No. 08-472

IN THE

Supreme Court of the United States

DIRK KEMPTHORNE, Secretary of Interior, *et al.*,

Petitioners,

—v.—

FRANK BUONO,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a person who regularly visits government land on which a sectarian religious symbol sits, and who incurs burdens to avoid coming into direct and unwelcome contact with that symbol, has Article III standing to bring an Establishment Clause suit challenging the governmental display of the symbol?

Whether, after a court has held that the presence of a sectarian religious symbol on government land violates the Establishment Clause, the transfer of that land perpetuates the Establishment Clause violation when the symbol remains designated by the government as an official memorial, the government retains a reversionary interest in the land, and the land transfer benefits persons whose religious expression with respect to the symbol previously has been favored by the government to the exclusion of others who wished to engage in expression on the land?

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COUNTERSTATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Presence Of A Sectarian Religious Symbol On Federal Land

A Latin cross sits on federal land in the Mojave National Preserve (the "Preserve") in California. Pet. 54a. A Latin cross has two arms, one horizontal and one vertical, at right angles to each other, with the horizontal arm being shorter. Pet. 55a. The Latin cross is the preeminent symbol of Christianity. *Id.* It is exclusively a Christian symbol, not a symbol of any other religion. *Id.*

The Mojave cross is between five and eight feet tall and is made of four-inch diameter pipes painted white. Pet. 55a. The cross is located in an area known as Sunrise Rock. Pet. 117a. It is mounted on the top of a prominent rock outcropping on the north side of Cima Road and it is visible to vehicles on the road from about 100 yards away. Pet. 118a.

A cross was first erected on the site in 1934 by the Veterans of Foreign Wars ("VFW"), Death Valley Post 2884, to honor those who died in combat. Pet. 118a. Religious adherents have held Easter Sunrise services at the cross for more than 70 years. Pet. 119a. Private parties have replaced the cross several times over the years. *Id.* A private party, who did not obtain a permit from the government, erected the current version of the cross in approximately 1998. Pet. 56a. There is no plaque or sign at or near the cross indicating that it is meant to be a memorial for soldiers. Pet. 118a. In 1999, the National Park

Service ("NPS"), a division of the U.S. Department of the Interior, evaluated the cross for eligibility for the National Register of Historic Places and concluded it did not qualify. Pet. 117a, 119a-20a.

The NPS administers the federal Preserve upon which the cross sits. Pet. 117a. The Preserve encompasses 1.6 million acres of land in the Mojave Desert, over 90 percent of which is federally owned. Pet. 55a. The federal Bureau of Land Management (BLM) transferred the land to NPS in 1994. *Id.*

The NPS has not allowed other individuals to erect free-standing permanent displays (religious or otherwise) in the Sunrise Rock area where the cross is located, and there are no other free-standing displays in the area. Pet. 119a. In 1999, the NPS denied permission to an individual who sought to erect a Buddhist memorial (known as a "stupa") in the area near the cross, citing to 36 Code of Federal Regulations 2.62(a) which 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." Pet. 56a-57a. The NPS denial letter further informed the applicant that "[a]ny attempt to erect a stupa will be in violation of Federal Law and subject you to citation and or arrest." Pet. 57a.

B. The Government's Efforts to Preserve the Cross

In the late summer of 2000, the American Civil Liberties Union of Southern California wrote to the NPS Director expressing constitutional concern about the presence of the cross in the Preserve. Pet. 120a. Shortly thereafter, on December 15, 2000, the

President signed an appropriations bill, a section of which provided that no government funds could be used to remove the cross. Pub. L. No. 106-554, 114 Stat. 2763, 2763A-230, § 113 (2000); BIO App. 1a.

Respondent brought this action on March 22, 2001. On January 10, 2002, while the matter was pending in the district court, Congress passed Pub. L. No. 107-117, a section of which designated the cross as a national memorial commemorating United States participation in World War I. *See* Pub. L. No. 107-117, 115 Stat. 2230, 2278-79, § 8137 (2001); BIO App. 1a-2a. The law provides federal funds to install a memorial plaque at the site of the cross and for the construction of a replica of the cross that was originally on the site. *Id*. at § 8137(c).

On October 23, 2002, after the district court's initial decision holding that the presence of the cross in the Preserve violated the Establishment Clause, Congress again banned the use of federal funds to remove the cross. Pub. L. No. 107-248, 116 Stat. 1519, 1551, § 8065(b) (2002); BIO App. 2a. On September 30, 2003, during the pendency of Petitioners' first appeal to the Ninth Circuit, Congress enacted Section 8121 of Public Law 108-87.[1] This provision calls for the transfer of the property on which the cross sits to the Veterans Home of California – Barstow, VFW Post 385E, in exchange for a parcel of land elsewhere in the Preserve that is owned by Mr. and Mrs. Henry Sandoz, private parties who had erected the current cross in 1998. Pet. 9a. The land transfer authorized

[1] The full text of Section 8121 is in Appendix G of the Petition, Pet. 147a-149a.

by Section 8121 is not based on open bidding or any other competitive process; instead, Congress simply directed that the land be transferred to the VFW's Barstow post. Although Section 8121(a) transfers the cross's land to private parties, it nonetheless also states that "the Secretary shall continue to carry out the responsibilities of the Secretary under such section 8137 [of Public Law 107-17]," Pet. 61a, which (as indicated above) designated the cross a national memorial. Another provision, Section 8121(e), states that if the "property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." Pet. 61a.

II. PROCEDURAL HISTORY

A. The District Court's First Decision

Respondent filed his lawsuit prior to the enactment of Sections 8137, 8065(b), and 8121. In his complaint, Respondent alleged that the presence of the cross on federal land and the government's preferential treatment of it violated the Establishment Clause. The district court held that Respondent had standing. Pet. 137a. The court then held that the presence of the cross in the Preserve violated the Establishment Clause, Pet. 137a-143a, and entered judgment for Respondent. Pet. 145a-146a. The court's injunction provided, in pertinent part, that "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." Pet. 146a.

B. The Court Of Appeals' First Decision

In a unanimous opinion by Judge Kozinski, the court of appeals affirmed the district court. The court of appeals held that Respondent had standing, Pet. 104a-107a, and that the presence of the cross in the Preserve violated the Establishment Clause because it created an appearance of government endorsement of religion. Pet. 108a-113a.

The government argued that Section 8121, which was enacted during the pendency of the appeal, mooted the case. After noting the government's concession that the "land transfer could take as long as two years to complete," Pet. 103a, the court of appeals rejected the government's argument. *Id.* at 102a-104a.

The government sought neither en banc review of the court of appeals' decision nor review of that decision in this Court.

C. The District Court's Second Decision

On November 29, 2004, Respondent filed a motion with the district court to enforce the injunction, or, in the alternative, to modify the injunction by expressly prohibiting the Section 8121 land transfer. On April 8, 2005, the district court held that Section 8121's land transfer perpetuated, rather than remedied, the Establishment Clause violation. Pet. 86a-99a. In reaching that conclusion, the district court "applied the analytical framework" from *Freedom from Religion Foundation v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), and *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir.

