No. 08-472

In the Supreme Court of the United States

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

v.

FRANK BUONO, RESPONDENT.

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

BRIEF FOR THE UTAH HIGHWAY PATROL ASSOCIATION AND ROBERT E. MACKEY AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

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

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

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

TABLE OF CONTENTS
(continued)

Page

QUESTIONS PRESENTED I

TABLE OF AUTHORITIES III

INTEREST OF AMICI CURIAE 2

ARGUMENT 3

I. RESPONDENT LACKS CONSTITUTIONAL STANDING TO CHALLENGE THE SUNRISE ROCK CROSS. 3

II. THE SUNRISE ROCK CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE 5

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases:

Allegheny County v. *Greater Pittsburgh ACLU*,
492 U.S. 573 (1989) 7, 14

American Atheists, Inc. v. *Duncan*,
528 F. Supp. 2d 1245 (D. Utah 2007) 3, 16

Buono v. *Kempthorne*,
527 F.3d 758 (9th Cir. 2008) ....*passim*

Buono v. *Norton*,
212 F. Supp. 2d 1202 (C.D. Cal. 2002).............. 3

Buono v. *Norton*,
371 F.3d 543 (9th Cir. 2004) 6, 8, 17

Capitol Square Review and Advisory Board v. *Pinette*,
515 U.S. 753 (1995) 14, 15, 16

Diamond v. *Charles*,
476 U.S. 54 (1986) 4

Elk Grove Unified Sch. Dist. v. *Newdow*,
542 U.S. 1 (2004) 18

Ellis v. *City of La Mesa*,
990 F.2d 1518 (9th Cir. 1993) 7

Jewish War Veterans of the United States v. *United States*,
695 F. Supp. 1 (D.D.C. 1987)............................. 7

Lemon v. *Kurtzman*,
403 U.S. 602 (1971) 9

Lujan v. *Defenders of Wildlife*,
504 U.S. 555 (1992) 5

Lynch v. Donnelly,
465 U.S. 668 (1984) 10, 14, 18

Marks v. *United States*,
430 U.S. 188 (1977) 11

McCreary County v. *American Civil Liberties Union of Kentucky*,
545 U.S. 844 (2005) 9, 12, 18

Mercer v. *Theriot*,
377 U.S. 152 (1964) 6

MLB Players Ass'n v. *Garvey*,
532 U.S. 504 (2001) 6

Murray v. *City of Austin*,
947 F.2d 147 (5th Cir. 1991) 13

Pleasant Grove City v. *Summum*,
129 S. Ct. 1125 (2009) 4

Separation of Church and State Committee v. *City of Eugene*,
93 F.3d 617 (9th Cir. 1996) 6, 7, 9

Stone v. *Graham*,
449 U.S. 39 (1980) 12

Summers v. *Earth Island Inst.*,
129 S. Ct. 1142 (2009) 4

Trunk v. *City of San Diego*,
568 F. Supp. 2d 1199 (S.D. Cal. 2008)............ 16

Van Orden v. *Perry*,
545 U.S. 677 (2005) ....*passim*

Weinbaum v. City of Las Cruces,
541 F.3d 1017 (10th Cir. 2008) 13, 14

Constitution and statutes:

U.S. Const.:

Art. IV, § 3, Cl. 2 (Property Clause) 18

Amend. I

Establishment Clause .... *passim*

Free Speech Clause 4

Department of Defense Appropriations Act, 2004,
Pub. L. No. 108-87, 117 Stat. 1100........................ 5

16 U.S.C. § 413 16

16 U.S.C. § 430g-6 16

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INTEREST OF AMICI CURIAE[1]

Robert E. Mackey – Robert Mackey organized the 1995 initiative to place fourteen granite crosses on Storm King Mountain, located in the White River National Forest. The crosses memorialize the death and sacrifice of Mr. Mackey's son, Donald Mackey,

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

and thirteen other firefighters who lost their lives while fighting the South Canyon Fire near Glenwood Springs, Colorado on July 5, 1994. The crosses were erected with the permission of each firefighter's family and the Bureau of Land Management. In the more than thirteen years since the granite memorial crosses were installed, Mr. Mackey and many others have visited the crosses to pay respect to the firefighters who gave their lives fighting the South Canyon fire. The proper resolution of this case is of great concern to Mr. Mackey because the Ninth Circuit's blanket prohibition of Latin crosses on federal land may call into question the existence of the firefighter memorial crosses on Storm King Mountain and other similar memorials around the country located on state and federal land.

