsement of religion that we already held exists.

This case can best be described as an ongoing controversy about the cross, the specifics of which shift with successive congressional enactments. The controversy is neither premature nor will it go away on its own. Given the specifics of § 8121, it is no answer to say that the land exchange is not complete. It is, as the district court notes, "already in progress," and the government intends to complete it. *Buono III,* 364 F. Supp. 2d at 1178. Buono's challenge to the present terms of the exchange is not a "hypothetical request[ ] for an advisory opinion." *Anchorage Equal Rights Comm'n,* 220 F.3d at 1141.

The Supreme Court has held that pre-enforcement review of a statute is appropriate where the governmental purpose in enacting the statute evidences an improper endorsement of religion in violation of the Establishment Clause. *See Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 313-14, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000). It is no legal leap to conclude that pre-enforcement review is similarly appropriate where the purpose of a statute is to evade an injunction intended to end an ongoing Establishment Clause violation.

In *Santa Fe,* the Supreme Court considered the ripeness of a facial challenge to a school district's policy purportedly allowing school prayer. *Id.* The policy permit-

ted students (a) to vote on whether there should be a student-delivered invocation given at the start of high school football games, and (b) to later vote to select the one student who would deliver the invocation at all games throughout the year. *Id*. at 297-98, 120 S. Ct. 2266. The school district argued that it was premature to review the policy because there "can be no certainty that any of the statements or invocations will be religious." *Id*. at 313, 120 S. Ct. 2266. Rejecting that challenge, the Court concluded that while forcing a student "to participate in religious worship" was a serious constitutional injury, so too was the "mere passage by [the school district] of a policy that has the purpose and perception of government establishment of religion . . . . [and] the implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote." *Id*. at 313-14, 120 S. Ct. 2266 (recognizing that "the Constitution also requires that we keep in mind 'the myriad, subtle ways in which Establishment Clause values can be eroded.'") (quoting *Lynch v. Donnelly,* 465 U.S. 668, 694, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (O'Connor, J., concurring)). Thus, the mere enactment of the policy, particularly in light of the school district's conduct, was a sufficient constitutional injury to warrant pre-enforcement review, and ultimately an injunction against implementation of the policy. *Id*. at 316, 120 S. Ct. 2266.[6] Importantly, in analyzing ripe

[6] Our cases have similarly held that passage of a statute and putting it into effect (even if the effect is not complete) gives rise to a dispute ripe for judicial review. In *Saint Elizabeth Community Hospital v. NLRB,* 708 F.2d 1436 (9th Cir. 1983), a church-run hospital challenged the National Labor Relations Board's jurisdiction over it as a violation of the Establishment Clause. *Id*. at 1440. Congress had amended the National Labor Relations Act expressly conferring jurisdiction over

ness, the Court looked to the history of the school district's conduct in enacting the policy and the true purpose of the policy. *Id*. at 314-15, 120 S. Ct. 2266.

The analogy to *Santa Fe* is apt. Here, both the district court and this court have concluded that a grave constitutional injury *already exists.* The permitting display of the Sunrise Rock cross in the Preserve is an impermissible governmental endorsement of religion. *See Buono II,* 371 F.3d at 548-50. As discussed further below, the constitutional injury will persist after—and as a result of—the land exchange effectuated under § 8121. This is so because (among other things) § 8121 and other applicable statutes[7] permit the government's significant *ongoing control* of and involvement with the cross and the property on which it is situated. *See Santa Fe,* 530 U.S. at 314-15, 120 S. Ct. 2266 (concluding that the text of the school district's policy alone reveals the extent of school involvement in the election of the student speaker and the content of the message to be delivered). And, the government's repeated actions in preserving the cross (and forestalling enforcement of the injunction) further evidence its goal of keeping the cross in place, *see* §§ 133, 8137, 8056(b), 8121, just as the school district in *Santa Fe* acted with the purpose of maintaining a

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nonprofit hospitals without excepting those run by religious institutions. We concluded that the question of NLRB's jurisdiction was ripe for review. *Id*. In *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil & Gas Conservation of the State of Montana,* 792 F.2d 782 (9th Cir. 1986), we held that the claim of Indian tribes challenging the validity of a cooperative agreement regarding agency jurisdiction to advise the tribes about oil and gas rights was sufficiently ripe where the final cooperative agreement had been placed into operation by the agreeing agencies. *Id*. at 788-89.

[7] *See* § 8137(a)-(c), 16 U.S.C. §§ 431, 410*aaa*—56.

school policy permitting prayer at school events. *Santa Fe,* 530 U.S. at 314-15, 120 S. Ct. 2266.[8]

Buono has alleged a sufficient constitutional injury to overcome any argument that his challenge to § 8121 is unripe. *See Santa Fe,* 530 U.S. at 314-15, 120 S. Ct. 2266. The challenge in this case presents a concrete injury, rather than an "imaginary" or "speculative" one.[9]

B. Prudential Component of Ripeness

Even where a concrete case or controversy is present, we consider whether, because of prudential concerns, we should decline to exercise jurisdiction. *See Union Carbide,* 473 U.S. at 581, 105 S. Ct. 3325; *Anchorage Equal Rights Comm'n,* 220 F.3d at 1141. We evaluate two interrelated factors: (a) the hardship that the party seeking relief will suffer from withholding judicial

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[8] The various governmental actions are discussed in further detail *infra* § II.A.3.

[9] The government can hardly rely, as a predicate for a ripeness challenge, on its attempt to temporarily comply with the permanent injunction by covering the cross with a wooden box. If that were the final compliance mechanism, the district court could determine whether it is sufficient. Significantly, however, the government is proceeding with the land exchange. *See Parents Involved in Community Schools v. Seattle School Dist. No. 1,* —U.S.—, 127 S. Ct. 2738, 2751, 168 L. Ed. 2d 508 (2007) (holding that school district's voluntary cessation of use of racial tie breaker pending outcome of litigation did not negate Article III standing of plaintiff group members challenging policy, as the school continued to vigorously defend the policy in court); *Friends of Earth, Inc. v. Laidlaw Envt'l Svcs. (TOC), Inc.,* 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (holding that voluntary cessation of wrongful conduct, either by defendant's achievement of substantial compliance with its permit requirements or its shutdown of offending facility, did not moot controversy over defendant's compliance with Clean Water Act because the offending conduct had not permanently ceased).

action, and (b) the fitness of the issues in the record for judicial review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

This case easily satisfies both prudential components. As to the harm, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Union Carbide*, 473 U.S. at 581, 105 S. Ct. 3325 (internal quotations and citations omitted).[10] The hardship resulting from the continuation of an Establishment Clause violation enjoined by the court is sufficient.

A claim is "fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Exxon Corp. v. Heinze*, 32 F.3d 1399, 1404 (9th Cir. 1994) (citations omitted). These requirements are satisfied here.

The key issue is primarily a question of law, i.e., whether the land exchange under § 8121 violates the district court's order permanently enjoining the government from permitting display of the cross in the Preserve. *See, e.g., Santa Fe*, 530 U.S. at 314, 120 S. Ct. 2266 (permitting facial challenge to school district's policy prior to enforcement of the policy based largely on the Court's ability to construe the constitutionality of

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[10] Unlike in *Anchorage Equal Rights Comm'n*, where the plaintiffs sought review of a housing law "in a vacuum and in the absence of any particular victims of discrimination," 220 F.3d at 1142, in this case there is a concrete victim—Buono—and the statutes are not being analyzed in a vacuum. *See, e.g., Buono III*, 364 F. Supp. 2d at 1181-82 (discussing history of government's preservation efforts regarding the cross).

the policy's purpose as a legal matter); *Union Carbide,* 473 U.S. at 581, 105 S. Ct. 3325 (granting pre-enforcement review of constitutionality of administrative scheme requiring registrants to participate in binding arbitration of disputes with limited judicial review because party's challenge raised solely legal issues).

Next, we assess the state of the factual record, an inquiry that overlaps with (and in this case collapses into) the third component, the finality of the decision. *Friedman Bros. Inv. Co. v. Lewis,* 676 F.2d 1317, 1319 (9th Cir. 1982). The government argues that the record is incomplete because certain factual scenarios, as yet unknown, could occur at some time in the future. The government illustrates its claim by positing two potential scenarios that may occur rendering decision on this appeal premature. Upon examination, neither proposed scenario persuades us that we should delay decision in this matter.

First, the government argues that once the land exchange is complete the VFW *might* at some point in the future *remove* the cross, but continue to maintain the property as a "war memorial" as provided under § 8121. Thus, according to the government, the court should not decide whether the injunction is violated unless and until the land exchange is complete and the VFW has an opportunity to decide whether to maintain or remove the cross.

Under the government's construction, the dispute would never be ripe because, even if the transfer occurred, the government or the VFW could always argue that removal of the cross could occur at some point in the future. Such gamesmanship is not sanctioned by our prudential ripeness doctrine.

The government's view is also at odds with two statutes related to the Sunrise Rock cross, which, when read together, demonstrate that the VFW cannot remove the cross without forfeiting the property to the government. Section 8137(a) designates "*the five-foot-tall white cross*" . . . as a "national memorial." § 8137(a) (emphasis added); *see also* § 8137(b) (referring to "[t]he memorial cross"); 16 U.S.C. § 431 (note) (listing "national memorial" titled "White Cross World War I Memorial"). In other words, the cross itself is the memorial. Section 8121(e) conditions transfer of the land on the VFW's agreement to "maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war." § 8121(e). Section 8121(e) further provides that if "the conveyed property is no longer being maintained as a war memorial, the property *shall revert* to the ownership of the United States." *Id*. (emphasis added). Under these two statutes, the VFW's removal of the cross from Sunrise Rock would trigger the reversionary clause of § 8121(e) and the land would revert to the United States. Nothing permits the VFW to destroy a national memorial, remove the cross, and erect a substitute memorial. The entire scheme is directed to preservation of the cross.

To suggest that we do not yet know enough facts to decide this dispute ignores the practical reality of these statutory mandates. In *Santa Fe,* the Court rejected the school district's similarly implausible explanations for its conduct, based on the history and context of the school district's actions:

> The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High

> School student understands clearly—that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. *We refuse to turn a blind eye to the context in which this policy arose,* and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

Santa Fe, 530 U.S. at 315, 120 S. Ct. 2266 (emphasis added).

The government also argues that DOI might never exercise the reversionary clause, even if the cross is removed. Again, this argument fails as § 8121(e) itself provides that the property "shall revert" if the property is no longer maintained as a "war memorial," i.e., *the cross* under § 8137. Countenancing this argument would also render the claim perpetually unripe, bringing to mind the Rule Against Perpetuities. Although the rule surely does not apply in this context, common sense should.

Even though the transfer itself is not complete, the certainty of the governmental action taking place is sufficiently ripe to allow review. *See, e.g., Friedman,* 676 F.2d at 1318-19 (concluding that challenge to agency's action as violating National Environmental Policy Act was ripe where agency had granted funds for project and exempted it from certain of NEPA's requirements, despite that formal action to acquire the subject property by condemnation had not yet commenced). Thus,

none of the prudential ripeness concerns weigh against our rendering a decision.[11]

II. VIOLATION OF THE PERMANENT INJUNCTION

We next address whether the district court abused its discretion in concluding that "transfer of the Preserve land containing the Latin Cross, which 'as [a] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion' . . . is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunset Rock." *Buono III,* 364 F. Supp. 2d at 1182 (citation omitted).

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[11] The government raises, for the first time on appeal, a second challenge under the guise of "ripeness." It argues that the district court exceeded its power by issuing a second injunction in the face the government's effort to comply with the original injunction. This is not a true ripeness consideration, but a challenge to the propriety of the district court's exercise of its equitable power to enforce its prior injunction. Because this issue is not one of justiciability or jurisdiction, the government waived the argument by failing to challenge the scope of the district court's action before that court. *See, e.g., Ritchie v. United States,* 451 F.3d 1019, 1026 & n.12 (9th Cir. 2006) (concluding that failure to raise an issue before district court resulted in waiver on appeal, particularly where the issue involved district court's broad discretion and district court "might have been able to address the problem" if raised). Even assuming no waiver, the district court acted within its broad equitable powers to enforce its prior injunction. *See, e.g., Ellis v. City of La Mesa,* 990 F.2d 1518, 1530-31 (9th Cir. 1993) (per curiam) (noting, in dispute over religious symbols on public land, that in light of changed circumstances of ownership of land (or a planned change in ownership), district court has broad equitable powers "to modify, fashion or enforce appropriate equitable relief" in assessing compliance with its prior injunction).

A. GOVERNMENT ACTION

In *Buono II,* we noted that "the presence of a religious symbol on once-public land that has been transferred into private hands may still violate the Establishment Clause." *Buono II,* 371 F.3d at 546 (citing *Freedom from Religion Found., Inc. v. City of Marshfield,* 203 F.3d 487, 496 (7th Cir. 2000)).[12] But we left for another day the question of "whether a transfer completed under section 8121 would pass constitutional muster." *Id.* In considering that question, we examine both the form and substance of the transaction to determine whether the government action endorsing religion has actually ceased. *See Marshfield,* 203 F.3d at 491.[13]

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[12] In *Marshfield,* it was undisputed that a white, marble, fifteen-foot statue of Jesus Christ situated on city park land violated the Establishment Clause. *Id.* at 489. To remedy the violation, the city sold the statue and a small parcel of land (0.15 acres) beneath the statue to a private organization that agreed to maintain the land and the statue, including paying for the electrical service used to light the statue. *Id.* at 490. After concluding that the sale properly ended the government action with respect to the statue and the property, the court determined that the statue's presence still violated the Establishment Clause. *Id.* at 495. Based on the historic association of the land with the public park, the dedication of the land to use as a public park through a restrictive covenant, and the physical location and visual perception of the now-private property within the public park, the court concluded that a reasonable observer would perceive that the statue was on city park property and that it "constitute[d] a City endorsement of religion." *Id.* at 495-96.

