

No. 08-472

In the
Supreme Court of the United States

**KEN L. SALAZAR, Secretary of the Interior;
JONATHAN B. JARVIS; and DENNIS
SCHRAMM,**
Petitioners,

v.

FRANK BUONO,
Respondent.

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

**BRIEF *AMICUS CURIAE* OF
THE NATIONAL LEGAL FOUNDATION,**
in support of the *Petitioners.*

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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (“NLF”) is a 501(c)(3) public interest law firm organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are particularly interested in assuring that constitutional case law not be misapplied by forcing governmental entities to remove from their land passive monuments that include religious themes or imagery.¹

SUMMARY OF THE ARGUMENT

This Brief expands on two arguments made by Petitioners Salazar, *et al.* (the “Secretary”). Both of *Amicus’s* arguments address aspects of whether the court below erred in its determination that an Establishment Clause violation existed prior to the Secretary’s attempt to transfer the World War I memorial (the “Cross”) to a local chapter of the Veterans of Foreign Wars (the “VFW”). Although the merits of an Establishment Clause violation are not explicitly set out in the questions before this Court, the court below based its analysis of the propriety of the land transfer on the incorrect conclusion that an Establishment Clause violation

¹ The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk. No counsel for any party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the *Amicus Curiae*, its members, and its counsel.

would persist after the transfer would take place. Thus, the question of whether an Establishment Clause violation existed in the first place prior to the land being transferred to the VFW is “fairly included” in the question presented. Sup. Ct. R. 14(1)(a).

First, even if the Cross is perceived as primarily a religious and sectarian symbol, the longstanding use of Latin crosses as memorials to the dead (especially military memorials) protects the use of such crosses from constitutional attack. When a memorial, such as the Cross, is “deeply embedded in the history and tradition of this country” and has “become part of the fabric of our society,” it should be afforded great deference as to its constitutionality. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). The facts of the instant case suggest nothing to militate against that deference, and whether the government had continued its ownership and control of the Cross or transferred it to a private owner is irrelevant to the fact that the Cross is constitutionally permissible on public land.

Second, the court below erred in its assessment of the reasonable observer standard when it evaluated whether the Cross would reasonably be construed as an endorsement of religion. The court below attributed to the reasonable observer knowledge of several detailed, but exclusively negative, pieces of information about the Cross. Any reasonable observer, therefore, with the knowledge attributed to it by the court below, would certainly have also known one more critical

datum—namely that the Cross had been transferred to a private owner.

ARGUMENT

The Secretary has persuasively argued the precise questions before this Court—in particular that Buono lacks standing to prosecute the suit under the particular facts he has alleged, and that, even if Buono has standing, the Act of Congress transferring the Cross to a private owner cured any Establishment Clause violation that may have existed. Importantly, however, not only would the transfer of the Cross have cured any Establishment Clause violation, no violation existed in the first instance. Further, no reasonable observer would have concluded the government was endorsing religion upon the transfer of the Cross to a private owner.

I. NO ESTABLISHMENT CLAUSE VIOLATION EXISTS BECAUSE OF THE LONG-STANDING HISTORY AND TRADITION OF THE GOVERNMENT USING CROSSES TO MEMORIALIZE THE DEAD AND SPECIFICALLY FALLEN SOLDIERS.

The Secretary, in discussing this Court’s reasoning in *Van Orden v. Perry*, 545 U.S. 677 (2005), appropriately noted that “if the Establishment Clause permits the government to *display* a longstanding memorial with a predominantly secular message [as in *Van Orden*], . . . *a fortiori* it permits the government to *transfer* such

a memorial to a bona fide private recipient.” (Pet’rs’ Br. at 29 (emphasis in original).) Although it is true that both the monument at issue in *Van Orden* and the Cross in the instant case do evince a predominantly secular message, under the Constitution and this Court’s precedents, a secular message need not predominate. In other words, even if this Court were to view the Cross as conveying a predominantly *religious* message, its existence on public land would still be constitutional; therefore, *a fortiori* the proposed land transfer including the Cross would also be constitutional because there would be nothing to “cure.”