Utah Highway Patrol Association ("UHPA") – UHPA is a private non-profit organization dedicated to supporting Utah State Highway Patrol Officers and acknowledging those troopers' service to the people of the State of Utah. UHPA conceived and constructed memorial crosses along Utah roadways at or near the location where thirteen highway patrol officers were mortally injured in the line of duty. No governmental or religious entities were involved in the process. The crosses were erected with the permission of each patrol officer's family and the State of Utah. American Atheists, Inc. and several individual members of that organization brought suit in the United States District Court for the District of Utah against several Utah state officials for permitting the erection of the crosses, alleging violations of the Establishment Clause, the Free Speech Clause, and the Utah Constitution.

UHPA intervened in the action. The district court granted the defendants' motion for summary judgment. See *American Atheists, Inc.* v. *Duncan*, 528 F. Supp. 2d 1245 (D. Utah 2007). American Atheists appealed the decision to the United States Court of Appeals for the Tenth Circuit. That case is still pending. The proper resolution of this case is of great concern to UHPA because if successful, Appellants' efforts could call into question the existence of the highway patrol officers' memorial crosses and other similar memorials around the country located on state and federal land.

ARGUMENT

I. RESPONDENT LACKS CONSTITUTIONAL STANDING TO CHALLENGE THE SUNRISE ROCK CROSS.

The cross in this case sits atop Sunrise Rock in the Mojave National Preserve in southeastern California. *Buono* v. *Norton*, 212 F. Supp. 2d 1202, 1204-05 (C.D. Cal. 2002). Erected in 1934 to commemorate individuals who died in World War I, the Sunrise Rock memorial takes the form of a Latin cross, variously described as five to eight-foot tall. *Buono* v. *Kempthorne*, 527 F.3d 758, 760-61 & n.2 (9th Cir. 2008) ("*Buono IV*"). Respondent challenged the Sunrise Rock cross under the Establishment Clause, U.S. Const. Amend. I, not because he "find[s] the cross, itself, offensive," J.A. 85, but because the property "is not open to groups and individuals to erect other freestanding, permanent displays," J.A. 50, including "signs or symbols that express their views or beliefs." J.A. 64.

If his claimed injury is merely that he strongly objects to the memorial on federal land because he believes it violates the Establishment Clause, Respondent would clearly lack standing under *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). In *Valley Forge*, the court made clear that personal injury based on "the psychological consequence presumably produced by observation of conduct with which one disagrees" is insufficient to confer standing. 454 U.S. at 485.

Combining that purely psychological injury with a concern that Sunrise Rock is not open to other groups or individuals to place signs and symbols that express their views or beliefs, which is not required by the Free Speech Clause, see *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009), does satisfy the concerns embodied in the standing requirements. See *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (standing "requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction") (quotation omitted); *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) (standing requirements ensure that litigation "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") (quotation omitted).

Respondent attempts to cure these defects by adding yet another basis for standing that would be insufficient standing alone. He claims that the presence of the Sunrise Rock cross interferes with his ability "to unreservedly use public land," Pet.

App. 107a, which translates into his prediction that in the future he will go out of the way to avoid seeing the memorial when he visits the Mojave National Preserve. J.A. 65.

Yet Respondent's voluntary change in behavior is not traceable to any government action. For as long as Respondent has been alive, there has been a cross on top of Sunrise Rock, except for some periods of time attributable to this litigation. Rather, Respondent's personal choice to alter his behavior is attributable to a change in his position, not the government's. Thus, his asserted injury is not "fairly traceable" to the challenged conduct - *i.e.*, the placement of the memorial in 1934. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992). Joining three insufficient bases for standing does not make a sufficient one.

II. THE SUNRISE ROCK CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The Sunrise Rock cross and the one acre parcel of land on which it was located was conveyed to the Veterans of Foreign Wars pursuant to Congressional legislation in exchange for a five-acre parcel of land located elsewhere in the Mojave National Preserve. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8121(a) and (b), 117 Stat. 1100.