[13] The Seventh Circuit stated that "[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion. We are aware, however, that adherence to a formalistic standard invites manipulation. To avoid such manipulation, we look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased." *Marshfield,* 203 F.3d at 491. Read as a whole, the

As did the district court, based on the circumstances of this case, we consider three aspects of the land exchange under § 8121: (1) the government's continuing oversight and rights in the site containing the cross after the proposed land exchange; (2) the method for effectuating the land exchange; and (3) the history of the government's efforts to preserve the cross.

Seventh Circuit position looks at the issue on a transaction-by-transaction basis. We agree with this approach. However, to the extent that *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. The Supreme Court's Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry in this area. *Compare McCreary County v. American Civil Liberties Union of Kentucky,* 545 U.S. 844, 884-85, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (holding unconstitutional postings of Ten Commandments at county courthouses on the basis that counties' purpose in erecting displays demonstrated impermissible governmental endorsement of religion), *with Van Orden v. Perry,* 545 U.S. 677, 700, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005) (upholding "passive monument" inscribed with Ten Commandments on Texas State Capitol grounds based on analysis of monument's and nation's history) (Rehnquist, C.J.) (plurality opinion). *See also Van Orden,* 545 U.S. at 685 nn.4 & 5, 125 S. Ct. 2854 (citing cases under the Establishment Clause over the preceding 25 years of Supreme Court jurisprudence). Moreover, the "public function" cases discussed in *Marshfield* suggest that constitutional violations are not presumptively cured when control is transferred from public to private hands. *Evans v. Newton,* 382 U.S. 296, 301, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966) ("[W]here the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector."); *Terry v. Adams,* 345 U.S. 461, 469, 73 S. Ct. 809, 97 L. Ed. 1152 (1953) (lack of formal public control over election primary "immaterial" to analysis of constitutional violation).

1. Continuing Government Oversight and Control Over the Cross and Preserve Property

Although Congress sought to transfer the property to the VFW, a private entity, the various statutes, when read as a package, evince continuing government control. The following summary highlights that control:

- NPS retains overall management and supervision of the Preserve.
- NPS is responsible for "the supervision, management, and control" of national memorials.
- The "five-foot-tall white cross" in the Mojave National Preserve is designated as a "national memorial."
- The transfer of land to the VFW is conditioned on the VFW's maintenance of the conveyed property as a memorial to World War I veterans.
- The Secretary must carry out its duties under § 8137, which provides $10,000 for NPS to acquire and install replicas of the original cross and plaque.
- The property "shall revert" to government ownership if "it is no longer being maintained as a war memorial."

The government retains various rights of control over the cross and the property. NPS is granted statutory powers of "supervision, management, and control" of national memorials. *See* 16 U.S.C. §§ 2, 431. Thus, NPS's general supervisory and managerial responsibilities with respect to the cross remain, despite a land transfer. *See, e.g.*, 16 U.S.C. § 1 (providing that the new-

ly created NPS is responsible for regulating and promoting "national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose" of conservation); 16 U.S.C. § 3 ("The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of [NPS].").[14]

In addition, § 8121(a) expressly reserves NPS's management responsibilities under § 8137. *See* § 8121(a) ("Notwithstanding the conveyance of the property under this subsection, the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137."). Section 8137 not only designates the cross a national memorial, but provides for $10,000 in funds for NPS to acquire and install replicas of the original plaque and cross located at the site. *See* § 8137(a)-(c). The district court found that these provisions gave the government an easement or license over the subject property for this particular purpose. *Buono III,* 364 F. Supp. 2d at 1180. Such an easement or license reflects ongoing control over the property requiring compliance with constitutional requirements on that land. *See, e.g., First Unitarian Church of Salt Lake v. Salt Lake,* 308 F.3d 1114, 1122 (10th Cir. 2002) (holding that where the government sells land to a private religious organization but maintains a pedestrian easement on the land, the First Amendment speech clause applies even though the private party holds title to the land).

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[14] The government does not dispute that the Preserve is under NPS's jurisdiction as a unit of the national park system. *See* 16 U.S.C. §§ 1(c), 410*aaa*—41, 410*aaa*—42, 410aaa—46.

The district court also focused on the significance of the government's retention of a reversionary interest in the property under § 8121(e). *See Hampton v. City of Jacksonville,* 304 F.2d 320, 322-23 (5th Cir. 1962) (holding that the inclusion of a reversionary clause in deeds to segregated golf courses conveyed by the city to private parties was sufficient state action to bring the golf courses within the Fourteenth Amendment because the reversionary clauses allowed the city to exercise "complete present control" over the golf courses); *Eaton v. Grubbs,* 329 F.2d 710, 714 (4th Cir. 1964) (holding that a reverter clause in a deed of trust allowed the city to effectively exercise control of the facility to ensure that it was always used "as a hospital," and that such ongoing city control over use of property constituted sufficient state action to subject the hospital to the Fourteenth Amendment's prohibitions against racial discrimination). As in *Hampton* and *Eaton,* the reversionary clause in § 8121(e) results in ongoing government control over the subject property, even after the transfer.

Although the government argues that reversionary interests are run-of-the mill clauses in contracts with the government, the commonality of such clauses does not diminish their power or effect. The fact remains that the government has an *automatic* reversionary interest in the property if it determines that the property is no longer being used as a "war memorial," which, at this juncture, is the cross itself. *See* § 8137. *See also Buono II,* 371 F.3d at 546 (noting the importance of the government's reversionary interest, and various other mechanisms by which the government can acquire public lands, in concluding that the dispute had not been rendered moot by passage of § 8121).

As it did with respect to ripeness, the government argues that the court must await exercise of the reversionary interest before determining whether it is a real factor in government control over the property. We reiterate the import of the reversionary interest; it shows the government's ongoing control over the property and that the parties will conduct themselves in the shadow of that control. The courts in *Hampton* and *Eaton* found dispositive the ongoing control resulting from the reversionary interest; their analysis is persuasive here.

Based on the government's ongoing supervisory, maintenance and oversight responsibilities with respect to the cross and the property, coupled with the reversionary interest, the district court found that the government retains important property rights in, and "will continue to exercise substantial control over," the property on which Sunrise Rock is located, even after the land exchange. *Id*. at 1179. The government has failed to show that this determination is either clearly erroneous or an abuse of discretion.

2. METHOD FOR EFFECTUATING THE LAND EXCHANGE

Next, we examine the method of sale by which § 8121 transfers the property to a private buyer outside the normal NPS procedures for transfer of parklands. The Secretary of DOI is authorized to exchange federal land for non-federal land under its jurisdiction. *See* 16 U.S.C. § 460*l*—22(b); *see also* § 410*aaa* 56 (authorizing the Secretary to "acquire all lands and interest in lands within the boundary of the [Mojave] preserve by donation, purchase, or exchange"). In this case, however, the decision to exchange the land was made by Congress and authorized by a provision buried in an appropriations bill. The government did not hold a hearing before enacting

such exchange. *E.g., id.* § 460*l*—22(b) (providing that upon request, "prior to such exchange the Secretary . . . shall hold a public hearing in the area where the lands to be exchanged are located"). Nor did the government open bidding to the general public. *E.g., id.* § 460*l*—22(a). Rather, § 8121 directs that the land be transferred to the VFW, the organization that originally installed a cross on Sunrise Rock some years ago and desires the continued presence of the current cross in the Preserve. The private land being exchanged for the federal property is owned by the Sandozes, who constructed the present cross and who have actively sought to keep the cross on Sunrise Rock. *Buono III,* 364 F. Supp. 2d at 1180.

The government argues that, of all parties, the VFW is the "logical purchaser" because it originally erected the cross at the site more than seventy years ago. The government cites *Marshfield* and another Seventh Circuit case, *Mercier v. Fraternal Order of Eagles,* 395 F.3d 693 (7th Cir. 2005). In both cases, the respective courts upheld the sale of property to a private party without an open market bidding process for the land. *Marshfield,* 203 F.3d at 489-90; *Mercier,* 395 F.3d at 694-95, 702-03.

Although neither the exclusion of other purchasers, nor the fact that Congress acted outside the scope of normal agency procedures for disposing of federal park land is dispositive, both acts demonstrate the government's unusual involvement in this transaction. These facts, coupled with the government's selection of beneficiaries of the land exchange who have a significant interest and personal investment in preserving the cross that has been ordered removed, provide additional evidence that the government is seeking to circumvent the injunc-

tion in this case. We see no basis to upset the district court's conclusion that the VFW was a straw purchaser. *Id*. at 1181.

3. HISTORY OF THE GOVERNMENT'S PRESERVATION EFFORTS

Finally, the government's long-standing efforts to preserve and maintain the cross atop Sunrise Rock lead us to the undeniable conclusion that the government's purpose in this case is to evade the injunction and keep the cross in place. In brief, when litigation was first threatened against NPS, Congress banned the use of government funds to remove the cross (§ 133), the first step in forestalling inevitable enforcement of a federal injunction. After litigation commenced, Congress designated the cross and adjoining Preserve property as a national memorial commemorating World War I (§ 8137). Congress also appropriated up to $10,000 for NPS to acquire replicas of the original cross and plaque at the site (*id.*), once more trying to bolster the presence of the cross. Once the district court enjoined display of the cross in *Buono I,* Congress again prohibited the use of federal funds to remove any World War I memorials (which, obviously, includes the cross) (§ 8056(b)); and, while the appeal was pending in *Buono II,* Congress enacted § 8121, directing the transfer of the subject property to a private organization, but maintaining effective government control over the memorial and the use of that property.

The government does not contest these legislative responses to various stages of the litigation in this case, or their purpose aimed at preserving the cross. Rather, the government attempts to diminish their importance. For example, the government argues that § 8137(c),

which earmarks funds for the replica plaque and cross, was passed before the district court's injunction and that after the injunction, DOI has taken no action to acquire the replicas. While this may be true, when Congress enacted § 8121, it specifically incorporated the Secretary's duty to carry out the responsibilities set out in § 8137; Congress did not repeal the funding provisions, or any other provision permitting ongoing government control. The funding provisions offer historical evidence of the governmental responses aimed at preserving the cross, as well as ongoing legislative authorizations. In that context, it does not matter whether DOI has exercised its powers to obtain such replicas; the important fact is that Congress directed that it do so, further showing its intent to preserve and maintain the cross.

We agree with the district court that the government engaged in "herculean efforts" to preserve the cross atop Sunrise Rock. *Buono III*, 364 F. Supp. 2d at 1182. We also agree that "the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin Cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." *Id*.

B. Continuing Governmental Endorsement of Religion

Our inquiry into a purported cure of an Establishment Clause violation must also analyze whether the improper governmental endorsement of religion has ceased. *See, e.g., Marshfield*, 203 F.3d at 493-96. Because of the procedural posture of this case, we have necessarily already considered that question. We previously held that the presence of the cross in the Preserve violates the Establishment Clause. *See Buono II*, 371 F.3d at 548-50. We also concluded that a reasonable

observer aware of the history of the cross would know of the government's attempts to preserve it and the denial of access to other religious symbols. *Id.* at 550. Even a less informed reasonable observer would perceive governmental endorsement of the message, given that "[n]ational parklands and preserves embody the notion of government ownership," that the Sunrise Rock area is used as a public campground, and finally, because of "the ratio of publicly-owned to privately-owned land in the Preserve." *Id.* Nothing in the present posture of the case alters those earlier conclusions. Under the statutory dictates and terms that presently stand, carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with the cross atop it—will do nothing to minimize the impermissible governmental endorsement. Nor does the proposed land exchange under § 8121 end the improper government action. Such a transfer cannot be validly executed without running afoul of the injunction.

In sum, the government has not shown the district court's factual findings to be clearly erroneous. Nor has the government shown that the district court applied erroneous legal standards. Finally, the district court's decision does not reflect any clear error of judgment. The district court did not abuse its discretion in enjoining the government from proceeding with the land exchange under § 8121 and ordering the government to otherwise comply with its prior injunction that it not permit the display of the Sunrise Rock cross in the Preserve.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

No. EDCV 01-216RTSGLX

FRANK BUONO, PLAINTIFF

v.

GALE NORTON, JONATHAN JARVIS, AND
MARY MARTIN, DEFENDANTS

Dated: Apr. 8, 2005

ORDER 1) GRANTING PLAINTIFF'S MOTION TO ENFORCE PERMANENT INJUNCTION, 2) DENYING PLAINTIFF'S MOTION TO MODIFY THE INJUNCTION AS MOOT, AND 3) PERMANENTLY ENJOINING DEFENDANTS' IMPLEMENTATION OF THE PROVISION OF SECTION 8121 OF PUBLIC LAW 108—87

TIMLIN, District Judge.

The court, Judge Robert J. Timlin, has read and considered plaintiff Frank Buono ("Plaintiff")'s motion to enforce or, in the alternative, modify the permanent injunction ("motion"), defendants Gale Norton, Secretary of the Interior, Jonathan Jarvis, Regional Director of the Pacific West Region of the Department of Interior,

and Mary Martin, Superintendent of the Mojave Desert Preserve (collectively, "Defendants")' response,[1] and Plaintiff's reply.[2] Based on such consideration, the court concludes as follows:

I.