2005) Pet. 90a-91a. Under that framework it considered the following factors: the congressional designation of the cross as a memorial; the method for effectuating the transfer; the preservation of governmental property interests in the form of a reversionary interest and easement; and the government's "herculean efforts" to preserve the cross, including Congress's barring the use of federal monies to take down the cross after the court's initial injunction. Pet. 91a, 93a, 97a. Based on those factors, the court held 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." Pet. 97a. The district court barred Petitioners from implementing Section 8121 and ordered them to comply with the court's existing judgment and injunction. Pet. 99a.

D. The Court Of Appeals' Second Decision

The court of appeals again affirmed the district court. Adopting the reasoning of the Seventh Circuit in *Marshfield*, the court of appeals held that in evaluating whether a transfer of land to a private party has ended an Establishment Clause violation, the court "examine[s] both the form and substance of the transaction to determine whether the government action endorsing religion has actually ceased." Pet. 76a (citing *Marshfield*, 203 F.3d at 491). Analyzing the form and substance of Section 8121, the court of appeals concluded that the land transfer did not cure the violation. In reaching that conclusion, the court of appeals largely relied on the

same factors that the district court had identified: the continued designation of the cross as a national memorial, and the government's resulting ongoing statutory responsibility for "the supervision, management, and control" of the cross; the government's future property interest in the land in the form of a reversionary interest; the actual method of the exchange; and the history of government efforts to preserve the cross. Pet. 77a-84a.

Subsequently, the court of appeals issued an order amending its opinion and (over a dissent) denying the government's petition for rehearing and suggestion for rehearing en banc on May 14, 2008. Pet. 35a-37a.[2]

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[2] Petitioners overstate the amendment to the Ninth Circuit's decision, which changed only a footnote characterizing *Marshfield*. Pet. 22. It did not amend any of the court's analysis of the case before it, nor did it amend its reliance on key passages from *Marshfield*. *Compare* Pet. 25a at n.13, *with* Pet. 36a-37a. In the amendment, the court of appeals simply deleted its characterization of *Marshfield* as creating a "presumption," recognizing that whatever *Marshfield* had said about a sale with no "unusual circumstances," the Seventh Circuit had in fact examined all the circumstances of each sale that came before it, "on a transaction-by-transaction basis," and that this approach was in accord with "[t]he Supreme Court's Establishment Clause jurisprudence [which] recognizes the need to conduct a fact-specific inquiry in this area." Pet. 36a-37a.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' RECOGNITION THAT RE-SPONDENT HAS STANDING DOES NOT WARRANT REVIEW.

A. Respondent Has Article III Standing

A person subjected to unwelcome exposure to religious exercises or symbols, or who incurs burdens to avoid them, has suffered a cognizable Establishment Clause injury conferring Article III standing. *See, e.g., School Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963) ("[S]chool children and their parents, who are directly affected by the laws and practices [mandating Bible readings in public school] against which their complaints are directed" have standing.); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 n.22 (1982) ("The Plaintiffs in *Schempp* had standing . . . because impressionable schoolchildren were subjected to unwelcome religious exercises *or* were forced to assume special burdens to avoid them.") (emphasis added); *see also id.* (contrasting *Schempp* with *Doremus v. Board of Education*, 342 U.S. 429 (1952), where plaintiffs lacked standing to challenge daily Bible readings in public school because they had no direct connection to those exercises, and thus had no need to assume special burdens to avoid the exercises).

Respondent satisfies this test. He has had direct and unwelcome contact with the cross in the Preserve and will incur burdens to avoid exposure to

it in the future. Pet. 123a. As the district court found, Respondent "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." *Id.*[3]

Petitioners contend that Respondent's objection to the cross is merely "ideological," not "religious," and that such an objection does not qualify as injury for Article III standing purposes under *Valley Forge*. Pet. 12-14. Petitioners are wrong. *Valley Forge* clarified the rules of taxpayer standing in Establishment Clause cases but did not disturb this Court's longstanding rule, set forth in *Schempp*, 374 U.S. at 224 n.9, that direct and

[3] Petitioners contend that Respondent lacks standing because the government is not forcing him to avoid coming into contact with the cross. Pet. 15. Their argument is foreclosed by this Court's precedents. For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167 (2000), this Court held that a plaintiff who would have liked to swim, camp, and picnic upstream of a river into which defendant was discharging pollutants, but had altered his behavior because of the discharges, had standing to challenge defendant's practices. *Id*. at 182-84. Nothing in the Court's opinion suggests that the defendant forced the plaintiff to forego swimming in, or otherwise avoid the river. Similarly, in *Valley Forge*, the Court stated that steps taken by plaintiffs to avoid religious exercises constituted cognizable injury for standing purposes, *Valley Forge*, 454 U.S. at 486 n.22, even though participation exercises was "voluntary." *Schempp*, 374 U.S. at 207; *see also American Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir.1986) (Posner, J.) (rejecting government argument that plaintiffs lack standing to challenge religious display on public property because they "can avoid it by continuing to follow their accustomed routes and shrugging off the presence of the lighted cross.").

unwelcome contact with a government-sponsored religious display or practice is enough to confer Establishment Clause standing. *Valley Forge*, 454 U.S. at 486 n.22 (citing *Schempp*). Other cases since *Schempp* have rested on the same understanding. *See, e.g., Lee v. Weisman,* 505 U.S. 577, 584 (1992) (holding that student who objects to graduation prayer at school she attends has standing to bring Establishment Clause claim).

The plaintiffs in *Valley Forge* had heard from a press release about the transfer of government property to a religious school; they lived in Maryland and Virginia and had never been to the area in Pennsylvania where the property was located. *Valley Forge*, 454 U.S. at 486-87. This Court held that the plaintiffs lacked standing to challenge the transfer because the mere fact that they were aware of, and distressed by, government activity with which they had no direct contact did not constitute a concrete and personalized injury. *Id*. at 485-86.