The Ninth Circuit in *Buono IV* upheld the district court's invalidation of the land transfer, which was tied to the district court's prior holding that the Sunrise Rock cross violated the Establishment Clause. 527 F.3d at 782-83. In upholding the district court, the Ninth Circuit presumed the Sunrise Rock cross conveyed a

religious message because it took the form of a Latin cross. It did so by adopting its earlier holding in *Buono* v. *Norton*, 371 F.3d 543 (9th Cir. 2004) ("*Buono II*"), that "the presence of the cross in the Preserve violates the Establishment Clause" and that the case was "'squarely controlled'" by its decision in *Separation of Church and State Committee* v. *City of Eugene*, 93 F.3d 617 (9th Cir. 1996). *Buono* v. *Kempthorne*, 527 F.3d 758, 772 (9th Cir. 2008) (quoting *Buono II*, 371 F.3d at 548). Without its prior holding in *Buono II*, the Court could not have found the land transfer violated the Establishment Clause.[2]

In *Separation of Church and State Committee*, the Ninth Circuit held a "fifty-one foot concrete Latin cross with neon inset tubing … located at the crest of Skinner's Butte" in a public park that was lit for "seven days during the Christmas season, five days during the Thanksgiving season, and on Memorial Day, Independence Day, and Veteran's Day" violated the Establishment Clause. 93 F.3d 617, 618-19. As the court noted, "[t]he cross ha[d] been the subject of litigation since the time it was erected." *Id.* at 618. Although the City of Eugene argued the cross was a war memorial, the court summarily held that

[2] The court may "consider all of the substantial federal questions determined in the earlier stages of the litigation" including "questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal." *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964) (quotations omitted). Thus, 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).

"[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." *Id.* 620.[3] As noted by Judge O'Scannlain in his concurrence in *Separation of Church and State Committee*, the majority opinion failed to provide an adequate explanation under then-existing precedent as to why the cross at issue violated the Establishment Clause. *Id.* at 620.[4]

Similarly, the Ninth Circuit in *Buono II* and *Buono IV* failed to consider the context of the Sunrise Rock cross, or to afford any weight to distinctions between the Sunrise Rock cross and the

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[3] The Ninth Circuit similarly suggested in dicta in *Ellis* v. *City of La Mesa* that "a sectarian war memorial [consisting of a large Latin cross] carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion." 990 F.2d 1518, 1528 (9th Cir. 1993). The court quoted with approval the holding of the United States District Court for the District of Columbia that "a cross, '[t]he principal symbol of Christianity, this nation's dominant religion, simply is too laden with religious meaning to be appropriate for a government memorial assertedly free of any religious message." *Id.* at 1527-28 (quoting *Jewish War Veterans of the United States* v. *United States*, 695 F. Supp. 1, 14-15 (D.D.C. 1987)).

[4] Judge O'Scannlain's opinion canvassed Supreme Court precedent and noted the merits of the City's argument that "the cross has a secular purpose as a war memorial," and that "[w]hile a crucifix is an unmistakable symbol of Christianity, an unadorned Latin cross need not be," but felt compelled to invalidate the memorial based on this court's holding in *Allegheny County v. Greater Pittsburgh ACLU* that the Establishment Clause "'prohibits government from appearing to take a position on questions of religious belief.'" *Id.* at 626, & n.12 (quoting *Allegheny*, 492 U.S. 573, 593-94 (1989)).

memorial cross at issue in *Separation of Church and State Committee* ("*SCSC*"). In *Buono IV*, the court noted that "[t]he government's several attempts to distinguish *SCSC* were not persuasive" and that "it was of no moment that the cross in *SCSC* was significantly taller, located in an urban area or illuminated during certain holidays." 527 F.3d at 772. The court in *Buono IV* then quoted at length from its prior holding in *Buono II*:

> 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.*

527 F.3d at 772 (quoting *Buono II*, 371 F.23d at 549-50 (emphasis added by *Buono IV*)).[5] In short, the

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[5] As Judge O'Scannlain aptly noted in his concurrence in *Separation of Church and State Committee*, "[w]hether a

court's analysis consisted of noting its prior precedent that a Latin cross is a religious symbol and that the presence of a cross on federal land therefore violates the Establishment Clause. Thus ended the court's analysis of the context and message of the Latin cross used in the Sunrise Rock memorial.