As mentioned above, the religious nature of the Cross notwithstanding, the Cross *on public land* remains entirely lawful under an exception to the *Lemon*-endorsement test, namely the test first articulated by the this Court in *Marsh v. Chambers*, 463 U.S. 783 (1983). *See Newdow v. Bush*, 355 F. Supp. 2d 265, 283 (D.D.C. 2005) (“There are exceptions to the *Lemon* test . . . and one of those exceptions” is *Marsh*); *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Ala. 2002) (referring to *Marsh* as an “exception to the *Lemon* test”); *ACLU v. Capital Square Review & Advisory Bd.*, 20 F. Supp. 2d 1176, 1182 (S.D. Ohio 1998), *aff’d*, 243 F.3d 289 (6th Cir. 2001) (finding *Marsh* an exception to *Lemon*). Notably, this Court implicitly reaffirmed *Marsh* by taking a *Marsh*-type approach in *Van Orden* to uphold a Ten Commandments monument on state property. Furthermore, the Cross is an acceptable symbol on federally owned land because Latin crosses are not necessarily exclusively religious.

A. *Marsh v. Chambers* controls when the issue before the court involves a “long-standing tradition” that has become part of the fabric of society.

In *Marsh*, this Court upheld prayers offered by a publicly funded, Christian clergyman at the opening of the Nebraska legislature’s sessions. 463 U.S. at 786. The Court declared that the practice of prayer before legislative sessions “is deeply embedded in the history and tradition of this country,” and that it had “become part of the fabric of our society.” *Id.* at 786, 792. The Court emphasized that long-standing traditions should be given great deference. *Id.* at 788. The *Marsh* test asks whether a long-standing practice, “based upon the historical acceptance[,] . . . [has] become ‘part of the fabric of our society.’” *Wallace v. Jaffree*, 472 U.S. 38, 63 n.4 (1995) (Powell, J., concurring) (citation omitted). The plurality in *Van Orden* specifically referred to *Marsh* as an example of how the recognition of the role of religion in our nation’s heritage is permissible under the Establishment Clause. *Van Orden*, 545 U.S. at 687-88 (plurality).

Writing for the plurality in *Van Orden*, Chief Justice Rehnquist noted that the constitutional analysis of the monument “is driven both by the nature of the monument and by our Nation’s history.” *Id.* at 686 (plurality). Chief Justice Rehnquist recognized that, “[t]here is 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.* (plurality) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674

(1984)). He also cited the deeply embedded practice of recognizing the role religion has played in our nation’s heritage. *Id.* at 687-88 (plurality).

Chief Justice Rehnquist compared the monument outside the Texas State Capitol with other Ten Commandment displays on government property, describing them as “acknowledgements of the role played by the Ten Commandments in our Nation’s heritage,” *id.* at 688-89 (plurality), and not as unconstitutional establishments of religion. Thus, the *Van Orden* plurality applied a *Marsh* analysis to the Texas Decalogue and stated that *Lemon* is “not useful” in dealing with a “passive monument.” *Van Orden*, 545 U.S. at 686 (plurality).²

Courts have used *Marsh* to uphold practices such as public proclamations with religious content, *Allen v. Consolidated City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989) (upholding a city resolution urging residents to participate in a day of prayer and commitment to fighting drugs); *Zwerling v. Reagan*, 576 F. Supp. 1373, 1378 (C.D. Cal. 1983) (upholding Presidential Year of the Bible proclamation); chaplaincy programs in the Army,

² Justice Breyer’s concurrence in *Van Orden* recognized the relevance of the *Marsh* analysis and found the *Lemon* test an unsatisfactory substitute for the exercise of legal judgment in these cases. *Van Orden*, 545 U.S. at 699-700. Justice Breyer distinguished *Van Orden* from *McCreary County v. ACLU*, 545 U.S. 844 (2005)—the other Ten Commandments case decided the same day—by noting that the *Van Orden* display is “simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document.” *Van Orden*, 545 U.S. at 703. This historical reflection is exactly what the *Marsh* court found constitutionally acceptable.