Contrary to Petitioners' thesis, this Court did not root its standing ruling in *Valley Forge* on the notion that the plaintiffs' objection to the transfer was ideological rather than religious. Indeed, the word "ideological" does not appear in the Court's opinion. As Judge Kozinski correctly observed in the initial court of appeals decision in this case, "*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.'" Pet. 106a (quoting

Valley Forge, 454 U.S. at 485). As Judge Kozinski recognized, *Valley Forge* drew a distinction between abstract, generalized objections, which are insufficient for Article III standing, and concrete objections that may result from direct contact with the challenged display or practice, which are sufficient for Article III standing.[4]

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[4] Other circuits have interpreted *Valley Forge* in similar fashion. *See Suhre v. Haywood County*, 131 F.3d 1083, 1086-87 (4th Cir. 1997) (Wilkinson, C.J.) (plaintiff who had regular contact with Ten Commandments display in county courthouse and was offended by it had standing, in contrast to plaintiffs in *Valley Forge* who "were denied standing. . . because they had absolutely no personal contact with the alleged establishment of religion."); *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d 1020, 1029 (8th Cir. 2004) (plaintiff had standing under *Valley Forge* because he "personally and directly, ha[d] been subjected" to the action to which he objected, and thus had "suffered an injury of a nature and to a degree the *Valley Forge* plaintiffs did not."), *aff'd with respect to standing, but rev'd on other grounds*, 419 F.3d 772 , 775 n.4 (8th Cir. 2005) (en banc); *American Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265, 268-69 (7th Cir. , 1986) (Posner, J.) (plaintiffs who are offended by religious display that they have direct contact with, and, as a result, go out of their way to avoid it, have standing under *Valley Forge*); *accord*, *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466 (5th Cir. 2001); *Southside Fair Housing Comm. v. City of New York*, 928 F.2d 1336, 1342 (2d Cir. 1991); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989); *Hawley v. City of Cleveland*, 773 F.2d 736, 739-40 (6th Cir. 1985); *American Civil Liberties Union of Georgia v. Rabun Cty. Chamber of Commerce*, 698 F.2d 1098, 1101 (11th Cir. 1983); *see also ACLU v. Township of Wall*, 246 F.3d 258, 265-66 (3d Cir. 2001) (Alito, J.) (noting that other circuits had held that, under *Valley Forge*, direct unwelcome personal contact with a religious display was sufficient injury for Article III standing, and holding that plaintiffs lacked standing because they only alleged direct personal contact with

Petitioners' interpretation of *Valley Forge* is at odds with this Court's recurring concern, expressed both before and after *Valley Forge*, that legal rules not require the government to inquire into whether a private person's conduct or beliefs are religious in nature. *See*, *e.g.*, *Gillette v. United States*, 401 U.S. 437, 457 (1971) (noting the dangers of "state involvement in determining the character of persons' beliefs and affiliations," and deciding "what is or is not religious.") (internal quotations omitted); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 450 (1969) (Establishment Clause precludes courts from "determin[ing] matters at the very core of a religion - the interpretation of particular church doctrines and the importance of those doctrines to the religion"); *see also New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment . . . "). Petitioners' reading of *Valley Forge* defies those teachings because it calls on judges to evaluate standing by ascertaining whether a belief is religious. Petitioner's argument that Respondent lacks standing to object to a cross because he is Catholic is like arguing that the Jewish plaintiffs in *Lee v. Weisman,* 505 U.S. 577 (1992), lacked standing to object to a rabbi's prayer. This Court held otherwise. *See id.* at 584 (holding that plaintiff has standing because she attends school where rabbi will deliver nonsectarian prayer at

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an earlier religious display, not later version of the display that was erected before the litigation began).

graduation).

Petitioners compound their erroneous interpretation of Establishment Clause standing by contending that the supposed "ideological nature of respondent's objection" to the cross is manifested in his attempt to "premise his *own* standing on the asserted rights of *third parties*" who were precluded from engaging in expression (religious or otherwise) at Sunrise Rock. Pet. 14. Petitioners misstate the meaning of Respondent's invocation of third party rights in this case. The government's treatment of third parties speaks to the merits of Respondent's claim, not to his standing to bring it. The government's refusal to allow third parties to place other religious symbols at Sunrise Rock, and its history of preferential treatment of the cross, reflect impermissible endorsement of religion under the Establishment Clause. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion) (giving sectarian private religious speech preferential access to government land would violate the Establishment Clause). As both lower courts correctly understood, Respondent is personally confronted with, and offended by, the government's favoritism of the cross over other symbols, religious or otherwise, and he sues to redress his own offense. Petitioners' reliance on third-party standing cases is inapposite.

B. The Circuit Conflict Petitioners Have Identified Is Irrelevant To This Case.

Petitioners identify circuit disagreement over whether, for purposes of standing to bring religious display cases, a plaintiff need only demonstrate that

he has unwelcome exposure to the display, as the Tenth and Fourth Circuits have held, or must also demonstrate that he has altered his behavior to avoid the display, as the Seventh Circuit has held. Pet. at 16-17. While the Seventh Circuit's standard requiring both unwelcome exposure and alteration of behavior is plainly incorrect under *Valley Forge*,[5] the purported conflict between that standard and the standard in the Fourth and Tenth Circuits is irrelevant in this case. Respondent has had unwelcome exposure to the cross *and* has taken on, and will continue to take on, special burdens to avoid that exposure. Pet. 107a, 123a. Thus, Respondent would have standing under the Fourth and Tenth Circuits' standard, as well as the Seventh Circuit's standard, and resolution of the circuit split would have no bearing the outcome of the standing inquiry here.

* * *

In sum, the lower court rulings acknowledging Respondent's standing are consistent with well-established doctrine and unexceptional in nature. Petitioners misread those rulings and this Court's precedents – and highlight an irrelevant circuit split – all in an attempt to generate an issue worthy of this Court's review. Respondent's standing does not present such an issue.

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[5] This Court expressly stated that Article III injury in an Establishment Clause case can be based on either an individual's direct and unwelcome contact with government support for religion *or* an individual's incurring burdens to avoid that contact. *Valley Forge*, 454 U.S. at 486 n.22.

II. THE COURT OF APPEALS' DECISION ON THE MERITS DOES NOT WARRANT REVIEW

Petitioners argue that review is warranted because the lower courts' decisions (1) conflict with Seventh Circuit precedent; (2) disrespect Congress; and (3) require the destruction of the cross in contravention of a congressional mandate. Each of these arguments is incorrect and none supports review.

A. The Court of Appeals Decision Does Not Conflict With The Approach Or Outcome Of Seventh Circuit Cases

Petitioners contend that the approach of the Ninth Circuit in this case, and the result it reached, conflict with the approach of the Seventh Circuit and the results that court has reached in two cases addressing whether a transfer of government land to a private party cured an Establishment Clause violation. Pet. 20-22 (citing *Freedom from Religion Foundation v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000) and *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005)). Petitioners are wrong on both counts. The Ninth Circuit employed the same approach as the Seventh Circuit. And, to the extent that the result in this case diverges from that of the Seventh Circuit cases, it is solely because of myriad factual differences between this case and those Seventh Circuit cases.

1. *The Ninth Circuit And Seventh Circuit Approaches Do Not Conflict*

In arguing that the Ninth and Seventh

Circuits are in direct conflict, Petitioners ignore that the Ninth Circuit explicitly adopted the approach employed by the Seventh Circuit in *Marshfield*. Pet. 76a. Moreover, both circuits held that the mere transfers of land on the facts presented had *not* cured the Establishment Clause violation. *See Marshfield*, 203 F.3d at 496 ("the sale [of land on which a religious symbols rests to a private party] has given this sectarian message preferential access to Praschak Wayside Park"). Petitioners barely hint at the actual holding of *Marshfield*, relegating it to a footnote at the very end of their discussion of the case. Pet. 22-23 n.9.