By holding that the use of a Latin cross in a war memorial violates the Establishment Clause regardless of other contextual factors, the Ninth Circuit in *Buono IV* failed to apply the contextual analysis required by this Court's decisions in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and plurality and concurring opinions in *Van Orden* v. *Perry*, 545 U.S. 677 (2005).[6] Nor did *Buono II* apply the *Lemon* test or any of its progeny. As noted by Judge

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religious display garners a great deal of attention or is scarcely noticed is irrelevant to the Establishment Clause" and that "how few or how many people view the display does not advance the analysis." 93 F.3d at 625 n.11.

[6] In the context of evaluating the "form and substance of the [land] transaction to determine whether the government action endorsing religion ha[d] actually ceased," the court dropped a footnote stating that it declined to adopt a "presumption of the effectiveness of a land sale to end a constitutional violation." In so doing, the court noted that the "Supreme Court's Establishment Clause jurisprudence recognizes the need to conduct a fact-specific inquiry *in this area*" and cited to the court's decisions in *McCreary County* v. *American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005) and *Van Orden*, 545 U.S. 677 (2005). *Buono v. Kempthorne*, 527 F.3d at 779 n.14. Unfortunately, the court did not make a similar "fact-specific inquiry" when determining in the first instance whether the use of a Latin cross in a veterans memorial constitutes an establishment of religion.

O'Scannlain in his dissent from the denial of rehearing en banc, the *Buono IV* 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* … and *Van Orden*[.]" *Buono* v. *Kempthorne*, 527 F.3d 758, 764 (O'Scannlain, J., dissenting from the denial of rehearing en banc). Further, Judge O'Scannlain contended that "[b]ecause 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." *Id.*

Chief Justice Rehnquist's plurality opinion in *Van Orden* generally noted that the *Lemon* test was "not useful in dealing with … passive monument[s]" such as a Ten Commandments display, opting instead to consider "the nature of the monument" and "our Nation's history." *Van Orden*, 545 U.S. at 686. This history included "'an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.'" *Id.* (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)). Such acknowledgments included various sculptures and displays located on federal property, including "a 24-foot-tall sculpture," "located outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia," "depicting, among other things, the Ten Commandments *and a cross*." *Id.* (emphasis added). Also of significance was the fact that although the Ten Commandments are religious in nature, they "have an undeniable historical meaning." *Id.* at 690. Thus, Chief Justice Rehnquist cautioned that "[s]imply having religious content or

promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Id.*

Likewise, while not abandoning the *Lemon* test, Justice Breyer's controlling concurring opinion in *Van Orden*, advised that the judgment necessary to evaluate displays such as the Ten Commandments "must reflect and remain faithful to the underlying purposes of the Clauses," and "*take account of context and consequences* measured in light of those purposes." *Id.* at 700 (emphasis added).[7] Further, Justice Breyer noted that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious" and that "[s]uch absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.* at 699 (citations omitted).

Ultimately, Justice Breyer declared that in borderline cases, there is "no test-related substitute for the exercise of legal judgment." *Id.* at 700. Acknowledging that "[i]n certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct)," and "a historical message (about a historic

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[7] See *Marks* v. *United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (quotations omitted).

relation between those standards and the law)," Justice Breyer upheld the Ten Commandments display in *Van Orden* after a consideration of various contextual factors, including the presence of concurrent secular message in addition to the religious one, the involvement of a private organization in selecting and financing the memorial and signs acknowledging that fact, the physical setting of the monument, and the passage of time between the erection of the monument and any challenge to its constitutionality. *Id.* at 701-02.

This Court's holdings in *Van Orden* and *McCreary County* v. *American Civil Liberties Union of Kentucky*, 545 U.S. 844, 868 (2005) ("Where the text is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view"); *id.* at 867 ("under the Establishment Clause detail is key"), should at least firmly establish that religious symbols should be judged according to the context in which they are displayed, with some displays passing constitutional muster and others, involving identical symbols, potentially failing the test. See *Van Orden*, 545 U.S. at 690 (Rehnquist, C.J.) ("There are, of course, limits to the display of religious messages or symbols.") (*citing Stone* v. *Graham*, 449 U.S. 39 (1980) (striking down Kentucky statute requiring the display of the Ten Commandments in every public schoolroom)).