Katcoff v. Marsh, 755 F.2d 223, 232 (2d Cir. 1985), and in a sheriff's department, *Malyon v. Pierce County*, 935 P.2d 1272, 1285 (Wash. 1997); equal after-hours access to school facilities for religious purposes, *DeBoer v. Village of Oak Park*, 267 F.3d 558, 569 (7th Cir. 2001); the use of the phrase "in the year of our Lord" on law licenses and on notary public commissions, *Doe v. Louisiana Supreme Court*, No. CIV.A.91-6135, 1992 WL 373566, at *6-7 (E.D. La. Dec. 8, 1992); state involvement in a Kosher food regulation, *Ran-Dav's County Kosher, Inc., v. State*, 608 A.2d 1353, 1375 (N.J. 1992) (relying on *Marsh's* "fabric of society" language); prayers at the presidential inaugural ceremonies, *Newdow v. Bush*, No. 01CV0218, 2001 U.S. Dist. LEXIS 25937 (E.D. Cal. July 17, 2001); *Newdow v. Bush*, No. 01CV0218, 2001 U.S. Dist. LEXIS 25936 (E.D. Cal. Dec. 28, 2001); *Newdow v. Bush*, No. 01CV0218, 2001 U.S. Dist. LEXIS 27758 (E.D. Cal. March 26, 2002); *Newdow v. Bush*, 355 F. Supp. 2d 265; and directly in religious display cases, *ACLU v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988), *State v. Freedom from Religion Foundation*, 898 P.2d 1013, 1029, 1043 (Colo. 1995), *Conrad v. City and County of Denver*, 724 P.2d 1309, 1314 (Colo. 1986), *ACLU v. Capital Square Review & Advisory Board*, 243 F.3d 289, 296, 300-01, 306 (6th Cir. 2001) (*en banc*), and *Murray v. Austin*, 947 F.2d 147, 170 (5th Cir. 1991) (cross on city insignia); and to help explain why displays should pass constitutional muster under the endorsement test. See, e.g., *Ams. United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992); *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 576-77 (Ct. App.

1989); *Suhre v. Haywood County*, 55 F. Supp. 2d 384, 396 (W.D.N.C. 1999).

Marsh should control the analysis of any alleged Establishment Clause violation in this case because using crosses to memorialize the dead acknowledges the role of religion in American life as well as the use of religious symbols for secular purposes like honoring the nation's heroes, a practice our nation has heretofore not been shy to do.

B. The Cross is constitutional because use of religious imagery and crosses on public land is firmly rooted in our nation's history and traditions.

A brief survey of our nation's monuments and cemeteries quickly illustrates the force of *Marsh* in the instant case. As Chief Justice Rehnquist himself pointed out in *Van Orden*:

The apex of the Washington Monument is inscribed "*Laus Deo*," which is translated to mean "Praise be to God," and multiple memorial stones in the monument contain Biblical citations. The Jefferson Memorial is engraved with three quotes from Jefferson that make God a central theme. Inscribed on the wall of the Lincoln Memorial are two . . . inscriptions [which] include . . . extensive acknowledgments of God. The first federal monument, which was accepted by the United States in honor of sailors who died in Tripoli, noted the dates of the fallen sailors as "the year of our Lord 1804. . . ."

Van Orden, 545 U.S. at 689 n.9 (plurality).

Government use of religious symbols as memorials is perhaps most poignantly displayed in this country's national cemeteries. The United States currently maintains over one hundred and twenty-five domestic national cemeteries. Department of Veterans Affairs National Cemeteries, <http://www.cem.va.gov/cem/cems/listcem.asp> (last visited June 5, 2009). Since the end of World War I—almost ninety years—the government, upon request of the family, has engraved the Latin cross as an emblem of belief on its headstones in its national cemeteries. History of Government Furnished Headstones and Markers, <http://www.cem.va.gov/cem/hist/hmhist.asp> (last visited June 5, 2009).