Citing *Marshfield*, the Ninth Circuit stated that to determine whether a transfer of government land to private parties has ended an Establishment Clause violation, a court must "examine both the form and substance of the transaction to determine whether the government action endorsing religion has actually ceased." Pet. 76a (citing *Marshfield*, 203 F.3d at 491). The Seventh Circuit's approach is virtually identical. It, too, "look[s] 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.

Nevertheless, Petitioners assert that there is a circuit conflict because the Seventh Circuit purportedly applies a "presumption" that a transfer of government land to private parties remedies any Establishment Clause violation, while the Ninth Circuit does not. Pet. 22. However, the Seventh Circuit did not state in either *Marshfield* or *Mercier* that it would apply a presumption regarding the effect of a transfer of public land to private parties.

No form of the word presume or presumption appears in that opinion or in *Mercier*. Rather, *Marshfield* merely states that "absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *Marshfield,* 203 F.3d at 491; *Mercier*, 395 F.3d at 701 (same).

"To the extent" that this language from the Seventh Circuit was meant to create a presumption that a land transfer will cure an Establishment Clause violation absent "unusual circumstances," the Ninth Circuit "decline[d] to adopt" that presumption. Pet. 25a; 36a. Regardless whether the Ninth Circuit's initial reading of the Seventh Circuit decisions is correct or not, it does not reflect any significant difference in the Establishment Clause analysis applied by the two courts. The Ninth Circuit, relying on this Court's precedents, engaged in a fact-specific inquiry to determine whether the land transfer was sufficient to remedy the Establishment Clause violation. Pet. 75a-76a. The Seventh Circuit's approach is effectively the same. In both *Mercier* and *Marshfield*, the Seventh Circuit took pains to stress that the transfer of public land to private parties would not end an Establishment Clause violation in every case; rather, each case had to be evaluated on its own facts. As the Seventh Circuit stated:

> The Supreme Court, and this court, have emphasized the case-by-case nature of a court's review of an alleged Establishment Clause violation. . . The same holds true for efforts to end a violation. Simply because we find in this case that the sale by the City of La

> Crosse did not violate the Establishment Clause *does not mean, as Marshfield made clear, that every such sale would be permissible.*

Mercier, 395 F.3d at 702 (internal citations omitted) (emphasis added); *see also Marshfield*, 203 F.3d at 491. In sum, there is no conflict between the approaches of the Seventh and Ninth Circuits: both are fact-specific and both look to the same sorts of facts for their constitutional consequences.

2. *Factual Distinctions Explain The Differing Results Between This Case And The Seventh Circuit Cases*

There are numerous factors in this case, absent in *Marshfield* or *Mercier*, that render the Section 8121 land transfer insufficient to terminate the Establishment Clause violation. These factors would constitute "unusual circumstances" within the meaning of the Seventh Circuit's decisions in *Marshfield* and *Mercier*, thereby raising serious questions under those cases about whether Section 8121 had effectively ended the already-adjudicated Establishment Clause violation. There is no reason to believe that this case would have come out differently had it been litigated in the Seventh Circuit; thus Petitioners' claim of a circuit conflict with the results here and in *Marshfield* and *Mercier* is illusory.

First, and most obviously, the cross in this case will remain designated a national memorial even after the transfer. *See* Pub. L. 107-117 § 8137 (2001); BIO App. 1a. By contrast, in neither *Marshfield* nor *Mercier* were the religious symbols

designated government memorials, and thus they did not have that hallmark of continued government imprimatur after the transfer.

The Seventh Circuit reasoned that transfers of government land on which religious symbols sit are, absent unusual circumstances, generally an effective way to end an Establishment Clause violation caused by the symbol on the land because reasonable observers will assume, post-transfer, that the religious expression reflected in the symbol is that of the new, private owner of the property, not the government. *Marshfield*, 203 F.3d at 491.[6] Petitioners make no effort to explain how the cross would become solely the expression of a private party following the Section 8121 transfer when the property on which it sits remains a congressionally designated national memorial.

A second fact-based distinction between this case and *Marshfield* and *Mercier* is the continued government entanglement with the cross in the Preserve following the Section 8121 transfer. Because the cross is to remains a national memorial post-transfer, NPS necessarily will continue to exercise "supervision, management and control" over it. 16 U.S.C. § 2; *see also* 16 U.S.C. § l; Pet. 78a-79a. The government exercised no such "supervision, management and control" following the land

[6] And yet (as Petitioners acknowledge), even in *Marshfield*, the Seventh Circuit remanded "to require additional measures, such as fencing and signs around the transferred land, that would inform a reasonable observer that the [religious display] was on private land and was not endorsed by the government." Pet. 22-23 n.9 (citing *Marshfield*, 203 F.3d at 497).

transfers in *Marshfield* or *Mercier*. Indeed, a prime example offered by the Seventh Circuit of "unusual circumstances" that would raise a fact-specific question about whether a land transfer case cured an Establishment Clause violation was a sale that "left the [government] with continuing power to exercise the duties of ownership." *Mercier*, 395 F.3d at 702. And in *Marshfield,* it was precisely the government's cessation of ownership duties over the land on which the religious symbol rested that led the Seventh Circuit to conclude that the transfer did not violate the Establishment Clause. *Marshfield,* 203 F.3d at 493.

Petitioners contend that the Ninth Circuit incorrectly interpreted federal law in concluding that the NPS would retain "various rights of control over the cross and the property," Pet. 78a, because NPS supervision applies only to federal land. Pet. 27. However, the very statute Petitioners cite, 16 U.S.C. § 1, provides that the NPS "shall promote and regulate the use of Federal *areas* known as national parks, monuments, and reservations. . . ." 16 U.S.C. § 1 (emphasis added). [7] In other words, national monuments are "Federal areas" under 16 U.S.C. § 1, regardless of whether they are on federal or private land.[8] If Congress had wanted to limit the NPS's

[7] Petitioners did not contest below, or in their Petition to this Court, that the NPS's duties with respect to national monuments applied also to national memorials. They argued only that the NPS's duties of "supervision, management, and control" applied to national memorials on federal land, not private land. Pet. 27.

[8] Other provisions of federal law also demonstrate that national monuments may be located on private land. For example, 16

jurisdiction to national monuments or memorials on federal lands, it could have done so, as it has done in other statutes. *Compare* 7 U.S.C. § 2814 (requiring federal agencies to "develop and coordinate an undesirable plants management program for control of undesirable plants on Federal lands under the agency's jurisdiction."). Under statutory construction principles, Congress's failure to use the term "federal lands" in 16 U.S.C. § 1 means that the provision should be interpreted to extend to "federal areas" that are not located on "federal land." *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 & n.2 (1987) (discussing statutory construction implications of Congress's use of a term in one statute that it failed to use in a second statute). Furthermore, the land transferred by Section 8121 will remain within the boundaries of the Preserve, and thus under the jurisdiction of the NPS. *See* 16 U.S.C. §§ 410aaa-42 and 410aaa-43.[9]

U.S.C. § 431 provides that the President may designate national monuments and that "when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract . . . *may be* relinquished to the government." (emphasis added). If the tract on which the national monument rests is not relinquished to the government (and it does not have to be under Section 431), then the tract would remain in private hands, notwithstanding the presence of a national monument on it.