BACKGROUND

On July 24, 2002, this court held that a Latin cross situated upon a prominent rock on federal land in the Mojave National Preserve ("the Preserve"), which the government[3] had designated as a national monument for World War I veterans during this litigation, violated the Establishment Clause of the First Amendment. *Buono v. Norton,* 212 F. Supp. 2d 1202, 1217 (C.D. Cal. 2002). The court entered a judgment that "Defendants, their employees, agents, and those in active concert with Defendants, are hereby permanently restrained and enjoined from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."

Defendants appealed to the Ninth Circuit Court of Appeals ("Ninth Circuit"), which stayed this court's order "permanently enjoining display of the cross to the extent that the order required the immediate removal or dismantling of the cross" but "did not stay alternative

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[1] Defendants are only being sued in their official capacities.

[2] The notice of motion stated "Plaintiffs" were bringing this motion, but it appears from footnote 3 of Plaintiff's points and authorities that plaintiff Allen Schwartz died before the motion was filed. Consequently, the court will use the language "Plaintiff," which refers only to Frank Buono.

[3] For the purposes of this order, "the government" refers to the executive and legislative branches of the federal government.

methods of compliance with" the order. *Buono v. Norton,* 371 F.3d 543, 545 n.1 (9th Cir. 2004). During the pendency of appeal, the Department of Interior covered the cross first with a tarpaulin secured by a lock and later with a large plywood box. The Ninth Circuit affirmed this court's judgment on June 7, 2004. *Id*. at 550. The cross remains covered by the box.

Prior to the Ninth Circuit's decision, Congress passed, and the President signed, the Department of Defense Appropriations Act of 2004 ("DDAA"), Pub. L. No. 108—87, 117 Stat. 1054 (2003). Section 8121 of the DDAA ("Section 8121") "requires the Secretary of the Interior to transfer the land on which the cross sits to the local Veterans of Foreign Wars Post in exchange for a privately-owned five-acre parcel elsewhere in the Preserve." *Buono,* 371 F.3d at 545. The Ninth Circuit held that Section 8121 did not moot the appeal, but left "for another day" the question "whether a transfer completed under Section 8121 would pass constitutional muster." *Id*.

For this court, that day is today. Plaintiff has brought a motion requesting that the court "either hold that the transfer violates the current injunction, or modify that injunction to prohibit the land transfer because it violates the Establishment Clause."

II.

ANALYSIS

A. Defendants' Requests for Delay

Defendants request that this court delay ruling on Plaintiff's motion until the Supreme Court provides additional guidance in two pending cases involving displays of the Ten Commandments on public property. *See Van*

Orden v. Perry, 351 F.3d 173 (5th Cir. 2003), *cert granted,* __ U.S. __, 125 S. Ct. 346, 160 L. Ed. 2d 220 (2004) (No. 03-1500); *ACLU v. McCreary County,* 354 F.3d 438 (6th Cir. 2003), *cert. granted,* __ U.S. __, 125 S. Ct. 310, 160 L. Ed. 2d 221 (2004) (No. 03-1693). These cases are inapposite to the instant motion because the issue here is not whether the display of the Latin cross on federal land violates the Establishment Clause. Both this court and the Ninth Circuit answered that question in the affirmative. *Buono,* 212 F. Supp. 2d at 1217; *Buono,* 371 F.3d at 550. Rather, the issue is whether the land transfer directed by Section 8121 violates the permanent injunction or is itself an unconstitutional violation of the First Amendment Establishment Clause. Moreover, as Plaintiff points out, if this court were to delay ruling on Plaintiff's motion each time the Supreme Court grants certiorari on an Establishment Clause case, this motion will never be finally resolved.

Defendants also request that this court postpone ruling on this motion for the "additional six months to two years" that it will take them to complete the land transfer. Section 8121, which was passed on September 30, 2003, expressly requires the Secretary of the Interior to undertake the land transfer. There is no doubt that the land transfer will go forward and, according to the government, it is already in progress. The court has examined Section 8121 and concludes that it provides sufficient information from which to determine whether the land transfer is a bona fide attempt to cure Defendants' violation of the Establishment Clause by maintaining the Latin cross on Preserve land or an improper attempt to evade the permanent injunction. As a consequence, the court does not need to delay its decision to

allow for the administrative tasks necessary for the completion of a potentially invalid land transfer.

B. Validity of Land Transfer

Plaintiff contends that the land transfer directed by Section 8121 is a sham by Defendants to preserve the Latin cross in the Preserve. Defendants contend that the transfer of the land on which the cross stands to private ownership will remedy the Establishment Clause violation.

The Seventh Circuit Court of Appeals ("Seventh Circuit") has held that, "[a]bsent unusual circumstances," the sale of public property containing an unconstitutional religious display "is an effective way for a public body to end its inappropriate endorsement of religion." *Freedom from Religion Found., Inc. v. City of Marshfield, Wisconsin,* 203 F.3d 487, 491, 492 (7th Cir. 2000) (holding that the sale of 0.15 acres of city park land containing a statute of Jesus Christ to a private organization "validly extinguished any government endorsement of religion" because there were not unusual circumstances);[4] *see also Mercier v. Fraternal Order of Eagles,* 395 F.3d 693, 702-04 (7th Cir. 2005) (holding that the sale of 440 square feet of a city park containing a Ten Commandments monument to a private organization was valid because there were no unusual circumstances). Since "adherence to a formalistic standard invites manipulation," a court must "look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually

[4] The display was still unconstitutional in that case because the private organization's land was "visually indistinguishable" from the city's land. *Id.* at 495.

ceased." *Freedom from Religion Found., Inc.,* 203 F.3d at 491.

Unusual circumstances that will invalidate a sale include (1) "a sale to a straw purchaser" leaving the public entity "with continuing power to exercise the duties of ownership," (2) a sale that does not comply with applicable law governing the sale of land by a public entity, or (3) "a sale well below fair market value resulting in a gift to a religious organization." *Mercier,* 395 F.3d at 702; *see also Freedom from Religion Found., Inc.,* 203 F.3d at 492. All of these unusual circumstances need not exist to invalidate a sale and a court may also consider the existence of other unusual circumstances in this analysis. *See Mercier,* 395 F.3d at 702, 703-04.

The court finds this analytical framework helpful and will apply it to the proposed Section 8121 mandated land transfer in the instant case. The pertinent question is whether the transfer of the acre of federal land on Sunrise Rock in the Preserve containing the Latin cross to the Veterans of Foreign War ("VFW") in exchange for other private land in the Preserve presumably owned by Mr. and Mrs. Henry Sandoz is characterized by any unusual circumstances. In particular, the court will examine the circumstances surrounding the government's retaining certain property rights over the site containing the cross ("subject property") after the proposed transfer, the method for effectuating the land transfer, and the history of the government's efforts to prevent the removal of the Latin cross.[5]

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[5] Section 8121(c) requires that "[t]he value of the properties to be exchanged under this section shall be equal or equalized as provided in subsection (d)," which provides for a "cash equalization payment" should one of the properties be appraised at a higher value than the

1. Continuing Property Rights in the Subject Property

It is clear from Section 8121 and its various subdivisions that, despite the transfer, the government will retain important property rights in the subject property and will continue to exercise substantial control over the property. Section 8121(e) legislates a reversionary clause in the property exchange transaction, providing that the transfer will be "subject to the condition that the recipient maintain the conveyed property as a" World War I memorial and that "[i]f 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." In effect, the government has tightly restricted the VFW's use of the subject property for one purpose and, more importantly, has reserved the right to reassert ownership and repossess the subject property any time the Secretary of the Interior makes the discretionary determination that the VFW is not adequately maintaining the Latin cross as a World War I memorial. Such a reversionary clause defeats Defendants' contention that the government has given up control over the subject property. *See Hampton v. City of Jacksonville,* 304 F.2d 320, 322-23 (5th Cir. 1962) (holding that where the city's conveyance of a segregated golf course to private parties included a rever-

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other. Although it is somewhat strange for the government to exchange one acre on Sunrise Rock for five acres elsewhere in the Preserve, which suggests, as Plaintiff contends, that the five acres are less desirable, the cash equalization provision negates any threat that the government will be giving the land to the VFW "well below fair market value." *Mercier,* 395 F.3d at 702. As noted above, however, the absence of one unusual circumstance does not negate the existence of the other unusual circumstances discussed *infra.*

sionary clause, which provided that the city could retake the property if it were no longer used for a golf course, the city had "complete present control" over the golf course and state action existed under the Fourteenth Amendment); *see also Downs v. Sawtelle,* 574 F.2d 1, 8 (1st Cir. 1978); *Eaton v. Grubbs,* 329 F.2d 710, 714 (4th Cir. 1964).

Furthermore, Section 8121(a) provides that "[n]otwithstanding the conveyance of the property under this subsection, the Secretary shall continue to carry out the responsibilities of the Secretary under" Section 8137 of the Department of Defense and Emergency Supplemental Appropriations for Recovery From and Response to Terrorist Attacks on the United States Act of 2002 ("Supplemental Appropriations Act"), Pub. L. No. 107—117, 115 Stat. 2230 (2002). Section 8137 of the Supplemental Appropriations Act designated the Latin cross on the subject property as a national World War I monument and required the Secretary of the Interior "to acquire a replica of the original memorial plaque and cross"[6] with "not more than $10,000 of funds available for the administration of the Mojave National Preserve" and "to install the plaque in a suitable location on the grounds of the memorial," thus giving the Secretary access to the subject property in the form of an easement or license for a particular purpose.

The designation of the Latin cross in the Preserve as a sectarian memorial by the government, as well as the government's use of $10,000 of federal funds to put a new plaque on Sunrise Rock and acquire a replica of the original cross, demonstrate that the government is in-

[6] The cross had first been erected in 1934 by the VFW as a memorial for World War I.

tent on preserving the Latin cross, the primary symbol of Christianity, in the Preserve. The government's direction that the Secretary of the Interior continue to carry out her responsibilities under Section 8137 of the Supplemental Appropriations Act in spite of the land transfer, as required by Section 8121(a), and the reversionary clause authorized in Section 8121(e), compel the conclusion that the government reserved its rights to remain actively involved with the Latin cross, even though the VFW has ownership of the subject property.

Given the government's continuing control over the Latin cross, it is significant that the subject property, including the Latin cross, is being transferred to the organization (VFW) that originally installed the cross and desires its continued presence in the Preserve, and that the private land being exchanged for the federal property is owned by a couple (Mr. and Mrs. Sandoz) who has actively sought to keep the Latin cross on Sunrise Rock. The direct land transfer to the VFW "to the exclusion of any other purchasers of or bidders for the land," *Murphy v. Bilbray,* 1997 WL 754604, at *11 (S.D. Cal. Sept. 18, 1997), demonstrates that the government's apparent endorsement of a particular religion has not actually ceased. *Cf. Mercier,* 395 F.3d at 702-03 (upholding the sale of 440 square acres of city park land containing a Ten Commandments monument in part because the government had terminated its relationship with the land and transferred "the traditional duties of ownership" to a private organization).[7] The court can

[7] In *Mercier,* 395 F.3d at 702-04, the Seventh Circuit in upholding the sale to a private organization of the city park land containing the Ten Commandments monument found it important that there was a "somewhat extensive effort made to distinguish the now-private property

only conclude that, under these circumstances, the VFW is "a straw purchaser." *Id*. at 702.

2. Compliance with Applicable Law

Another unusual circumstance in this case is the nature of the proposed transfer of the subject property. Under normal circumstances, the transfer of land over which the National Park Service ("NPS") has jurisdiction takes place pursuant to 16 U.S.C. § 4601—22(b) ("Section 4601—22(b)"), which gives the Secretary of the Interior authority to exchange federal land for non-federal land. Here, however, the land transfer decision did not occur through the normal administrative process by which the Secretary of the Interior exercises her discretion pursuant to Section 4601—22(b). Instead, the land transfer decision was made directly by the government and authorized by a provision buried in a defense appro-

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from the Park." While in *Mercier* "[a]ny reasonable person walking past the Monument" would "quickly recognize" that it is not on city property because of the two fences surrounding it and the six signs disclaiming any endorsement of it by the city, *id*. at 703-04, our case is distinguishable. The Latin cross atop Sunset rock "is visible to vehicles traveling on the road from a distance of approximately 100 yards," *Buono,* 212 F. Supp. 2d at 1205, and it is not clear how any fences and sign disclaimers like those in *Mercier* would prompt reasonable drivers viewing the cross from afar to "quickly recognize" that, unlike the surrounding 1.6 million acres, the one acre containing the cross was actually private land. *See Murphy,* 1997 WL 754604, at *11 (invalidating the city's first attempt to sell to a private organization 222 square feet of land containing a cross atop Mt. Soledad, which the Ninth Circuit held to violate the No Preference Clause of the California Constitution in a previous case, in part because visitors would not be able to differentiate that "small plot of land" from the "approximately 170 acres of municipally owned and maintained park land" despite the existence of "a small disclaimer plaque").

priations bill. While not dispositive by itself, this unusual circumstance adds support to Plaintiff's contention that the government is seeking to evade this court's injunction with the land transfer. *Cf. Freedom from Religion Found., Inc.*, 203 F.3d at 492 (finding no unusual circumstances where the sale of 0.15 acres of city park land containing a statute of Jesus Christ "complied with the applicable Wisconsin law governing the sale of land by municipalities").