A visit to Arlington National Cemetery reveals that the Latin cross is the predominant emblem of belief engraved in the sea of white headstones. Unidentified soldiers who fell in battle are honored by Arlington's Tomb of the Unknown Soldier, which reads, "Here Rests in Honored Glory an American Soldier Known but to God." The Tomb of the Unknowns, Arlington National Cemetery, http://www.arlingtoncemetery.org/descriptions/tous_back.html (last visited June 5, 2009). The United States also maintains twenty-four overseas military cemeteries. American Battle Monuments Commission, <http://www.abmc.gov/home.php> (last visited June 5, 2009). Virtually all of the overseas military cemeteries are overwhelmingly dominated by a single memorial symbol—rows upon rows of

white, Latin crosses. *See id.* (ABMC Video, “Fields of Honor.”).

Chapels mark the centerpiece of many of the overseas cemeteries and are adorned with Bible verses and religious prose. At the chapel at the Flanders Field cemetery near Waregem, Belgium, for instance, the outer wall explicitly notes the builder of the chapel—the United States of America—with an inscription written in English, Flemish, and French. *See* <http://www.abmc.gov/cemeteries/cemeteries/ff.php>, Flanders Field American Cemetery & Memorial Booklet at 8. Further, the chapel’s interior contains an altar bearing the words of the Divinity: “I WILL RANSOM THEM FROM THE POWER OF THE GRAVE. I WILL REDEEM THEM FROM DEATH. (Hosea, XIII:14)” *Id.* at 9. Finally, the ceiling of the chapel is decorated with a mosaic depicting religious themes—“The beauty of the interior [of the chapel] is enhanced by the mosaic ceiling, which depicts a lighted oil lamp under the stars of Heaven with doves of peace flying toward the light” *Id.* at 10.

The cemetery at Flanders Field is no less remarkable. In addition to placing a Latin cross at every non-Jewish soldier’s grave (some of whom almost certainly were not Christians), the government placed a cross at the grave of every *unidentified* soldier, some of whom were likely non-Christians. *See* <http://www.abmc.gov/cemeteries/cemeteries/ff.php>, Flanders Field American Cemetery & Memorial Booklet at 12 (last visited June 5, 2009). Moreover, each cross marking the unidentified soldiers bears the engraving, “HERE

RESTS IN HONORED GLORY AN AMERICAN SOLDIER KNOWN BUT TO GOD.” *See id.* at 15.

The practice at Flanders Field is indicative of a longstanding and permissible tradition of honoring fallen heroes with crosses, simultaneously evincing both a religious and non-religious meaning (*e.g.* their juxtaposition with Stars of David for graves of Jewish soldiers (religious), as well as their use to mark graves of the unknown (non-religious)). This practice corresponds neatly with our nation’s interest in maintaining the Cross as a war memorial, and demonstrates the longstanding acceptability of using the cross simultaneously as a symbol of death and as a symbol of religious significance.

Arlington National Cemetery, for its part, contains a number of memorial crosses. For example, Arlington is home to the Argonne Cross Memorial, which is a memorial to the soldiers of the World War I American Expeditionary forces in France,³ and the Canadian Cross of Sacrifice, which honors U.S. citizens who served in the Canadian forces in the First and Second World Wars and Korean War.⁴ There are countless crosses emblazoned on the tombstones of fallen servicemen and women. Other religious symbols adorn memorials as well. Any assumption by the Court that *government* ownership and control of the Cross (as part of a Veterans’ memorial) violates the Establishment Clause would indeed call into

³ *See* http://www.arlingtoncemetery.org/visitor_information/Argonne_Cross.html (last visited June 5, 2009).

⁴ *See* http://www.arlingtoncemetery.org/visitor_information/Canadian_Cross.html (last visited June 5, 2009).

question the constitutionality of these memorials in our nation's cemeteries.⁵ These examples demonstrate that this nation has cherished a long and unbroken tradition of using crosses and other religious symbols as memorials to the dead.