[9] Petitioners insist that "because the NPS can install a replica plaque before the land exchange is complete," the provision in Section 8137 calling on the Secretary of Interior to spend funds to acquire and install a plaque at the site "does not require any ongoing federal involvement in the memorial." Pet. 27. That assertion is not supported by the record. In the absence of that record support, the land transfer provides a form of easement

A third fact-based distinction between this case and *Mercier* and *Marshfield* is the reversionary clause in § 8121(e). That clause requires that the transferred land be returned to federal government ownership if the VFW does not "maintain the conveyed property as a memorial commemorating the United States participation in World War I." Pub. L. 108-87, § 8121(e) (2003); Pet. App. 148a. As the Ninth Circuit correctly noted, it is well-established that reversionary clauses in government land transfer provisions constitute a form of continuing government control over the property. Pet. 80a (citing cases). These cases conform with a basic tenet of property law that a reversionary interest is an ownership interest in real property. *See*, *e.g.*, *Restatement (Second) of Property*: *Donative Transfers* § 1.4 (1983). Moreover, the reversionary clause contained in Section 8121 is directly tied to the government's ongoing interest in maintaining the sectarian religious symbol at the heart of this case. By contrast, the reversionary clause in *Marshfield* was entirely unrelated to the religious symbol on the land that was transferred. *Marshfield*, 203 F.3d at 490 (deed contained a covenant running with land transferred to private party, the only effect of which is to restrict use of the parcel to public park purposes). In *Mercier*, the government did not retain

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for the government to enter onto the property, thereby both depriving the new owner of one of the traditional bundle of property rights that constitutes ownership of real property – the right to exclude others – and perpetuating the government's entanglement with the land post-transfer. No such easement was retained by the government in either *Marshfield* or *Mercier*.

any future interest in the transferred land.

Petitioners contend that the Ninth Circuit misapprehended the effect of the reversionary clause, which, they assert, does not require that the VFW keep the cross, so long as it maintains the land as some kind of a war memorial. Pet. 25-26. Petitioners ignore, however, that 18 U.S.C. § 1369 prohibits, in pertinent part, injuring or destroying any monument "commemorating the service of any person or persons in the armed forces of the United States" if "the structure, plaque, statue, or other monument described in subsection (a) is located on property owned by, or under the jurisdiction of, the Federal Government." Given the cross's designation as a national memorial by Congress, and the fact that the land on which the cross is located is within the boundaries of the Preserve, the cross remains "under the jurisdiction of the federal government" for purposes of Section 1369. *See* 16 U.S.C. §§ 410aaa-42, 410aaa-43 (providing for the transfer of approximately 1.4 million acres in the boundary of the Mojave National Preserve from the BLM to the "administrative jurisdiction" of the Director of the NPS).[10] In light of 18 U.S.C. § 1369, the VFW may well be required to maintain the cross under penalty of federal law. While courts may generally impute

[10] Land within the boundary of the Preserve includes privately owned land. *See* 16 U.S.C. § 410aaa-56 (permitting the Secretary to acquire privately owned lands "within the boundary of the [Mojave National P]reserve"); *Free Enter. Canoe Renters Ass'n v. Watt*, 711 F.2d 852, 856 (8th Cir.1983) (observing that the phrase "within the boundaries" of the Ozark National Scenic Riverways "incorporate[s] federal, state, and private land, and . . . makes no distinctions on the basis of ownership").

expression on private land to its private owner, that understanding would not hold, where, as here, the private owner is arguably *required* by federal law to maintain the expression.

However, even if Petitioners are correct that neither § 8121(e) nor any other federal law requires that the VFW keep the cross in place, their arguments provide no reason for this Court to grant review. A reversionary interest is an ownership interest in the property that the government retains. Here, the reversionary clause will likely influence the VFW's decisions about how it uses its property because maintaining the cross is the easiest and cheapest means of preventing reversion to the government. Thus, the clause is one piece of information that would inform the reasonable observer's conclusion that the government is not, through the Section 8121 land transfer, attempting to disassociate itself from a sectarian symbol.

The Ninth Circuit's ruling that Section 8121 did not cure the Establishment Clause violation also rested in part on the fact that the land transfer was not accomplished through normal statutory channels. One such channel is the general land transfer statute providing for the Secretary of Interior to exchange federal land for non-federal land. Another channel is found in a specific statute that addresses land exchanges within the Preserve. Pet. 81a-82a (citing statutory provisions governing land exchanges by the Secretary of Interior and in the Mojave Preserve). The land transfer here was not effectuated through either of those ordinary methods. Instead, it was enacted as a special provision in an appropriations bill, and was

essentially a private bill benefitting a particular association (the VFW) and particular individuals (the Sandozes).

This Court has held that governmental action involving religion taken outside the normal statutory process may reflect an Establishment Clause violation. In *Board of Educ. Of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687 (1994), for example, the Court held that a school district, the boundaries of which were coextensive with the boundaries of a devoutly religious village, and that was created by "a special Act of the legislature," rather than through the "State's general laws governing school district reorganization," violated the Establishment Clause. *Id.* at 700-01. The Court's decision was grounded in the abnormal circumstances surrounding the creation of the district, which raised concerns that the government was not, and would not, exercise its school district reorganization "authority in a religiously neutral way," as the Establishment Clause requires. *Id.* at 703.

Here too, the government's past favoritism at Sunrise Rock for religious expression over other forms of expression -- combined with exclusion of everyone but the Sandozes and the VFW from the opportunity to obtain the land on which a sectarian religious symbol rests -- gives rise to a concern that the government is not using its land transfer authority in a religiously neutral manner.

The factual history here is significantly different from *Marshfield* and *Mercier*, making the identity of the beneficiaries of the Section 8121 transfer more relevant to the analysis than the

identity of the beneficiaries of the transfers in the Seventh Circuit cases. Long before the government had designated the cross a national memorial, it had allowed Mr. Sandoz to come onto federal land to erect a Latin cross, without obtaining the permission required by federal law, but forbade, under threat of arrest and prosecution, someone else from coming onto the same land to erect a Buddhist memorial. Pet. 56a-57a.[11] This favoritism for expression of one particular religion violates the Establishment Clause, *see Pinette*, 515 U.S. at 766 (plurality opinion), and distinguishes the facts of this case from those of the Seventh Circuit cases. In neither *Marshfield* nor *Mercier* was there a track record of governmental favoritism, in the form of preferential access to government land for one religion over another. Nor is there any reason to believe the Seventh Circuit would have ignored such a history of favoritism in considering whether the government's method of transfer remedied an Establishment Clause violation.