3. History of the Government's Preservation Efforts

The history of the government's efforts to preserve and maintain the Latin cross on the subject property is yet another unusual circumstance in this case. *See Santa Fe Ind. Sch. Dist. v. Doe,* 530 U.S. 290, 309-310, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) (examining the history of the school board's policy of prayer at football games to determine whether the purpose of its current policy of allowing student-initiated prayer at football games "was to preserve a popular 'state-sponsored religious practice.'") (*quoting Lee v. Weisman,* 505 U.S. 577, 596, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992)).

In 2000, after the American Civil Liberties Union threatened to sue to remove the Latin cross, Congress passed, and the President signed, the Consolidated Appropriations Act, Pub. L. No. 106—554, 114 Stat. 2763 (2000), which included a provision, Section 133, that prevented the use of any federal funds for the removal of the Latin cross. Then, in early 2002, Congress passed, and the President signed, the Supplemental Appropriations Act, which contained a provision, Section 8137, designating the subject property, including the Latin cross, as a national World War I monument and appropriating up to $10,000 in federal funds to obtain a replica

of the original cross and original plaque that were placed on the land in 1934, and to install the plaque on the property. Later in 2002, after this court had enjoined the display of the Latin cross, Congress passed, and the President signed, the Department of Defense Appropriations Act of 2003, Pub. L. No. 107—248, 116 Stat. 1519 (2002), which had a provision, Section 8056(b), that prohibited the use of federal funds to dismantle any World War I memorials. Then, while the case was on appeal to the Ninth Circuit, Congress passed, and the President signed, the DDAA, which included Section 8121 directing the transfer of the subject property to a private organization but maintaining effective government control over the use of that property by requiring the Latin cross to remain thereon.

In light of this history, it is evident to the court that the government has engaged in herculean efforts to preserve the Latin Cross on federal land and that the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation by Defendants. The court finds that Section 8121 and its pertinent subdivisions regarding a transfer of the subject property by Defendants to the VFW violates this court's judgment ordering a permanent injunction.

4. Remedy

Having considered the aforementioned unusual circumstances, the court concludes that the transfer of the Preserve land containing the Latin Cross, which as "[a] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion," *Ellis v.*

City of La Mesa, 990 F.2d 1518, 1527 (9th Cir. 1993), is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunset Rock. As a result, the court concludes that the proposed transfer of the subject property to the VFW is invalid. *See Paulson v. City of San Diego,* 294 F.3d 1124, 1133 (9th Cir. 2002) (en banc) (invalidating the city's second attempt to sell to a private organization 0.509 acres of land containing a cross on Mt. Soledad, which the Ninth Circuit held to violate the No Preference Clause of the California Constitution in a previous case, because the city's bidding process had the effect of skewing the outcome of the sale in favor of sectarian organizations).[8]

The court will therefore grant Plaintiff's motion to enforce the permanent injunction and deny Plaintiff's alternative motion to amend the injunction as moot.

III.

DISPOSITION

ACCORDINGLY, IT IS ORDERED THAT:

1) Plaintiff Frank Buono's motion to enforce the permanent injunction is GRANTED;

2) Plaintiff Frank Buono's motion to amend the permanent injunction is DENIED as moot;

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[8] Since the court has found that the proposed transfer is an unlawful attempt to evade the permanent injunction, it need not consider Plaintiff's other contention that the land transfer itself is an independent violation of the Establishment Clause.

3) Defendants Gale Norton, Jonathan Jarvis, and Mary Martin, their agents, employees, successors, assignees, or anyone acting in concert with them are permanently enjoined from implementing the provisions of Section 8121 of Public Law 108—87; and

4) Defendants Gale Norton, Jonathan Jarvis, and Mary Martin are hereby ordered to comply forthwith with the judgment and permanent injunction entered by this court on July 24, 2002.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55032

FRANK BUONO; ALLEN SCHWARTZ,
PLAINTIFFS-APPELLEES

v.

GALE NORTON, SECRETARY OF THE INTERIOR, IN HER OFFICIAL CAPACITY; JONATHAN JARVIS, REGIONAL DIRECTOR, PACIFIC WEST REGION OF THE DEPARTMENT OF INTERIOR, IN HIS OFFICIAL CAPACITY,[*] MARY MARTIN, SUPERINTENDENT OF THE MOJAVE NATIONAL PRESERVE, IN HER OFFICIAL CAPACITY,
DEFENDANTS-APPELLANTS

Argued and Submitted: Aug. 6, 2003
Filed: June 7, 2004

Before KOZINSKI and T.G. NELSON, Circuit Judges, and RESTANI, Judge.[**]

KOZINSKI, Circuit Judge:

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[*] Jarvis is substituted for his predecessor, John J. Reynolds, former Regional Director of the Pacific West Region of the Department of the Interior. See Fed. R. App. P. 43(c)(2).

[**] The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

Plaintiffs claim that the presence of a Latin cross on federally-owned land in the Mojave National Preserve, which is managed by the National Park Service, violates the Establishment Clause. A Latin cross "has two arms, one horizontal and one vertical, at right angles to each other, with the horizontal arm being shorter than the vertical arm." *Buono v. Norton,* 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002). The Latin cross "is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion." *Id.; see also Ellis v. City of La Mesa,* 990 F.2d 1518, 1527 (9th Cir. 1993). The cross at issue is constructed of four-inch-diameter metal pipe and painted white. It sits in an area of the Preserve known as Sunrise Rock, adjacent to Cima Road, a secondary road roughly eleven miles from the I-15 in San Bernardino County, California.

Plaintiffs sued the Secretary of the Interior, the Regional Director of the National Park Service and the Superintendent of the Preserve, seeking removal of the cross. The district court granted summary judgment for plaintiffs and enjoined defendants from allowing continued display of the cross. Defendants appeal. We review the grant of summary judgment de novo. *Winterrowd v. Am. Gen. Annuity Ins. Co.,* 321 F.3d 933, 937 (9th Cir. 2003).[1]

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[1] We stayed the district court's order permanently enjoining display of the cross to the extent that the order required the immediate removal or dismantling of the cross. We did not stay alternative methods of compliance with, or additional obligations imposed by, the district court's order. *Buono v. Norton,* No. 03-55032, 2003 WL 22724262 (9th Cir. May 15, 2003) (order granting motion to stay); *Buono v. Norton,* No. 03-55032, 2003 WL 22724265 (9th Cir. June 6, 2003) (clarifying May 19 order). The Department of the Interior has covered the cross.

1. Since we heard oral argument, Congress passed the Department of Defense Appropriations Act of 2004 (DDAA), Pub. L. No. 108—87, 117 Stat. 1054 (2003). Section 8121 of the DDAA requires the Secretary of the Interior to transfer the land on which the cross sits to the local Veterans of Foreign Wars Post in exchange for a privately-owned five-acre parcel elsewhere in the Preserve. Section 8121(a) further provides that, "[n]otwithstanding the conveyance of the property . . . , the Secretary [of the Interior] shall continue to carry out the responsibilities of the Secretary under section 8137" of the Department of Defense and Emergency Supplemental Appropriations Act of 2002, Pub. L. No. 107—117, 115 Stat. 2230 (2002), which had designated the cross a war memorial. Section 8137(c) in turn directs the Secretary to "use not more than $10,000 of funds available for the administration of the Mojave National Preserve to acquire a replica of the original memorial plaque and cross placed at the national World War I memorial . . . and to install the plaque in a suitable location on the grounds of the memorial." Finally, the DDAA provides that if the "property is no longer being maintained as a war memorial," the property shall revert to the United States. § 8121(c).

Defendants urge that, "[g]iven the *impending* mootness of this case, the Court should avoid deciding the constitutional issues raised here." Supplemental Mem. of Appellants at 4 (emphasis added). We are not convinced. This case is not yet moot and may not be for a

significant time, as defendants concede that the land transfer could take as long as two years to complete.[2]

Even if the transfer were already completed, defendants have not carried their burden of showing that "(1) subsequent events [have] made it absolutely clear that the allegedly wrongful behavior [cannot] reasonably be expected to recur, *and* (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Norman-Bloodsaw v. Lawrence Berkeley Lab.,* 135 F.3d 1260, 1274 (9th Cir. 1998) (internal quotation marks and citations omitted; alterations in original). "'Mere voluntary cessation of allegedly illegal conduct does not moot a case.'" *Id*. (quoting *United States v. Concentrated Phosphate Exp. Ass'n,* 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)); *see also City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 288-89, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982). As discussed, section 8121(c) of the DDAA provides that the land may revert to the federal government. Further, not only is there nothing in section 8121 that prevents the land from being otherwise returned to the government, federal law contemplates just such a transfer. *See* 16 U.S.C. § 431 ("When such [national monuments] are situated upon a tract . . . held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United

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[2] So far, the Bureau of Land Management has completed a survey and legal description of the cross site as the first step toward the land transfer.

States."); *see also id.* § 410aaa—56 (authorizing the Secretary to "acquire all lands and interest in lands within the boundary of the[Mojave] preserve by donation, purchase, or exchange").

Finally, we note that the presence of a religious symbol on once-public land that has been transferred into private hands may still violate the Establishment Clause. *See Freedom from Religion Found., Inc. v. City of Marshfield,* 203 F.3d 487, 496 (7th Cir. 2000) (as amended on denial of rehearing and rehearing en banc). We express no view as to whether a transfer completed under section 8121 would pass constitutional muster, but leave this question for another day. *See Separation of Church & State Comm. v. City of Eugene* (*SCSC*), 93 F.3d 617, 620 n.5 (9th Cir. 1996) (per curiam).

2. Defendants claim that plaintiffs Frank Buono and Allen Schwartz lack standing. To have standing, a plaintiff "must have suffered an injury in fact" that is "fairly traceable" to the challenged conduct, and "it must be likely that the injury would be redressed by a favorable decision." *Desert Outdoor Adver. v. City of Moreno Valley,* 103 F.3d 814, 818 (9th Cir. 1996); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). The district court concluded that plaintiffs have standing; we review de novo. *Porter v. Jones,* 319 F.3d 483, 489 (9th Cir. 2003).

The district court found that Buono is a retired employee of the Park Service who previously served as Assistant Superintendent of the Preserve. He "now lives in Oregon" but "regularly visits the Preserve." *Buono,* 212 F. Supp. 2d at 1207. He "visit[s] the Preserve two to four times a year on average." *Id.* At the time of sum-

mary judgment, "Buono . . . intend[ed] to sell his home in Oregon, to relocate to Southern California or Arizona, and to make more frequent trips to the Preserve." *Id.* The district court further found that:

> Buono is deeply offended by the cross display on public land in an area that is not open to others to put up whatever symbols they choose. A practicing Roman Catholic, Buono does not find a cross itself objectionable, but stated that the presence of the cross is objectionable to him as a religious symbol because it rests on federal land.

Id.

Defendants argue that Buono has not suffered injury-in-fact. They assert that the offense he experiences in seeing the cross is "ideological, not religious, in nature and, hence, is not cognizable under the Establishment Clause." Appellants' Opening Br. at 12. This distinction is meaningful, they suggest, because "[u]nconstitutional establishments of religion cause harm by sending 'a message to nonadherents that they are outsiders, not full members of the political community.'" *Id.* (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 773, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring)). They add that Buono did not allege that the presence of the cross at Sunrise Rock made him feel like an outsider. Defendants rely on *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982), as the source for the purported distinction between ideologically and religiously-based offense. But *Valley Forge* does not support this distinction; instead, it reminds the federal courts that only concrete, personal-

ized injury—not an abstract, generalized grievance—suffices to confer standing.

At issue in *Valley Forge* was a transfer of federal property in Pennsylvania from the government to Valley Forge Christian College, for which the college made no payment. *Id.* at 467-68, 102 S. Ct. 752. Plaintiffs "reside[d] in Maryland and Virginia; their organizational headquarters [we]re located in Washington, D.C. They learned of the transfer through a news release." *Id.* at 487, 102 S. Ct. 752 (footnote omitted). The Court concluded that, under these facts, plaintiffs had not "alleged an *injury* of *any* kind, economic or otherwise, sufficient to confer standing." *Id.* at 486, 102 S. Ct. 752. Rather, theirs was merely a generalized grievance. *See id.* at 482-86, 102 S. Ct. 752.

Valley Forge nowhere suggests that plaintiffs lacked standing because their offense at the property transfer was grounded in ideological, rather than religious, beliefs. Rather, plaintiffs lacked standing because their sense of offense was unaccompanied by "any personal injury suffered . . . *as a consequence* of the alleged constitutional error." *Id.* at 485, 102 S. Ct. 752. The problem was not the nature of "the psychological consequence" plaintiffs experienced in observing "conduct with which [they] disagree[d]," but the absence of any personal injury at all, economic or non-economic, accompanying it. *Id.* By relying on *Valley Forge,* defendants confuse inquiry into whether the requisite injury-in-fact accompanies offense, with inquiry into the psychological motives giving rise to such offense. The *Valley Forge* Court drew a distinction between abstract grievances and personal injuries, not ideological and religious beliefs.