That has been the interpretation of *Van Orden* and *McCreary* by various other courts of appeals. The Fifth Circuit has upheld against an Establishment Clause challenge the city insignia of

Austin, Texas, which is derived from Stephen F. Austin's family coat of arms, and topped by a Latin cross flanked by a pair of wings. *Murray* v. *City of Austin*, 947 F.2d 147, 149-50, 158 (5th Cir. 1991). The court upheld the insignia based on its close connection to the city's namesake, the "long-standing unique history" of the insignia and the fact that there was "absolutely no evidence of an intent to proselytize, or advance, any religion." *Id.* at 155.

Similarly, the Tenth Circuit has rejected a *per se* rule of invalidity as to the use of Latin crosses in public displays. In *Weinbaum* v. *City of Las Cruces*, the Tenth Circuit upheld the City of Las Cruces' use of three Latin crosses in the city seal and on municipal property because it is "hardly startling that a City with the name 'The Crosses' would be represented by a seal containing crosses." 541 F.3d 1017, 1035 (10th Cir. 2008). This was particularly appropriate where "indisputable evidence showed that even the name of the City reflected merely the cemetery, representing the violence in the area rather than proselytizing forces in general or a particular faith." *Id.* In the process, the court held that a Latin cross is "unequivocally a symbol of the Christian faith," "[b]ut not exclusively so" and that although it had previously invalidated city seals containing Latin crosses, it did "not issue a per se rule in those cases. *Id.* at 1022, 1023 & n.2 (10th Cir. 2008). Instead, the Tenth Circuit has noted that "[o]n the whole, Establishment Clause cases are predominantly fact-driven, and [cases involving Latin crosses in city seals] are particularly sui generis," requiring an examination of "the purpose, context, and history of the symbol." *Id.* at 1022,

1031. Thus, in contrast to the Ninth Circuit's presumed invalidity, the Fifth and Tenth Circuit decisions establish that at least in some contexts the use of a Latin cross does not, in and of itself, violate the Establishment Clause.

This more context-specific analysis is borne out not just by *Van Orden*, which is merely the most recent in a line of cases evaluating displays with otherwise religious symbols based on their context. Thus, although the Court struck down the isolated display of a crèche in the focal point of a courthouse, *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), it upheld the display of a crèche where the context rendered the display nothing more than part of a secular celebration of the holiday season. *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984). Thus, the court's treatment of displays of the Ten Commandments and crèches, both inherently religious symbols, indicates that the broader context determines whether those symbols are being used to convey an alternative and permissible secular message.

Although this Court has not previously addressed the constitutional appropriateness of the use of a Latin cross as a war memorial, the court's decision in *Capitol Square Review and Advisory Board* v. *Pinette*, 515 U.S. 753, 770 (1995), provides some guidance. Although the outcome of that case turned on a finding that the cross at issue was private expression in a public forum, Justice Thomas noted in a concurrence that "the fact that the legal issue before us involves the Establishment Clause should not lead anyone to think that a cross erected

by the Ku Klux Klan is a purely religious symbol. The erection of such a cross is a political act, not a Christian one." *Id.* at 770 (Thomas, J., concurring). Justice Thomas also pointed out that a Latin cross takes on a different meaning in the context of the Ku Klux Klan where it is "a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other group hated by the Klan" and is associated with the Klan "not because of religious worship, but because of the Klan's practice of cross burning." *Id.*

Although as Justice Stevens argued, the alternative meaning associated with the Latin cross at issue in *Pinette* could also be construed as an anti-religious message and therefore also impermissible under the Establishment clause, *id.* at 797-98 (opinion of Stevens, J. dissenting) (noting that the Latin cross at issue might convey "completely different messages from [the] symbol" ranging from "an inspirational symbol of the crucifixion and resurrection of Jesus Christ" to "an anti-Semitic symbol of bigotry and disrespect for a particular religious sect"), the various opinions acknowledge that the use of a Latin cross does not also convey a message endorsing Christianity, and allow for the possibility that a Latin cross may be used in such a manner so as to neither convey a primarily religious or anti-religious message. Even Justice Souter's seemingly categorical statement in *Pinette* that the Latin cross "is the principal symbol of Christianity around the world" and its display "alone could not reasonably be taken to have any secular point" was placed in the context of a discussion of the location of the cross "immediately

in front of the Ohio Statehouse, with the government's flags flying nearby, and the government's statues close at hand," and the absence of any other private displays. *Id.* at 792 (Souter, J., concurring in part, and concurring in the judgment).