It is these key factual distinctions that distinguish this case from *Mercier* and *Marshfield*, not, as Petitioners argue, the law applied to these facts or the circuit applying that law.

B. This Case Is Not About Deference To Congress But About The Ability Of Courts To Enforce Their Constitutional Judgments.

Petitioners assert that this Court's review is

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[11] Mr. Sandoz stated that he opposed the removal of the cross, and that if the cross were taken down, he would put it back up. Pet. 120a.

merited because, in invalidating Section 8121, the court of appeals failed to give proper deference to an Act of Congress. Pet. 23. However, none of the cases Petitioners cite concerns the level of deference a court should accord in determining whether an Act of Congress remedies an already-adjudicated constitutional violation by the federal government. Petitioners cite no case, and Respondent is not aware of any, that holds that a court that has already found a constitutional violation exists should presume that any congressional action purportedly designed to remedy that violation does so.

Seeking to bolster their deference argument, Petitioners assert that the court of appeals placed improper weight on the long history of congressional involvement with the cross in concluding that the district court had not abused its discretion in finding that purpose of Section 8121 was to avoid the effects of its prior injunction. In fact, the court of appeals acted consistently with decisions of this Court stressing the importance of the history of government involvement with religious symbols or exercises in assessing their constitutionality. *See, e.g., McCreary County v. American Civil Liberties Union of Ky.,* 545 U.S. 844 (2005)*; Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 309 (2000).

Petitioners' deference argument seeks traction in the dissent from the denial of rehearing en banc, which characterized the panel decision as "'effectively announc[ing] the rule that Congress cannot cure a government agency's Establishment Clause violation by ordering the sale of land upon which a religious symbol previously was situated.'" Pet. 29 (quoting Pet. 37a). The panel announced no

such rule. It merely held that, after applying the fact-specific inquiry employed by the Seventh Circuit and mandated by this Court's jurisprudence, and given the unusual circumstances of *this* particular transaction, the congressional land transfer did not remedy the previously-adjudicated Establishment Clause violation.

C. This Case Does Not Present the Question Whether the Cross Must be Removed, Nor Is the Land Transfer a Permissible Accommodation of Religion.

Petitioners contend that this Court should review this case because the decisions below force destruction of the cross, which, they contend, would demonstrate "hostility toward religion". Pet. 19-20. While Petitioners' argument therefore (correctly) concedes that the cross is a religious symbol, it errs in suggesting that the lower courts have required destruction of the cross. As a factual matter, the court of appeals' decision enjoining Section 8121 does not require the government to tear down the cross. It merely affirms the district court's order requiring the government to comply with the district court's injunction, which does not necessitate destruction of the cross. Pet. 85a; Pet. 146a.[12] This would be a

[12] Although the injunction prohibits the "display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve," Pet. 146a, when the injunction was issued, the government had not proposed to transfer the land on which the cross rests to a private party. Therefore the district court's initial decision did not address the propriety of that remedy. In granting Respondent's motion to enforce the injunction following the enactment of Section 8121, the district court cited

different case, for example, if the government had responded to the injunction by transferring the land on which the cross sits to the highest bidder without the NPS's continuing "supervision, management and control" over the cross and land. A remedy along those lines, which would not require the government to "tear down the cross," can be accomplished without this Court's intervention.

Petitioners fare no better with their argument that Section 8121 reflects a permissible accommodation of religion. As this Court repeatedly has stated: "Government efforts to accommodate religion are permissible *when they remove burdens on the free exercise of religion*." *County of Allegheny v. ACLU of Greater Pittsburgh Chapter*, 492 U.S. 573, 601 n.51 (1989) (emphasis added). Those burdens must generally be government-imposed, s*ee Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005), and the resulting accommodation cannot "single[] out a particular religious sect for special treatment."

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approvingly to the framework set out by the Seventh Circuit in *Marshfield* for evaluating when a land transfer to a private party is sufficient to remedy an already-adjudicated Establishment Clause violation, and the court of appeals did the same in affirming the grant of the motion to enforce the injunction. Pet. 90a-91a; Pet. 36a; Pet. 76a. Neither the district court nor the court of appeals held that a land transfer never would be permissible, and that the only constitutionally acceptable remedy is to remove or destroy the cross. Indeed, Respondent has proposed land transfer remedies that do not entail tearing down the cross. *E.g.*, Plaintiff's Opposition to Petition for Rehearing, at 3. Accordingly, this case does not present the question whether, as a matter of law, a land transfer from the government to a private party can *ever* remedy an Establishment Clause violation.

Kiryas Joel, 512 U.S. at 706*; id*. at 707 ("[W]hatever the limits of permissible legislative accommodations may be, it is clear that neutrality as among religions must be honored."). Petitioners do not explain, nor could they, what government-imposed burden on the free exercise of religion Section 8121 lifts; nor could they justify the accommodation of only one faith's religious expression.[13]

III. THIS CASE RAISES SERIOUS MOOTNESS PROBLEMS AND THEREFORE PRESENTS A POOR VEHICLE FOR REVIEW OF THE QUESTIONS PRESENTED

Even if the questions presented here were worthy of review, this case would be an inappropriate vehicle for resolving them because changed factual circumstances likely have rendered the parties' dispute over the transfer moot.

In Section 8121, Congress expressly conveyed the land on which the cross sits to "the Veterans Home of California—Barstow, Veterans of Foreign Wars Post #385E." Pet. 147a-149a. However, VFW Post 385E no longer exists. Its charter was revoked in May 2007, and therefore "the post is now defunct." BIO App. 4a. The demise of Post 385E raises a complex mootness question: Is the Section 8121 land

[13] When this Court has upheld the placement of religious symbols on public property, it has done so in recognition of the role of religion in American society, *see, e.g., Van Orden v. Perry,* 545 U.S. 677, 688-90 (2005), not as an accommodation. *See Allegheny*, 492 U.S. at 601 n.51 (religious symbol on county property not permissible accommodation of religion because it does not relieve a government-imposed burden on religion).

transfer now null and void, thus rendering this case moot; or, can the transfer go forward with some other entity standing in the shoes of Post 385E, even though Congress expressly named only that particular Post as the grantee in Section 8121? As a threshold matter, this Court would have to resolve this serious mootness issue before it could turn to the questions presented by the Petition. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978) (mootness is a "threshold" issue because it implicates the Court's jurisdiction).

The California VFW has asserted that it is the successor in interest to Post 385E and that it therefore will assume Post 385E's rights and obligations under the Section 8121 conveyance. BIO App. 4a. Whether the state VFW can simply be substituted for Post 385E as the statutory grantee is not so clear cut, however.