The district court found that "Buono will tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing, even though traveling down Cima Road is often the most convenient means of access to the Preserve." *Buono,* 212 F. Supp. 2d at 1207. Buono is, in other words, unable to "freely us[e]" the area of the Preserve around the cross because of the government's allegedly unconstitutional actions. *SCSC,* 93 F.3d at 619 n.2. We have repeatedly held that inability to unreservedly use public land suffices as injury-in-fact. *See id*. (noting that plaintiff organization "is composed of local citizens who have standing to bring this challenge because they alleged that the cross prevented them from freely using the area on and around" the location of the cross); *see also Ellis,* 990 F.2d at 1523; *Hewitt v. Joyner,* 940 F.2d 1561, 1564-65 (9th Cir. 1991). Such inhibition constitutes "personal injury suffered . . . *as a consequence* of the alleged constitutional error," beyond simply "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge,* 454 U.S. at 485, 102 S. Ct. 752. Moreover, we have so held even as to plaintiffs who, like Buono, are members of religious sects but nonetheless are offended by religious displays on government property. *See Ellis,* 990 F.2d at 1523 (plaintiffs with standing included members of Catholic and Episcopalian faiths). Buono has therefore alleged injury-in-fact sufficient to confer standing.[3]

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[3] Plaintiff Schwartz, a Jewish veteran, never visited the Preserve or saw the cross until he decided to join this case as a plaintiff. The district court found that Schwartz "is not offended or injured by the sight of the cross, only by the fact that the land on which it rests is federally owned." *Buono,* 212 F. Supp. 2d at 1208. Schwartz asserts that he "intends to visit the cross area regularly during his trips to Las Vegas be-

3. Defendants argue on the merits that display of the cross at Sunrise Rock does not violate the Establishment Clause. The district court concluded that "the primary effect of the presence of the cross" was to "advance[ ] religion." *Buono,* 212 F. Supp. 2d at 1215. We review de novo whether the Establishment Clause was violated. *Int'l Ass'n of Machinists, Lodge 751 v. Boeing Co.,* 833 F.2d 165, 167 (9th Cir. 1987).

This case is squarely controlled by *Separation of Church & State Committee v. City of Eugene*. In *SCSC,* plaintiffs alleged that a "fifty-one foot concrete Latin cross with neon inset tubing," located at the crest of a hill in a city park, violated the Establishment Clause. 93 F.3d at 618. "From the late 1930s to 1964, private individuals [had] erected a succession of wooden crosses in the park, one replacing another as they deteriorated. In 1964, private individuals erected the cross at issue" in *SCSC*. *Id*. In 1970, the cross was designated as a war memorial and deeded to the City of Eugene; "a bronze plaque was placed at the foot of the cross dedicating it as a memorial to [all] war veterans." *Id*. at 618-19. Be-

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cause he finds the presence of the cross on government land offensive. He will go to see if it has been taken down." *Id*. at 1209. Defendants contend that Schwartz lacks standing because, like Buono, he does not allege sufficient injury and because he subjected himself to his alleged harm by seeking out the cross.

Because we hold that Buono has standing, we need not also evaluate Schwartz's standing. *See Leonard v. Clark,* 12 F.3d 885, 888 (9th Cir. 1993) ("The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others." (citing *Carey v. Population Servs. Int'l,* 431 U.S. 678, 682, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977))).

ginning that year, the City of Eugene "illuminated the cross" during the Christmas and Thanksgiving seasons, as well as "on Memorial Day, Independence Day, and Veteran's Day." *Id*. at 618. Considering both the effects prong of *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L. Ed. 2d 745 (1971), and the endorsement test from Justice O'Connor's concurrence in *Lynch v. Donnelly,* 465 U.S. 668, 687, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984), we held that "[t]here is no question that the Latin cross is a symbol of Christianity, and that its placement on public land by the City of Eugene violates the Establishment Clause[, b]ecause the cross may reasonably be perceived as governmental endorsement of Christianity." *SCSC,* 93 F.3d at 620.

Similarly here, the cross at Sunrise Rock sits on publicly-owned land, and both it and its predecessors were privately erected. A cross was first placed on the site in 1934 by the Veterans of Foreign Wars, in memory of veterans who died during World War I; a plaque near the original cross identified it as a war memorial. Private parties have since replaced the original cross several times. Easter Sunrise services have been held at Sunrise Rock since at least 1935. The Park Service has not opened the cross site to other permanent displays, nor are there other displays, religious or otherwise, in the area. In 1999, the Park Service denied a third-party request to erect a Buddhist stupa near the cross.[4] Although there is currently no plaque or sign indicating as

[4] A stupa is a "hemispherical or cylindrical mound or tower, artificially constructed of earth, brick, or stone, containing a relic chamber and surmounted by a spire or umbrella; esp., a Buddhist mound forming a memorial shrine of the Buddha." Webster's New International Dictionary 2504 (2d ed. 1939).

much,[5] recent legislation designated the Sunrise Rock cross as a federal war memorial for World War I veterans. *See* Department of Defense and Emergency Supplemental Appropriations Act § 8137. Federal law prohibits the Park Service from spending money to remove the cross. *See* Department of Defense Appropriations Act of 2003, Pub. L. No. 107—248, § 8065(b), 116 Stat. 1519 (2002) (prohibiting the use of funds to dismantle World War I memorials); Consolidated Appropriations Act of 2001, Pub. L. No. 106—554, § 133, 114 Stat. 2763 (2000) (same as to removal of Sunrise Rock cross).

Defendants seek to distinguish *SCSC* by contrasting the visibility and location of the two crosses. They point out that the *SCSC* cross was fifty-one feet tall, illuminated with neon tubing and located in a city park adjacent to Eugene's downtown business district. By contrast, the Sunrise Rock cross is five to eight feet tall, "is in a remote location, is not projected toward the public, and is not illuminated the way the cross was in *SCSC*." Appellants' Opening Br. at 22. Further, they continue, the "cross at issue here is not in an urban park or adja-

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[5] Defendants assert that the cross "will soon have a new sign [identifying it as a war memorial] . . . that will correct any misperceptions about the purpose and message of the cross." Appellants' Opening Br. at 23. Defendants are mistaken that the presence of such a sign would enhance their position. In *SCSC,* the City of Eugene placed a plaque on the cross in question, identifying it as a war memorial. However, despite the sign—indeed, perhaps because of it—"observers might [still have] reasonably perceive[d] the City's display of such a religious symbol on public property as government endorsement of the Christian faith. Further, the City's use of a cross to memorialize the war dead m[ight have led] observers to believe that the City ha[d] chosen to honor only Christian veterans." *SCSC,* 93 F.3d at 626 (O'Scannlain, J., concurring).

cent to a public building[,] . . . [which are] tangible embodiments of government." *Id.*

These distinctions are of no moment. Though not illuminated, the cross here is bolted to a rock outcropping rising fifteen to twenty feet above grade and is visible to vehicles on the adjacent road from a hundred yards away. Even if the shorter height of the Sunrise Rock cross means that it is visible to fewer people than was the *SCSC* cross, this makes it no less likely that the Sunrise Rock cross will project a message of government endorsement to a reasonable observer. *See SCSC,* 93 F.3d at 625 n.11 (O'Scannlain, J., concurring) ("[T]he Establishment Clause focuses on whether the religious display creates an appearance of governmental endorsement of religion. Thus, how few or how many people view the display does not advance the analysis.").

Nor does the remote location of Sunrise Rock make a difference. That the Sunrise Rock cross is not near a government building is insignificant—neither was the *SCSC* cross. What is significant is that the Sunrise Rock cross, like the *SCSC* cross, sits on public park land. National parklands and preserves embody the notion of government ownership as much as urban parkland, and the remote location of Sunrise Rock does nothing to detract from that notion.

Defendants further argue that a reasonable observer would not perceive the cross site as public land because of the proximity of two private ranches and several corrals within two miles of the cross. How much information we will impute to a reasonable observer is unclear. Justice O'Connor has suggested that a reasonable observer "must be deemed aware of the history and context of the community and forum in which the religious

display appears," including ownership of the land in question. *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 780-81, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (O'Connor, J., concurring). Under this view, a reasonable observer would know that Sunrise Rock is federally-owned. Even if we assumed a reasonable observer to be less well-informed, *see id.* at 800 n. 5, 115 S.Ct. 2440 (Stevens, J., dissenting), we would still reach the same conclusion. The Mojave National Preserve encompasses 1.6 million acres, over 90 percent of which is federally-owned, and the area where the cross sits is used as a campground. Given the ratio of publicly-owned to privately-owned land in the Preserve and the use to which the Sunrise Rock area is put, a less well-informed reasonable observer would still believe—or at least suspect—that the cross rests on public land.

Finally, defendants suggest that a reasonable observer aware of the history of the cross—such as its placement by private individuals—would believe that the government is not endorsing Christianity by allowing the cross to remain at the site. However, a reasonable observer who is *that* well-informed would know the full history of the cross: that Congress has designated the cross as a war memorial and prohibited the use of funds to remove it, and that the Park Service has denied similar access for expression by an adherent of the 7378 Buddhist faith. "'Whatever else the Establishment Clause may mean . . . , it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).'" *SCSC,* 93 F.3d at 619 (citation omitted) (quoting *Allegheny County v. Greater Pittsburgh ACLU,* 492 U.S. 573, 605, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989)).

This case is materially indistinguishable from *SCSC*. Thus, even assuming that the government has a clearly secular purpose in maintaining display of the cross as a war memorial, *see Lemon,* 403 U.S. at 612, 91 S. Ct. 2105, the Sunrise Rock cross violates the Establishment Clause.

AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. EDCV01216RTSGLX
FRANK BUONO & ALLEN SCHWARTZ, PLAINTIFFS,

v.

GALE NORTON, JOHN REYNOLDS, & MARY MARTIN,
DEFENDANTS

July 24, 2002

ORDER 1) GRANTING PLAINTIFFS FRANK BUONO'S AND ALLEN SCHWARTZ'S MOTION FOR SUMMARY JUDGMENT; AND 2) DENYING DEFENDANTS GALE NORTON'S, JOHN REYNOLDS', AND MARY MARTIN'S MOTION FOR SUMMARY JUDGMENT

TIMLIN, District Judge.

The court, Judge Robert J. Timlin, has read and considered Plaintiffs Frank Buono ("Buono") and Allen Schwartz ("Schwartz") (collectively, "Plaintiffs")'s Motion for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56 ("Rule 56"); Defendants Gail Norton ("Norton"), John Reynolds ("Reynolds"), and Mary Martin ("Martin") (collectively, "the govern-

ment's"[1] opposition; and Plaintiffs' reply. The court also has read and considered the government's Motion for summary judgment pursuant to Rule 56; Plaintiffs' opposition; and the government's reply. Based on such consideration, the court concludes as follows:

I.

BACKGROUND

Buono filed a Complaint for injunctive and declaratory relief on March 22, 2001, alleging that the government violated his rights under the Establishment Clause of the First Amendment to the United States Constitution. On October 26, 2001, a First Amended Complaint ("FAC") was filed, adding Schwartz as a co-Plaintiff. Both Plaintiffs and the government now move the court for summary judgment.[2]

II.

EVIDENTIARY OBJECTIONS

A. Plaintiffs' Objections to Portion of Martin Declaration Dated March 12, 2002

1. Paragraph 9—overruled.

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[1] The court will refer to Defendants as "the government" because Norton, Secretary of the United States Department of Interior, Reynolds, Regional Director of the Pacific West Region of the National Park Service ("NPS"), and Martin, Superintendent of the Mojave National Preserve ("Preserve"), are sued in their official capacities. The court notes that Reynolds was erroneously sued as the Regional Director of the Pacific West Region of the Department of the Interior.

[2] Because simultaneous cross-motions for summary judgment on the same claim are before the court, the court has considered the appropriate evidentiary material identified and submitted in support of both motions and in opposition to both motions before ruling on each of them.

B. Plaintiffs' Objections to Portions of Buono Deposition Dated December 27, 2001

1. Page 60, lines 10-12; page 61, lines 1-11, 15-20; page 66, lines 14-24, 17-20; page 80, lines 9-19; page 100, lines 8-23; page 101, lines 7-9; page 134, line 21 through page 135, line 1; page 173, lines 12-21-overruled.

2. Page 164, lines 21-25-sustained on the basis of relevance.[3]

3. Page 91, lines 1-9; page 92, lines 2-7, 8-17; page 93, lines 8-18; page 94, line 24 through page 96, line 3-sustained on the basis of relevance.

C. Plaintiffs' Objections to Portions of Schwartz Deposition Dated December 18, 2001

1. Page 21, lines 20-25-overruled

2. Page 37, lines 6-23; page 43, line 20 through page 44, line 9; page 46, lines 9-14; page 47, lines 16-19-sustained on the basis of relevance.

III.

UNCONTROVERTED MATERIAL FACTS

The following are uncontroverted material facts supported by admissible evidence.

A latin cross sits on federal land in the Preserve.

The Preserve is located in the Mojave Desert in southeastern California, between the cities of Barstow, California, and Las Vegas, Nevada. The Preserve lies almost entirely between Interstate 15 ("I-15") to the north and Interstate 40 to the south, starting approxi-

[3] The court notes that page 164, lines 21-25 does not establish Buono's current residence.

mately 60 miles east of Barstow and extending toward the California-Nevada boundary and U.S. Route 95.

The cross is located on federal land within the Preserve known as Sunrise Rock, approximately 11 miles south of Interstate 15.

Before Congress designated the area as a national preserve, the United States Bureau of Land Management ("BLM"), the NPS's sister agency within the United States Department of Interior ("DOI"), had managed much of the federal desert land, including the area surrounding Sunrise Rock.

The Preserve is now operated by the NPS, a division of the DOI and a federal agency.

The Preserve encompasses approximately 1.6 million acres, or 2500 square miles, of primarily federally owned land in the Mojave Desert. The BLM, another federal agency, transferred the land to the NPS in 1994 as a result of the California Desert Protection Act.