Aside from ignoring this Court's warnings against the use of per se rules in Establishment Clause cases, the Ninth Circuit's lack of contextual analysis ignores the well-established use of unadorned Latin crosses as memorials to fallen soldiers and public servants. See *American Atheists* v. *Duncan*, 528 F. Supp. 2d 1245 (D. Utah 2007); *Trunk* v. *City of San Diego*, 568 F. Supp. 2d 1199 (S.D. Cal. 2008). These memorials draw on the association of the Latin cross as an instantly recognizable symbol of death and sacrifice, which are traceable to its prevalent use as a grave marker. Just as the message of the Ten Commandments can have "secular moral message" "about proper standards of social conduct," *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring), so too can a Latin cross symbolize death and sacrifice for our country. And not only are these memorials permitted to reside on federal land, but may also be protected from vandalism by federal law.[8]

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[8] Such is the case with the Irish Brigade Memorial in Gettysburg National Military Park. *See* 16 U.S.C. § 413 (making it a misdemeanor punishable by a fine and imprisonment to willfully destroy, mutilate, deface, injure or remove any monument, statute, marker, guidepost or other structure from any national military park); *id.* at § 430g-6 (authorizing Secretary of Interior to acquire by donation, purchase or exchange, lands outside the boundary of the park on which historic monuments and tablets commemorating the Battle of Gettysburg have been erected).

The Ninth Circuit's per se rule also threatens memorials containing Latin crosses across the country, even in cases where additional contextual factors are present, such as the proximity of the memorial to the location where public servants such as Donald Mackey or Utah State Troopers lost their lives in the line of duty. See *Van Orden*, 545 U.S. at 695 (Thomas, J., concurring) ("If a cross in the middle of a dessert establishes a religion, then no religious observance is safe from challenge.") (citing *Buono II*, 212 F. Supp. 2d at 1204-05).

In the final analysis, the result of the Ninth Circuit's holding in *Buono IV* is nothing less than the adoption of a *per se* rule against the use of crosses in memorials in clear violation of the Court's recent cautionary statements in *Van Orden* and *McCreary County*. See *Van Orden*, 545 U.S. at 690 (plurality opinion of Rehnquist, C.J.) ("[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."); *id.* at 701 (Breyer, J. concurring) ("focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather to determine the message that the text here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the display"); *id.* at 704 (invaliding a Ten Commandments display "based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public

buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."); *McCreary County*, 545 U.S. at 874 ("Nor do we have occasion here to hold that a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history"); *see also Lynch*, 465 U.S. at 678 (in Establishment Clause cases, "the inquiry calls for line drawing; no fixed, per se rule can be framed"); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring) (noting that challenged actions were "not minor trespasses upon the Establishment Clause to which [we] turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.").

Because the Ninth Circuit applied a per se rule of invalidity to the Sunrise Rock cross, it ignored this Court's recent decisions in *Van Orden* and *McCreary County*, which require a contextual analysis when evaluating whether a passive display containing a religious symbol violates the Establishment Clause. Had the Ninth Circuit conducted such an inquiry, it should have noted not only the common secular use of Latin crosses as memorials and gravesite markers, but also the similarity of factors between the Sunrise Rock cross and the Ten Commandments display in *Van Orden*. Absent an underlying Establishment Clause violation, Congress's exercise of its authority under the Property Clause, Art. IV, §3, cl. 2, does not raise any additional constitutional issues.

CONCLUSION

Because the Ninth Circuit applied a per se rule of invalidity to the Sunrise Rock cross, it ignored this Court's recent decisions in *Van Orden* and *McCreary County*, which require a contextual analysis when evaluating whether a passive display containing a religious symbol violates the Establishment Clause. Had the Ninth Circuit conducted such an inquiry, it should have noted not only the common secular use of Latin crosses as memorials and gravesite markers, but also the similarity of factors between the Sunrise Rock cross and the Ten Commandments display in *Van Orden*. This failure warrants reversal by this Court.

Respectfully submitted.

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