Therefore, in light of the authorities above, the Cross would still be valid under *Marsh* even if this Court attributes to the Cross the predominantly religious character that the court below did. See *Buono v. Kempthorne*, 527 F.3d 758, 773, 778 (9th Cir. 2008) (accepting uncritically the holding of the District Court which found that the “Latin Cross [is a] sectarian war memorial [that] carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion.” (citation omitted)). As noted above, the historical acceptability and longevity of using religious symbols in general, and crosses in particular, to memorialize fallen heroes means that any analysis considering whether an ongoing Establishment Clause violation exists after the transfer of the land should begin with the recognition that the existence of the Cross on *public* land was constitutional all along. The existence of the Cross, regardless of whether it is on public or private land, will no more endanger the Establishment Clause than does the Biblical

⁵This Court may take judicial notice of the official websites and their recorded facts and photographs cited here in Section II.B., because they are issued by a public authority and as such are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). See also, *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977) (citing Rule 201(b)).

inscription on the Liberty Bell,⁶ or the national motto on our coins.

Simply put, any ruling that the Cross, existing as a veterans' memorial, violates the Establishment Clause would be in direct conflict with the intentions of the Framers of the First Amendment and with deeply rooted practices and traditions of this nation. Throughout our nation's history our government has openly recognized religion on its property, especially that property used to commemorate those who have made the ultimate sacrifice. This Court should reject the notion that the First Amendment will not allow today what was permitted long ago by its very authors. Moreover, the burden of proving such a claim must be placed upon those who, by their "untutored devotion to the concept of neutrality," *School District of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring), would deny veterans, their families, and the vast majority of Americans this symbol of remembrance and acknowledgement of the sacrifice made by this Nation's fallen heroes. In fact, any conclusion to the contrary places virtually every religious reference on public land at risk from such "untutored devotion." *Id.* (Goldberg, J., concurring).

As Justice Thomas recently noted concerning the Cross at issue in the instant case, "If a cross in the middle of a desert establishes a religion, then no

⁶The Liberty Bell is inscribed with the following Bible verse, "Proclaim LIBERTY Throughout All the Land Unto All the Inhabitants Thereof (Leviticus, 25:10)." See Liberty Bell Center, <http://www.nps.gov/inde/liberty-bell-center.htm> (last visited June 5, 2009).

religious observance is safe from challenge.” *Van Orden*, 545 U.S. at 694-95 (Thomas, J., concurring). The Constitution recognizes no such “establishment,” thereby protecting the Cross from the instant “challenge.” *Id.* at 695 (Thomas, J., concurring).

II. THE COURT BELOW ERRED IN APPLYING THE REASONABLE OBSERVER STANDARD BECAUSE THE COURT ATTRIBUTED TO THE OBSERVER ONLY INFORMATION ABOUT THE CROSS WHICH CAST IT IN A NEGATIVE LIGHT AND NOT INFORMATION WHICH CAST IT IN A POSITIVE LIGHT.

The Secretary has also persuasively argued that any reasonable observer would quickly be able to conclude that the government was not endorsing religion, having transferred the Cross to a private owner. (Pet’rs’ Br. at 22-23.) Moreover, because a reasonable observer would have knowledge of the long-standing history and traditions discussed above (especially crosses used in cemeteries and at war memorials), the reasonable observer would similarly conclude that no endorsement of religion existed *prior* to the transfer of ownership.

Amicus simply adds one note of context to illustrate the error of the court below in its analysis of the reasonable observer. The court below attributed to a reasonable observer the following:

[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. 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.”

Buono, 527 F.3d at 782-83 (citations and quotations omitted).

The court below, however, cannot postulate such an informed reasonable observer without acknowledging that the observer would know one more critical piece of information—namely, that the Cross was the subject of years-long litigation, resulting in an attempt to cure a perceived Establishment Clause violation by *transferring ownership to a private party*. In other words, the reasonable observer contemplated by the court below cannot plausibly have knowledge of “the government’s attempts to preserve [the Cross] and the denial of access to other religious symbols” but at the same time lack knowledge that the government no longer owns the land in an attempt to follow a court order. Therefore, when this Court attributes *all* pertinent knowledge to the reasonable observer, the inescapable conclusion remains that the Cross offends no law, and most especially not the Constitution.

CONCLUSION

For the foregoing reasons, as well as other reasons stated in the Petitioners' and other *Amicus Curiae* Briefs, this Court should reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,
this 8th day of June 2009,

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