Following the creation of the Preserve in 1994, Marvin Jensen ("Jensen") was appointed as the Preserve's first Superintendent. Buono at that time worked for the NPS and was assigned to the Preserve from January 22, 1995, to December 10, 1995, serving as an Assistant Superintendent for Ecosystem Management. Martin, the Deputy Superintendent, succeeded Jensen as Superintendent in 1995. In 1995, Buono left the Preserve and took a similar position with the NPS at the Joshua Tree National Park. Buono retired from public service in 1997, although he remains active and interested in NPS activities.

Approximately 86,600 acres of private land remain within the Preserve's boundaries. Another 43,000 acres belong to the State of California.

The cross is mounted on the top of a prominent rock outcropping on the north side of Cima Road, a narrow blacktop secondary road that passes through the Preserve.

The cross is visible to vehicles traveling on the road from a distance of approximately 100 yards.

A latin cross has two arms, one horizontal and one vertical, at right angles to each other, with the horizontal arm being shorter than the vertical arm.

The latin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion.

The cross is between five and eight feet tall, and it is bolted into the rock.

The cross is constructed out of four inch diameter metal pipes that are painted white.

The cross was erected in 1934, 60 years before Congress created the Preserve, by the Veterans of Foreign Wars as a memorial to veterans who died in World War I. Photos show the presence of wooden signs near the cross stating, "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members Veterans of Foregin [sic] Wars, Death Valley Post 2884." The wooden signs are no longer present, and the original cross, which is no longer standing, has been replaced several times by private parties since 1934.

There is currently no plaque at the cross indicating that it was intended to act as a memorial for soldiers.

The cross has been a gathering place for Easter Sunrise services since as early as 1935. Visitors to the Preserve also use the site to camp.

The NPS has not opened up the area of Sunrise Rock to individuals to erect other free-standing permanent displays, religious or otherwise, and there are no other free-standing displays, religious or otherwise, in the area.

The controversy surrounding the cross surfaced in 1999, when the NPS received a letter from an individual who identified himself as "Sherpa San Harold Horpa" of Jensen, Utah. The person who sent the letter under the alias "Sherpa San Harold Horpa" is also known to Buono as Herman R. Hoops ("Hoops"), a retired NPS employee and long-time acquaintance of Buono. Hoops requested permission from the NPS to erect a "stupa" (a dome-shaped Buddhist shrine) on a rock outcrop at a trail head located near the cross.

In a May 27, 1999, letter, the NPS informed Hoops that agency regulations codified at 36 C.F.R. § 2.62(a) would prohibit Hoops from installing a religious symbol, such as a stupa. The NPS noted that it intended to remove the cross located at that site.

On October 6, 1999, the American Civil Liberties Union ("ACLU") sent the NPS a letter expressing concern about the cross and threatened legal action if the NPS did not remove the cross.

After receiving the ACLU's October 6, 1999, letter, Martin directed the NPS staff to study the history of the cross. On January 31, 2000, the NPS completed an evaluation of the cross for commemorative significance, and

concluded that the cross did not qualify for inclusion in the National Register of Historic Places.

The NPS was informed during contacts with local citizens that immediately removing the cross could lead to significant public opposition. The NPS had encountered considerable public opposition to earlier decisions to remove privately-owned items interfering with its management of the Preserve.

On August 3, 2000, the ACLU wrote to NPS Director Robert Stanton and asserted that the cross on federal land violated the United States Constitution and that the ACLU would sue the NPS within 60 days unless the NPS removed the cross. The ACLU letter stated: "If we do go forward with a lawsuit, a court not only would order the government to remove the cross, but it also likely would assess damages against those responsible government officials who knew about the cross and yet did nothing about it [in] the face of the clear constitutional commands that make its presence on government property illegal."

Martin distributed a memorandum to her staff on October 6, 2000, informing it of her decision to remove the cross, citing her concern over the threatened private damage claim. After receiving the ACLU letters, the NPS located the private individuals believed to be responsible for maintaining the cross. Martin met with them and discussed the possibility of their voluntarily removing the cross. The individuals expressed their unwillingness to remove the cross and their determination to replace the cross if it were taken down.

On October 20, 2000, Reynolds wrote to inform the ACLU that the NPS intended to remove the cross.

San Bernardino County Supervisor Kathy A. Davis wrote to Congressman Jerry Lewis ("Lewis") (R-CA) on November 2, 2000, protesting the removal of the "veteran's memorial." In response to an inquiry from Lewis, Reynolds informed Lewis of the NPS's decision to remove the cross. NPS did not immediately remove the cross.

On December 15, 2000, the United States Congress passed an appropriations bill, the Consolidated Appropriations Act, a provision of which provided that none of the appropriated federal government's funds may be used to remove the cross. Then-President Clinton signed the law on December 21, 2000. The NPS did not act to remove the cross due to the legislative spending ban.

In December 2001 Congress passed PL 107-117, the Department of Defense and Emergency Supplemental Appropriations for Recovery From and Response to Terrorist Attacks on the United States Act, a provision of which designated the cross as a national memorial commemorating United States participation in World War I. The law provides funds to install a memorial plaque at the foot of the cross.

Buono worked for the NPS from 1972 to 1997. Buono was the Assistant Superintendent of the Preserve from September 1994 until December 1995. He held the same title at the Joshua Tree National Park until his retirement.

Buono became aware of the cross in 1995, when as the then-Assistant Superintendent of the Preserve, he was driving on Cima Road and "saw the cross on the small granite outcropping to which it is affixed."

Buono has never observed any sign, plaque, or indication of religious services performed at Sunrise Rock. He observed the cross perched on a rock off the highway from a distance of several hundred feet. He described the area surrounding the cross as a natural desert environment, with the only visible signs of human activity from Sunrise Rock being off-road vehicle tracks and a parking area for trail hikers, but with no buildings, telephone poles, or power lines in view.

He has no knowledge of anything the NPS has done to erect, maintain, or sponsor the cross, nor is he aware of any permit issued by the NPS or BLM regarding the cross.

Buono was actively involved in the designation of the Preserve as a national park area and its transfer from the control of the BLM to the NPS.

He regularly consulted with employees at the NPS legislative affairs office, wrote position papers, and sponsored a panel discussion in an effort to have the California Desert Protection legislation enacted into law.

Buono has remained actively involved in the Preserve since he moved from the area and since his retirement from the NPS.

Although he now lives in Oregon, Buono regularly visits the Preserve. Since leaving the NPS he has visited the Preserve two to four times a year on average.

Because of his continuing concern with the Preserve, Buono maintains regular contact with a wide variety of persons and groups located in or involved with the Preserve, including the National Audubon Society, National Parks Association, Southwest Center for Biological Di-

versity, Citizens for Mojave National Park, and the Public Employees for Environmental Responsibility.

Buono next intends to visit the Preserve in the Spring of 2002.

In 2002, Buono also intends to sell his home in Oregon, to relocate to Southern California or Arizona, and to make more frequent trips to the Preserve.

Buono is deeply offended by the cross display on public land in an area that is not open to others to put up whatever symbols they choose. A practicing Roman Catholic, Buono does not find a cross itself objectionable, but stated that the presence of the cross is objectionable to him as a religious symbol because it rests on federal land.

Buono will tend to avoid Sunrise Rock on his visits to the Preserve as long as the cross remains standing, even though traveling down Cima Road is often the most convenient means of access to the Preserve.

The NPS has no record of a complaint by Buono concerning the cross during his NPS career. Buono never mentioned or objected to the cross in discussions with any fellow employee of the NPS during his tenure as Assistant Superintendent of the Preserve. At no time did he ever discuss the legality of the cross with his agency's legal adviser. Buono submitted written comments to the Preserve on its draft General Management Plan in 1998, after he was aware of the cross, but he did not address or object to the cross. After he left the NPS, Buono spoke once about the cross with the Preserve's Chief Ranger, Sean McGuinness, in November 2000.

Schwartz is a many times decorated Jewish veteran of the United States Armed Forces.

He joined the Air National Guard in 1953 and was on active duty in the Air Force from 1956 until 1978.

Schwartz served in a variety of places, including March Air Force Base in California, as well as in Korea and in Vietnam from January 1967 through January 1968.

Schwartz is a member of a wide variety of veterans' organizations.

He is the Quartermaster of Post 152 of the Jewish War Veterans, Commander of Post 6476 of the Veterans of Foreign Wars ("VFW"), and Chaplain of American Legion Post 155.

Schwartz lives in Rialto in San Bernardino County, California, approximately three hours' drive from the cross.

Schwartz has lived for the past 23 years in San Bernardino County, the same county that encompasses the Preserve and the cross, and was unaware of its existence until September 2001, when a fellow veteran mentioned it at a VFW Post meeting and the chairman of the "action committee" asked him to "check out" the cross. He never had any occasion to visit the Preserve or view the cross until he decided to become a plaintiff in this action. He is not offended or injured by the sight of the cross, only by the fact that the land on which it rests is federally owned.

Schwartz first visited the cross in October 2001, while taking a side excursion en route to Las Vegas. He saw no sign directing him to the location of the cross,

and does not recall any markings indicating who owned the surrounding land, other than his vague recollection of a sign that he was entering the Preserve. He has no personal knowledge of whether and which portions of the land within the boundaries of the Preserve are owned by the United States, the State of California, or private citizens. Schwartz has no personal knowledge of whether or not the land on which the cross is situated is federal.

He first observed the cross from his car at a distance of approximately 50 feet while driving south on Cima Road from Interstate 15. After driving past the cross and turning around, he saw the cross driving back north from a "very short distance," estimated at 20 feet.

Schwartz observed that the rock on which the cross is located is 15 to 20 feet in height. Schwartz climbed to within 10 feet from the cross, which he described as made of four-inch white painted pipe, and approximately six feet in height. He enjoyed "extremely clear" visibility of at least a mile from atop the rock, but observed no other signs of human habitation or buildings, just the paved road, rock, weeds, and probably some cactus. Schwartz saw no evidence at the cross of any lights, plaques, signs, or religious worship (besides the cross itself). He also knows of no NPS activity in the area, including maintenance or sponsorship of the cross.

Schwartz is offended by the presence of the cross on federal land because he does not believe that the United States should permit sectarian religious symbols on government property unless the property is open to all to erect other symbols or displays.

His further reaction to the cross itself is that it is "very nice to have put it up there whoever did it," and

the sole basis for his objection is its presence on federal land.

At the time Schwartz climbed up near the cross, there were no plaques or other signs stating that the cross is intended to be a veterans' memorial.

Even if such signs were there, the cross would offend Schwartz, because a sectarian Christian symbol is not meaningful to him as a Jewish war veteran.

The presence of the cross negatively affects Schwartz' enjoyment of the area as he passes through it.

Schwartz intends to visit the cross area regularly during his trips to Las Vegas because he finds the presence of the cross on government land offensive. He will go to see if it has been taken down.

Schwartz never contacted the NPS to express any concern or objection regarding the cross.

Norton is the Secretary of the DOI. As Secretary of the DOI, she oversees the NPS.

Reynolds is the Regional Director of the Pacific West Region of the NPS. The Preserve is within the Pacific West Region of the NPS.

Martin is the Superintendent of the Preserve.

IV.

ANALYSIS

A. Legal Standard Governing Motion For Summary Judgment

Under Rule 56(c), a district court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, to-

gether with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c).

The Supreme Court and the Ninth Circuit have established the following standards for consideration of such motions: "If the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.' " *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987) (quoting Rule 56(e) and citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.,* 793 F.2d 1100, 1103-04 (9th Cir.1986)). With respect to these specific facts offered by the non-moving party, the court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. *See T.W. Elec. Serv.,* 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)).

Rule 56(c) nevertheless requires this Court to enter summary judgment, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,*

477 U.S. at 322, 106 S.Ct. at 2552. The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient: "[T]here must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986); *see also Matsushita,* 475 U.S. at 586, 106 S.Ct. at 1355-56 ("[W]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."). This court thus applies to either party's motion for summary judgment the same standard as that for a motion for a directed verdict: "[W]hether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *T.W. Elec. Serv.,* 809 F.2d at 630.

B. Plaintiffs' and the Government's Motions

The court concludes that the evidence as presented by both Plaintiffs and the government does not establish any triable issues of material fact. Consequently the court will consider and decide under the uncontroverted material facts (1) whether Buono and Schwartz have standing to assert their constitutional claims, and (2) if either or both of them has standing as a matter of law, whether the presence of the cross on federally owned land in the Preserve violates the Establishment Clause of the First Amendment to the United States Constitution.

1. *Standing*

Article III of the United States Constitution limits federal court jurisdiction to "Cases" and "Contro-

versies." U.S. Const. art. III, § 2; *see also, e.g., Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-60, 112 S. Ct. 2130, 2135-36, 119 L. Ed. 2d 351 (1992). Standing, or "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues," *ASARCO Inc. v. Kadish,* 490 U.S. 605, 612-13, 109 S. Ct. 2037, 2043, 104 L. Ed. 2d 696 (1989) (citing *Warth v. Seldin,* 422 U.S. 490, 498, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975)), is therefore a matter of constitutional dimension.

Plaintiff must satisfy three requirements in order to establish Article III standing. First, plaintiff "must demonstrate 'injury in fact'—a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens,* 529 U.S. 765, 771, 120 S. Ct. 1858, 1861, 146 L. Ed. 2d 836 (2000) (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 155, 110 S. Ct. 1717, 1723, 109 L. Ed. 2d 135 (1990) (internal quotation marks and citation omitted)). Second, she "must establish causation—a 'fairly . . . trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant." *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41, 96 S. Ct. 1917, 1926, 48 L. Ed. 2d 450 (1976)). Third, she "must demonstrate redressability—a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Id.* at 771, 120 S. Ct. at 1861-62 (quoting *Simon,* 426 U.S. at 45, 96 S. Ct. at 1928).