In government land transfers, "nothing passes by implication." *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 546 (1837); *Albrecht v. United States*, 831 F.2d 196, 198 (10th Cir. 1987). Thus, when interpreting statutory land grants, this Court has admonished that "all that is granted must be found in the plain terms of the act." *City of Minneapolis v. Minneapolis St. Ry. Co.*, 215 U.S. 417, 427 (1910). Here, the language of the land transfer statute is plain. Section 8121 names a specific recipient of the land grant – VFW Post 385E. The statute conveys nothing to the California VFW. To bestow rights on the California VFW thus would expand the scope of the conveyance beyond its express terms.

This is not to say that a putative successor may never assume the rights and obligations of the original grantee in a federal land transfer. For example, this Court has held that federal land can be transferred to a successor when the original grantee's rights to the property had fully vested prior to the transfer. *Stark v. Starrs*, 73 U.S. 402, 417-18 (1867); *Simmons v. Wagner*, 101 U.S. 260, 261 (1879). In such cases, once the grantee's right to the land vests, the grantee can sell or assign his rights, or direct that the land descend to his heirs upon his death. *See Cawley v. Johnson*, 21 F. 492, 495 (C.C. W.D. Wis. 1884). However, when conditions precedent are prescribed in the land transfer statute, no land can be conveyed to a successor until those conditions "have been fully performed." *McCune v. Essig*, 118 F. 273, 273-74, 280 (C.C. E. D. Wash. 1902); *see also Hall v. Russell*, 101 U.S. 503, 509-510 (1879) (grantee who died before completing four-year residency requirement of land grant statute could not transfer land to heirs because "nothing passed until all was done that was necessary to entitle the occupant to a grant of the land").

Applying these principles here, Section 8121 sets forth conditions precedent that must occur before the land is conveyed to Post 385E. In particular, the United States must be provided consideration equal to the value of the transferred land, a process that requires the conveyance of property by Mr. and Mrs. Henry Sandoz in exchange for the transferred land; an appraisal of both properties; and, if necessary, a cash equalization payment. Pet. 147a-148a. Because of the injunction enjoining the Section 8121 transfer, the statutory

conditions have yet to be satisfied. Thus, Post 385E never obtained a vested right in the federal land before its charter was revoked and therefore the land cannot be transferred to the Post's putative successor.[14]

Congress could, of course, have provided in Section 8121 for a successor to assume Post 385E's rights and obligations in the event that the Post became nonexistent prior to the completion of the conditions precedent to the transfer. *E.g.*, *McCune v. Essig*, 199 U.S. 382, 388-89 (1905) (quoting statute that stated, if grantee is dead, his widow can make necessary showing that conditions have been satisfied); *Shulthis v. McDougal*, 170 F.529, 531-33 (8th Cir. 1909) (statutes and agreements providing for land grants to tribe members specifically provided that, if recipient died before patent or deed becomes effective, title would inure to recipients heirs). But Congress issued no such directive in Section 8121. And neither the statute itself nor its legislative history provides a clear indication that Congress necessarily would have considered the state VFW to be interchangeable with the local Post group for purposes of the statutory land transfer. In the absence of any trace of Congressional intent for the land to be transferred to an entity other than Post 385E, the State VFW cannot simply appoint itself the Section 8121 transferee.

In sum, the demise of Post 385E raises difficult mootness issues that this Court would have

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[14] If it granted the Petition, this Court also would have to determine, as a legal and factual matter, whether the state VFW is the successor to Post 385E.

to address before reaching the questions presented in the Petition. These considerations render the case a poor vehicle to resolve those questions and thus furnish an additional ground for denying the Petition.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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Dated: January 8, 2009

APPENDIX

Pub. L. 106-554, 114 Stat. 2763, 2763A-230, § 133 (2000)

SEC. 133. 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 California first erected in 1934 by the Veterans of Foreign Wars along Cima Road approximately 11 miles south of Interstate 15.

Pub. L. 107-117, 115 Stat. 2230, 2278-79, § 8137 (2002)

SEC. 8137. (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.

Pub. L. 107-248, 116 Stat. 1519, 1551, § 8065 (2002)

SEC. 8065. (a) None of the funds made available in this or any other Act may be used to pay the salary of any officer or employee of the Department of Defense who approves or implements the transfer of administrative responsibilities or budgetary resources of any program, project, or activity financed by this Act to the jurisdiction of another Federal agency not financed by this Act without the express authorization of Congress: Provided, That this limitation shall not apply to transfers of funds expressly provided for in Defense Appropriations Acts, or provisions of Acts providing supplemental appropriations for the Department of Defense.

(b) None of the funds in this or any other Act may be used to dismantle national memorials commemorating United States participation in World War I.

Veterans of Foreign Wars of the United States
Department of California

November 17, 2008

The Honorable Dirk Kempthorne
Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Veterans Home of California—Barstow, Veterans of Foreign Wars Post #385E

Secretary Kempthorne,

In Public Law 108-87 § 812l(a)-(f), 117 Stat. 1100 (2003), Congress directed the Secretary of the Interior to convey to the Veterans Home of California--Barstow, Veterans of Foreign Wars Post #385E ("Post 385") all right, title, and interest of the United States in and to a parcel of real property (the "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.

As consideration for the Property, 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. Public Law 108-87 § 8121(b), 117 Stat. 1100 (2003).

This conveyance was subsequently enjoined by the U.S. District Court for the Central District of California. *Buono v. Norton*, 364 F. Supp. 2d 1175 (CD. Cal. 2005). The injunction was upheld by the U.S. Court of Appeals for the Ninth Circuit. *Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), reprinted as amended at *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008). The United States has petitioned the U.S. Supreme Court for a writ of certiorari. Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Kempthorne v. Buono, U.S. Supreme Court No. 08-472 (Oct. 10, 2008). In May 2007, the charter of Post 385 was revoked and the post is now defunct. In accordance with Veterans of Foreign Wars By-Laws Sections 210-211 (attached as Appendix "A") and Veterans of Foreign Wars Manual of Procedure Sections 210-211 (attached as Appendix "B"), Veterans of Foreign Wars Department of California is the successor in interest of Post 385 and will assume ownership of and responsibility for the Property upon lifting of the injunction.

Respectfully,

/s/

J. Nichols Guest
State Commander

Enclosures

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Phone (916) 449-8850 FAX (916) 449-8832
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APPENDIX A

Authorized Attendees. Any member of the Post and those on official business shall be recognized by the Post Commander for the conduct of business.

Guests. With the approval of the Post Commander/Committee Chairman, any member or guest may attend a Post/Committee meeting. Such visiting member or guest shall have no voice unless recognized by the Post Commander/Committee Chairman, and shall have no voting privileges.

Sec. 204

Sec. 205

Sec. 206--Change of Location, Meeting Place, Day or Time.

A Post may change its chartered location, meeting place, meeting day or time as prescribed in Section 206 of the Manual of Procedure.

Sec. 207

Sec. 208--Change of Name.

A Post may change its chartered name as prescribed in Section 208 of the Manual of Procedure.

Sec. 209--Consolidation of Posts.