The government does not contest that Buono and Schwartz satisfy the redressability prong because part of the relief, namely, ordering the government to remove the cross, would remedy the alleged injury in fact.

Therefore, the court will address the government's contentions that Buono and Schwartz have not demonstrated injury in fact and causation.

a. Injury in fact

To allege an injury in fact, plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560, 112 S. Ct. at 2136. In the Establishment Clause context, injury in fact exists if plaintiff was "subjected to unwelcome religious exercises or [was] forced to assume special burdens to avoid them." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.,* 454 U.S. 464, 486 n. 22, 102 S. Ct. 752, 766 n. 22, 70 L. Ed. 2d 700 (1982). *See also, e.g., Arizona Civil Liberties Union v. Dunham,* 112 F. Supp. 2d 927, 929 (D.Ariz.2000) (quoting *American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.,* 698 F.2d 1098, 1108 (11th Cir. 1983) (quoting in turn *Valley Forge,* 454 U.S. at 487 n. 22, 102 S. Ct. at 766 n. 22)).

With respect to being "subjected to unwelcome religious exercises," "religious exercises" can include "religious displays":

> Religious display cases are an even more particularized subclass of Establishment Clause standing jurisprudence. The injury that gives standing to plaintiffs in these cases is that caused by unwelcome direct contact with a religious display that appears to be endorsed by the state. Applying *Valley Forge,* many lower courts have thus premised standing on the injury that results from unwelcome personal contact with a state-sponsored religious display.

Suhre v. Haywood County, 131 F.3d 1083, 1086-87 (4th Cir.1997) (citing *Murray v. City of Austin,* 947 F.2d 147, 151 (5th Cir. 1991); *Kaplan v. City of Burlington,* 891 F.2d 1024, 1027 (2d Cir. 1989); *Foremaster v. City of St. George,* 882 F.2d 1485, 1490-91 (10th Cir. 1989); *Saladin v. City of Milledgeville,* 812 F.2d 687, 692 (11th Cir. 1987); *Harvey v. Cobb County,* 811 F. Supp. 669, 675 (N.D. Ga.), *aff'd,* 15 F.3d 1097 (11th Cir. 1994)). There is no question based on the uncontroverted facts that both Buono and Schwartz were harmed by being subjected to an unwelcome religious display, namely the cross. Each Plaintiff came into a direct and unwelcome contact with the cross. Each was offended by its presence, and each will continue to be offended by its presence on subsequent, imminent trips by them to or near the site of the cross.

With regard to the second disjunctive element for standing in Establishment Clause cases—being forced to assume burdens to avoid government-endorsed religion—the government contends that Plaintiffs' exposure to the cross should be disregarded for purposes of standing because Plaintiffs could have avoided the harm. However, the Seventh Circuit has expressly rejected such an argument, and the court adopts its reasoning. In *American Civil Liberties Union v. City of St. Charles,* 794 F.2d 265 (7th Cir. 1986) (Posner, J.), the Seventh Circuit responded to defendant's contention that "plaintiffs have inflicted this cost on themselves and can avoid it by continuing to follow their accustomed routes and shrugging off the presence of the . . . cross." 794 F.2d at 268. The court held "[t]hat the injury to the plaintiffs could have been averted . . . did not deprive the plaintiffs of standing," commenting that

"[i]f [they] lacked standing . . . no one would have standing." *Id*. at 268-69. By the government's logic, all individuals offended by a religious display could avoid it and thereby not be harmed by it. Such an argument flies in the face of standing jurisprudence and would render the Establishment Clause a nullity.

In the same vein, the government claims that Buono's and Schwartz's standing is as tenuous as that of plaintiffs in *Bear Lodge Multiple Use Ass'n v. Babbitt,* 175 F.3d 814 (10th Cir. 1999), because plaintiffs' standing here, as in *Bear Lodge,* is based on plaintiffs' "coming to the injury." The *Bear Lodge* plaintiffs challenged, inter alia, the constitutionality of the government's request that plaintiffs refrain from rock climbing in a certain area. *See id*. at 820-22. Finding that plaintiffs did not have standing, the court focused on the fact that plaintiffs' compliance with the request was voluntary. *See id*. at 821-22. However, Plaintiffs' standing here is not premised on conduct pursuant to the same precatory request as that of the *Bear Lodge* plaintiffs. The cross will remain on the federal land, continuing to harm Buono and Schwartz when they are in or near the area, unless and until the court orders it removed.

The fact that Schwartz initially proactively sought to find the cross is also irrelevant. Standing sufficient to warrant the imposition of prospective injunctive relief is not based on Schwartz's previous visits to the Preserve, but rather on such future visits. While the fact that he intends to visit the cross regularly "*because* he finds the presence of the cross . . . offensive" might not establish an injury in fact, *see Valley Forge,* 454 U.S. at 487, 102 S.Ct. at 766 (commenting that plaintiff may not "roam the country in search of governmental wrongdo-

ing" in order to gain standing), Schwartz also asserts that his "enjoyment of the area" will be lessened due to the presence of the cross when he passes through the Preserve in the future for reasons other than checking on the status of the cross. Such harm constitutes injury in fact.[4] In other words, the court concludes that both Plaintiffs have incurred an actual and particularized concrete injury, not a generalized grievance, by the existence of the cross as located in the Preserve.

In sum, the Ninth Circuit has held repeatedly that plaintiffs who are prevented from freely using public land due to a religious symbol being located thereon have suffered an injury in fact. *See, e.g., Separation of Church and State Comm. v. City of Eugene,* 93 F.3d 617, 619 n. 2 (9th Cir. 1996) (per curiam) ("SCSC"); *Ellis v. City of La Mesa,* 990 F.2d 1518, 1523 (9th Cir. 1993); *Hewitt v. Joyner,* 940 F.2d 1561, 1564 (9th Cir. 1991). Here, as a result of the presence of the cross, Buono, who regularly visits the Preserve, will avoid traveling on Cima Road, which is often the most convenient means of access to the Preserve. Schwartz, who also plans on passing through the Preserve, is unable to enjoy the area fully due to the presence of the cross. The presence of

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[4] The uncontroverted material facts are silent with respect to whether Schwartz will see the cross when he "passes through" the area in the future. However, neither Buono nor Schwartz actually needs to see the cross in order to be injured by its presence. *Compare Books v. City of Elkhart,* 235 F.3d 292, 297 (7th Cir.2000) (finding that plaintiffs have standing, even though their injury was based, at least in part, on the fact that they "know the [religious symbol] is there whether [they] see it or not"). It is sufficient for purposes of standing that Plaintiffs know that the cross will remain until the government removes it, which knowledge will negatively affect their enjoyment of the area as they pass through the Preserve.

the cross clearly prevents them from freely using public land.

In the case most analogous to the situation at bar, *SCSC,* the Ninth Circuit made short thrift of defendant City of Eugene's standing arguments. Ruling on the constitutionality of a latin cross situated in a public park, the Ninth Circuit disposed of a challenge to plaintiff's standing in a footnote: "As a threshold matter, we note that [plaintiff organization] is composed of local citizens who have standing to bring this challenge because they alleged that the cross prevented them from freely using the area." *SCSC,* 93 F.2d at 619 n. 2.[5] Here, Buono will not travel on Cima Road and Schwartz cannot enjoy his travels through the Preserve due to the presence of the cross. This is sufficient to constitute injury in fact. *Compare City of St. Charles,* 794 F.2d at 268 (holding that plaintiffs have standing to assert Establishment Clause violation because, in part, a cross "led [plaintiffs] to alter their behavior").[6]

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[5] The government seeks to distinguish the *SCSC* court's discussion of standing because the cross in *SCSC* was larger and otherwise more prominent than the cross here. Even if this were the case, the court is nonplussed how the size and prominence of a cross in any way affects whether plaintiffs, who had direct contact with the cross, and who were and will continue to be injured by its presence, have standing. *Compare Rabun,* 698 F.2d at 1108 (commenting that "the Supreme Court has made it clear that no minimum quantitative limit is required to establish injury [in fact]").

[6] The government raises three issues with respect to Plaintiffs' injury in fact, or lack thereof, that have yet to be addressed by the court, none of which warrants more than brief mention. First, in an argument that the government quixotically both advances and concedes as baseless, the government claims that Plaintiffs have not suffered an injury in fact because their contact with the cross is for a very short period of time. However, any viewing of an allegedly unconstitutional religious

b. Causation

The government contends that the uncontroverted facts do not establish as a matter of law a fairly traceable connection between the injury in fact to Plaintiffs and the alleged conduct of the government. It argues that private individuals erected and maintained the cross, and that the government has taken no affirmative action to support the religious symbol. However, as Plaintiffs point out, the government has taken and will continue to take affirmative action in support of the cross, and, in any event, governmental affirmative action is not necessary to establish causation for the purpose of standing in Establishment Clause cases.

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symbol, no matter how brief, is significant, and the government cites no judicial authority to the contrary. Second, the government argues that the presence of the cross does not impede Plaintiffs' enjoyment of "nearly all" of the 1.6 million acres of the Preserve. This is a similarly unavailing argument. *See, e.g., Gonzales,* 4 F.3d at 1417 (one cross on 336 acres of public park did not negate plaintiffs' standing because "denial of even a portion of the Park is an injury in fact"). *See also Valley Forge,* 454 U.S. at 486 n. 22, 102 S.Ct. at 766 n. 22 (plaintiff has standing in Establishment Clause action when she alleges that she must assume burdens to avoid a religious symbol).

Third, the government makes much of the fact that neither Buono nor Schwartz complained about the presence of the cross prior to their filing the present action. Judicial precedent does not support Defendants' implied contention that the lack of pre-trial complaints about the alleged unconstitutionality of a religious symbol should factor into standing analysis. Courts in similar situations have held that plaintiffs have standing without questioning their lack of pre-trial complaints. *See, e.g., Books,* 235 F.3d at 296-97 (plaintiffs who had lived in close proximity to allegedly unconstitutional religious symbol for decades had standing, notwithstanding that there was no evidence that they had complained about the presence of the symbol prior to their filing the complaint).

First, the government has and will continue to support maintaining the cross. Citing an administrative regulation, the NPS refused Hoops' request to erect another religious display in the same area of the Preserve as the cross. In its letter denying the request, the NPS advised Hoops that it intended to remove the cross.[7] However, recent federal legislation banning the NPS from spending money to remove the cross precludes it from doing so. Moreover, the NPS, pursuant to federal law, plans to install a memorial plaque at the base of the cross. The first governmental action—refusing the installation of another religious symbol, while permitting the presence of the cross—constitutes governmental support for the cross; the second—spending money and installing a plaque at the site of the cross, while prohibiting the NPS from using appropriated money to remove the cross—constitutes both governmental support for and maintenance of the cross. These affirmative actions provide a "fairly traceable connection" between the injury in fact and the government's conduct. *See Desert Outdoor Adver. v. City of Moreno Valley,* 103 F.3d 814, 818 (9th Cir.1996).

Second, a showing of affirmative action by the government is not required to establish the causation element of standing in order to challenge the constitutionality of a religious display on government land when the government has not opened up the area to other religious displays. Numerous courts have held that plain-

[7] The government appears to argue that one reason it did not remove the cross was Martin's apprehension that doing so would have subjected her to physical abuse from local citizens. While the court is sympathetic to Martin's concern for her well-being, the court finds it irrelevant to the issue of Plaintiffs' standing.

tiffs have standing to challenge the constitutionality of religious symbols neither erected nor maintained by the government. *See, e.g., Books,* 235 F.3d at 295-301 (holding that plaintiffs have standing to challenge the constitutionality of monument inscribed with the Ten Commandments placed on government land by private organization, even though government did not maintain the structure); *Gonzales v. N. Township,* 4 F.3d 1412, 1414-17 (7th Cir. 1993) (holding that plaintiffs have standing to challenge the constitutionality of the presence of a cross in a city park, even though the cross was neither erected nor financially maintained by the government). While the court concludes from the uncontroverted facts that the federal government did and will take affirmative action in support of maintaining the cross, establishing a certain traceable connection between the injury in fact and the government's conduct, the mere presence of the cross on federal land is sufficient to satisfy the causation prong.

While, in general, "the concept of injury for standing purposes is particularly elusive in Establishment Clause cases," *Murray,* 947 F.2d at 151, this is not such a case. The court concludes as a matter of law that both Buono and Schwartz have standing to challenge the constitutionality of the government's maintaining the presence of the cross under the Establishment Clause. The court now will consider the constitutionality of the presence of the cross in the Preserve.

2. *Constitutionality of the Presence of the Latin Cross*

The Establishment Clause of the First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of reli-

gion . . . . " U.S. Const. amend. 1. According to the Supreme Court, "the Establishment Clause [has come] to mean that government may not promote or affiliate itself with any religious doctrine or organization . . . ." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 590-91, 109 S.Ct. 3086, 3099-3100, 106 L. Ed. 2d 472 (1989).

> Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion, see, *e.g., Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989)), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente,* 456 U.S. 228, 244, 102 S. Ct. 1673, 1683, 72 L. Ed. 2d 33 (1982).

Id. at 605, 109 S.Ct. at 3107.