Two or more Posts may consolidate by authority of the Commander-in-Chief as prescribed in Section 209 of the Manual of Procedure.

Sec. 210--Surrender of Charter.

A Post may surrender its charter only upon a vote of its members as prescribed in Section 210 of the Manual of Procedure.

Sec. 211--Suspension and Revocation of Charter.

Actions by the Commander-in-Chief—Suspension. The Commander-in-Chief may suspend a Post Charter for a period of up to six (6) months for violations of the National By-Laws and Manual of Procedure.

Establishment of Trusteeship. Upon the imposition of any suspension under this section, the Department Commander shall establish a trusteeship as prescribed in Section 211 of the Manual of Procedure.

Actions by the Commander-in-chief—Revocation. The Commander-in-chief may revoke a Post Charter.

Actions by the Department Commander—Suspension. The Department Commander may suspend a Post Charter for a period of up to three (3) months.

Sec. 212--Defunct Posts.

The Commander-in-Chief shall revoke a Post's Charter if such Post has less than ten (10) members on February 1.

In the event of such a revocation, disposition of the property and trust funds of the Post shall be handled as prescribed in Section 210.

Sec. 213--Arrearages, Deficiencies and Omissions.

Any Post in arrears for any financial obligations to County Council (if applicable), District, Department and National for fees, dues, poppy money, supply money, failing to

APPENDIX B

Sec. 209--Consolidation of Posts.

Two or more Posts may consolidate upon a vote of their respective members conducted in accordance with the procedures herein set forth as follows:

1. A motion to consider consolidation shall be made and approved at a stated meeting of the Posts.
2. A committee shall be appointed by the Post Commander to investigate consolidation.
3. All Posts involved in the consolidation shall exchange a report of all assets and liabilities.
4. A Post may then, after at least twenty (20) days written notice to the Department Commander and members of the respective Posts, consolidate upon a two-thirds (2/3) vote of the members present and voting at each stated Post meeting.
5. The Department Commander shall be notified, in writing, immediately after the meeting of the outcome of the action taken.
6. A Department representative shall conduct a joint meeting of all Posts within thirty (30) days for the purpose of determining the name, number (must be one of the consolidating Post numbers), location of the consolidated Post and the election and installation of officers. A written notice must be sent to the members of all Posts involved at least

fourteen (14) days in advance. All actions, with the exception of the election of officers, must be approved by a two-thirds (2/3) vote of the members present at the stated meeting,

7. Such facts shall be certified by the Department representative, submitted to the Department Commander for forwarding to the Commander-in-Chief who shall issue a Certificate of Charter reciting the facts of such consolidation. The Certificate of Charter shall rank from the date of the senior Post's charter.

The property of each of the Posts shall be conveyed to and become the property of the consolidated Post. All past officers in each Post shall be entitled to rank as of date of service in their respective Posts.

Sec. 210—Surrender of Charter.

A Post may surrender its charter in accordance with the procedures herein set forth as follows:

1. A motion to consider surrendering a Post charter shall be made and approved at a stated meeting of the Post. If approved, the Post Commander shall immediately provide the Department Commander with a list describing all assets and liabilities of the Post.
2. A Post may then, after at least twenty (20) days written notice to the Department Commander and members

of the Post, vote to surrender the charter upon a two-thirds (2/3) vote of the members present and voting at a stated meeting.

3. The Department Commander shall be notified immediately after the meeting, in writing, of the outcome of the vote to surrender the charter of a Post. If approved, the Department Commander shall within thirty (30) days, request that the Commander-in-Chief cancel the charter. Pending such cancellation the Post shall not dispose of any assets.

Disposition of Property. In case of surrender or forfeiture of a charter, all of the property of the Post, including real property, books of record and papers and money belonging to it, shall be immediately recovered by the District and turned over to the Department for disposition as directed by the Department Council of Administration for the purposes set forth in the Congressional Charter.

In case of surrender or forfeiture of a charter, the Department Council of Administration in the case of trust funds or trust property, or both, shall carry out the intent and purpose of such trust to the extent of such funds or property, or both.

Sec. 211--Suspension and Revocation of Charter.

1. Actions by the Commander-in-chief—Suspension.

The Commander-in-Chief may suspend a post charter in accordance with the procedures herein set forth.

a. The Commander-in-Chief shall issue a Special Order directing the Department Commander to suspend a Post Charter.

2. Actions by the Commander-in-Chief—Revocation.

The Commander-in-Chief may revoke a Post Charter in accordance with the procedures herein set forth.

a. The Post Commander shall be notified in writing of the proposed action by certified mail, return receipt requested, to the address of record.

b. Unless the Post Commander notifies the Commander-in-Chief in writing by certified mail, return receipt requested, within fifteen (15) days of receipt of notice that the Post desires a hearing, the revocation of the Charter shall be effected.

c. In the event that the Post requests a hearing, said hearing shall be held within thirty (30) days of the receipt of the notice. A hearing will be scheduled

at a time and place and in a manner prescribed by the Commander-in-Chief.

d. The Commander-in-Chief shall decide the matter within thirty (30) days.
e. If the Post is not already under suspension at the time that the notice of proposed revocation is given, the Post shall thereafter be under suspension.
f. The Commander-in-Chief may at his discretion, and after hearing the matter if so requested, revoke the charter of the Post by issuing a Special Order to that effect.

3. Actions by the Department Commander—Suspension.

The Department Commander may suspend a Post Charter in accordance with the procedures herein set forth.

a. The Department Commander shall issue a Special Order suspending a Post Charter and appointing trustees consisting of three to five members. Pursuant to a written grant of powers and limitations, such trustees shall carry on the business and affairs of the Post during the period of suspension. The acts and actions of the trustees shall be subject to the approval or disapproval of the Department Commander.
b. The Post Commander shall be notified in writing of the action by certified mail, return receipt requested, to the

address of record or by personal delivery by a designated representative.

c. The Department Commander shall notify the Commander-in-Chief in writing within two (2) days.
d. While under suspension no meetings shall be held in the name of the Post or organization, except for the sole purpose of the discussion of the cause, effect or removal of the penalty and no funds of the Post shall be expended or obligations incurred during and while the order of suspension is in force and effect except as may be expended or obligated by the trustees appointed under this subsection.
e. Following an initial suspension period as provided in this subsection, the Department Commander shall revoke or extend the suspension for an additional period of time not to exceed ninety (90) days.

4. Actions by the Department Commander—Revocation.

The Department Commander may at any time during the suspension period, recommend revocation of the Post Charter to the Commander-in-Chief.

Sec. 212--Defunct Posts. (See Section 212 By-Laws)

Sec. 213--Arrearages, Deficiencies and Omissions.

If a Post has any outstanding financial obligations due National Headquarters that remain unpaid on September 1, the amount due will be deducted from future dues payments until balance due is paid in full.

Sec. 214--Solicitation of Funds.

Posts may solicit funds or contributions or otherwise engage in fund-raising activities