The parties agree that the Supreme Court's ruling in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), sets forth the governing test to evaluate an alleged Establishment Clause violation. *See also Alvarado v. City of San Jose,* 94 F.3d 1223, 1231 (9th Cir. 1996) (noting that "the *Lemon* test is the one applied in this circuit") (citing *Brown v. Woodland Joint Unified Sch. Dist.,* 27 F.3d 1373, 1378 (9th Cir. 1994); *Kreisner v. San Diego,* 1 F.3d 775, 780 (9th Cir. 1993)). A government religious practice or symbol will survive an Establishment Clause challenge when it (1) has a secular purpose, (2) has a primary effect that neither ad-

vances nor inhibits religion, and (3) does not foster excessive state entanglement with religion. *See Lemon,* 403 U.S. at 612-13, 91 S. Ct. at 2111. "State action violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard,* 482 U.S. 578, 583, 107 S.Ct. 2573, 2577, 96 L. Ed. 2d 510 (1987); *see also Vernon v. City of Los Angeles,* 27 F.3d 1385, 1397 (9th Cir. 1994) (citing *Edwards*).

The government maintains that its actions satisfy all of *Lemon*'s test elements, while Plaintiffs contend that the government has run afoul of both the purpose and effect prongs. The court need not assess whether the purpose prong is violated because the primary effect of the presence of the cross advances religion.

The effect prong "asks whether, irrespective of government's actual purpose, the practice . . . in fact conveys a message of endorsement or disapproval [of religion]." *Lynch v. Donnelly,* 465 U.S. 668, 690, 104 S. Ct. 1355, 1368, 79 L. Ed. 2d 604 (O'Connor, J., concurring). With regard to whether the presence of the cross has a primary effect that advances or inhibits religion, or conveys a message of governmental endorsement or disapproval of religion, the court is bound by *SCSC,* which, in applying the effect prong, concluded that the presence of a particular cross on government land violated the Establishment Clause. The *SCSC* court, faced with facts materially indistinguishable from those in the action at bar, assessed the constitutionality of a latin cross that was erected by private individuals. *See id*. at 618. These individuals deeded the cross to the City of Eugene, which placed a plaque "at the foot of the cross dedicat[ing] it as a memorial to war veterans." *Id*. Every year, the City of Eugene illuminated the cross for seven

days during the Christmas season, five days during the Thanksgiving season, and one day each on Memorial Day, Independence Day, and Veteran's Day. *See id.*

The Ninth Circuit concluded that it was "simple" and "straightforward" that the presence of the cross had a primary effect that advanced religion, and thus was unconstitutional. *Id.* at 620 n. 5. Finding that "[t]here is no question that the Latin cross is a symbol of Christianity," and that "the cross may reasonably be perceived as governmental endorsement of Christianity," the court held that "its placement on public land by the City of Eugene violates the Establishment Clause." *Id.* at 620 (concluding that "the City of Eugene has impermissibly breached the First Amendment's 'wall of separation' between church and state"). This is notwithstanding the fact that the cross served officially as a war memorial. *See id.* at 618-19.[8]

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[8] Many other courts have similarly held that a religious symbol's official designation as a war memorial does not shield it from constitutional scrutiny. *See, e.g., Gonzales,* 4 F.3d at 1421 ("*Lemon* does not permit a municipality to exempt a[sic] obviously religious symbol from constitutional strictures by attaching a sign dedicating the symbol to our honored dead."); *Jewish War Veterans of U.S. v. United States,* 695 F. Supp. 3, 14 (D.D.C. 1988) ("The use of a cross as a memorial to fallen or missing servicemen is a use of what to some is a religious symbol where a nonreligious one likely would have done as well. The Court is constrained to find that cross cannot satisfy the secular effect prong of the *Lemon* test because it conveys a message of endorsement of Christianity."); *Greater Houston Chapter of American Civil Liberties Union v. Eckels,* 589 F. Supp. 222, 235 (S.D. Tex.1984) ("[E]ven if one strains to view the symbols in the context of a war memorial, their primary effect is to give the impression that only Christians and Jews are being honored by the county.").

Defendants attempt to distinguish *SCSC* on two bases: First, that the cross in *SCSC* was much more noticeable than the cross at bar. Second, that the government is significantly less intertwined with the cross here than in *SCSC*. *Compare Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 337, 107 S. Ct. 2862, 2869, 97 L. Ed. 2d 273 (1987) ("For a law to have forbidden 'effects' under *Lemon,* it must be fair to say that the *government itself* has advanced religion through its own activities and influence.") (emphasis in original). However, neither distinction is apt.

While it is true that the *SCSC* cross, unlike the cross at bar, was large (51 feet tall), illuminated at night, and located in a relatively populous city, these characteristics are largely inapposite factors to Establishment Clause analysis. While the "particular physical setting" is a relevant consideration in assessing whether the presence of a religious symbol violates the Establishment Clause, *see, e.g., Allegheny,* 492 U.S. at 597, 109 S. Ct. at 3103, nothing in *SCSC* suggests that the particular setting of the cross in question militates in favor of finding its presence meets the primary effect standard. Quite the opposite: the cross is on federal land, and the court concludes from the uncontroverted material facts that a reasonable observer would believe that such land and the cross are owned by the government. *See Allegheny,* 492 U.S. at 620, 109 S. Ct. at 3115 (whether primary effect advances or inhibits religion is to be assessed according to the standard of a "reasonable observer"). *Compare SCSC,* 93 F.3d at 626 (O'Scannlain, J., concurring) (rejecting defendant's argument that the cross is constitutional because it "stands so remote from any government buildings").

Furthermore, the court concludes that the size of a cross and the number of people who view it are not important for deciding whether a reasonable observer would perceive the cross located on federal land as governmental endorsement or disapproval of religion. *Compare Books,* 235 F.3d at 296 (religious symbol that is six feet tall and three-and-a-half feet wide was unconstitutional); *American Civil Liberties Union of Ohio v. City of Stow,* 29 F. Supp. 2d 845, 847 (N.D. Ohio 1998) (holding unconstitutional a city seal, which was displayed on, inter alia, official City stationary and letterhead, because the upper-left quadrant depicted an open book, overlaid with a cross). Similarly, the constitutionality of the presence of a religious symbol does not depend on the number of people who view the symbol. It is sufficient that Plaintiffs have been and will continue to be harmed by the presence of the cross. *Compare SCSC,* 93 F.3d at 625-26 n. 11 (O'Scannlain, J., concurring):

> I do not subscribe to the notion that a constitutional violation results merely because the cross . . . is visible to many. Whether a religious display garners a great deal of attention or is scarcely noticed is irrelevant to the Establishment Clause. Rather, the Establishment Clause focuses on whether the religious display creates an appearance of governmental endorsement of religion. Thus, how few or how many people view the display does not advance the analysis.

With respect to the government's attempt to distinguish *SCSC* on the ground that the government in *SCSC* was more intertwined with the cross than is the government as to the subject cross, this contention lacks merit. It is true that in *SCSC,* unlike in the present situation,

the City of Eugene granted a permit (post-erection) to the individuals who erected the cross, and then accepted a deed to the cross. *See* 93 F.3d at 618. In addition, the City of Eugene illuminated the cross fifteen days annually. *See id*. However, as discussed above, the uncontroverted facts are that the government is intimately connected to the cross. *See supra* Section B.1.b.[9]

Here, as in *SCSC,* the presence of the cross on federal land conveys a message of endorsement of religion. Thus, the court concludes as a matter of law based on the uncontroverted facts that the presence of the cross on the federal land portion of the Preserve is unconstitutional, and the court will grant Plaintiffs' Motion for summary judgment and deny the government's Motion for summary judgment.[10]

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[9] In so finding, the court notes that it is not engaging in an analysis pursuant to the third *Lemon* prong-excessive state entanglement with religion. Rather, it is merely responding to the government's attempts to distinguish *SCSC.*

[10] To the extent that the government contends that the court should not rule on the constitutionality of the presence of the cross due to the plenary power doctrine, *see* U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . . "), its argument is unsupportable. In essence, the government asks this court to hold that the plenary power doctrine as embodied in the Property Clause trumps all constitutional provisions. This position is both contrary to law and bad policy. First, "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction *so long as the exercise of that authority does not offend some other constitutional restriction.*" *Buckley v. Valeo,* 424 U.S. 1, 132, 96 S. Ct. 612, 688, 46 L. Ed. 2d 659 (1976) (per curiam) (internal citation omitted) (emphasis added). Moreover, under the government's argument, Congress could pass and the President could sign legislation that allows discrimination on the basis of race or gender, or that permit the restriction of speech, so long as such conduct occurs on

V.

DISPOSITION

ACCORDINGLY, IT IS ORDERED THAT:

1) Plaintiffs' Motion for summary judgment is GRANTED; and

2) the government's Motion for summary judgment is DENIED.

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federal land. However, the legislative and executive branches' exercise of their constitutional powers continues to be subject to compliance with the Establishment Clause of the First Amendment, one of the oldest Amendments to the United States Constitution.

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DISTRICT

ED CV 01-216-RT

FRANK BUONO; ALLEN SCHWARTZ, PLAINTIFFS

v.

GALE NORTON, SECRETARY OF THE INTERIOR, IN HER OFFICIAL CAPACITY; JOHN J REYNOLDS, REGIONAL DIRECTOR, PACIFIC NORTHWEST REGION OF THE DEPARTMENT OF INTERIOR, IN HIS OFFICIAL CAPACITY; MARY MARTIN, SUPERINTENDENT OF THE MOJAVE NATIONAL PRESERVE, IN HER OFFICIAL CAPACITY, DEFENDANTS

[July 24, 2002]

JUDGMENT

On July 24, 2002, the Court made an Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment ("Order"). Accordingly,

IT IS ORDERED AND ADJUDGED that judgment be entered in Plaintiffs' favor on their claim for declaratory and injunctive relief.

IT IS FURTHER ORDERED ADJUDGED AND DECLARED that the actions of Defendants, as stated in the uncontroverted material facts section of the Order, violated Plaintiffs' rights under the Establishment Clause of the First Amendment to the United States Constitution.

IT IS FURTER ORDERED AND ADJUDGED that Defendants, their employees, agents, and those in active concert with Defendants, are hereby permanently restrained and enjoined from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve.

IT IS FURTER ORDERED AND ADJUDGED that Plaintiffs recover their costs against Defendants in the amount of $_____.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs have sixty days from the entry of this Judgment to file any motion for attorney's fees.

DATED: July 24, 2002.

/s/ ROBERT J. TIMLIN
ROBERT J. TIMLIN
United States District Judge

APPENDIX G

1. Section 8121 of the Department of Defense Appropriations Act of 2004, Pub. L. No. 108—87, 117 Stat. 1054, 1100, provides:

(a) EXCHANGE REQUIRED.—In exchange for the private property described in subsection (b), the Secretary of the Interior shall convey to the Veterans Home of California—Barstow, Veterans of Foreign Wars Post #385E (in this section referred to as the "recipient"), all right, title, and interest of the United States in and to a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by section 8137 of the Department of Defense Appropriations Act, 2002 (Public Law 107-117; 115 Stat. 2278)) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war. Notwithstanding the conveyance of the property under this subsection, the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137.

(b) CONSIDERATION.—As consideration for the property to be conveyed by the Secretary under subsection (a), Mr. and Mrs. Henry Sandoz of Mountain Pass, California, have agreed to convey to the Secretary a parcel of real property consisting of approximately five acres, identified as parcel APN 569-051-44, and located in the west 1/2 of the northeast 1/4 of the northwest 1/4 of the northwest 1/4 of section 11, township 14 north, range 15 east, San Bernardino base and meridian.

(c) EQUAL VALUE EXCHANGE; APPRAISAL.—The values of the properties to be exchanged under this section shall be equal or equalized as provided in subsection (d).

The value of the properties shall be determined through an appraisal performed by a qualified appraiser in conformance with the Uniform Appraisal Standards for Federal Land Acquisitions (Department of Justice, December 2000).

(d) CASH EQUALIZATION.—Any difference in the value of the properties to be exchanged under this section shall be equalized through the making of a cash equalization payment. The Secretary shall deposit any cash equalization payment received by the Secretary under this subsection in the Land and Water Conservation Fund.

(e) REVERSIONARY CLAUSE.—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 and honoring the American veterans of that war. 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.

(f) BOUNDARY ADJUSTMENT; ADMINISTRATION OF ACQUIRED LAND.—The boundaries of the Mojave National Preserve shall be adjusted to reflect the land exchange required by this section. The property acquired by the Secretary under this section shall become part of the Mojave National Preserve and be administered in accordance with the laws, rules, and regulations generally applicable to the Mojave National Preserve.

2. Section 8137 of the Department of Defense and Emergency Supplemental Appropriations for Recovery From and Response to Terrorist Attacks on the United States Act of 2002, Pub. L. No. 107—117, 115 Stat. 2230, 2278, provides:

(a) DESIGNATION OF NATIONAL MEMORIAL.—The five-foot-tall white cross first erected by the Veterans of Foreign Wars of the United States in 1934 along Cima Road in San Bernardino County, California, and now located within the boundary of the Mojave National Preserve, as well as a limited amount of adjoining Preserve property to be designated by the Secretary of the Interior, is hereby designated as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.

(b) LEGAL DESCRIPTION.—The memorial cross referred to in subsection (a) is located at latitude 35.316 North and longitude 115.548 West. The exact acreage and legal description of the property to be included by the Secretary of the Interior in the national World War I memorial shall be determined by a survey prepared by the Secretary.

(c) REINSTALLATION OF MEMORIAL PLAQUE.—The Secretary of the Interior shall use not more than $10,000 of funds available for the administration of the Mojave National Preserve to acquire a replica of the original memorial plaque and cross placed at the national World War I memorial designated by subsection (a) and to install the plaque in a suitable location on the grounds of the memorial.