No. 08-472

In the Supreme Court of the United States

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

v.

FRANK BUONO

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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes: Page

Miscellaneous:

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Over a five-judge dissent from denial of rehearing en banc, the Ninth Circuit invalidated an Act of Congress and required the federal government to remove a cross that has stood for 75 years as a memorial to fallen service members. While respondent argues that there is no circuit split on that question, the Ninth Circuit's invalidation of an Act of Congress based on an erroneous and potentially far-reaching constitutional theory would warrant review even in the absence of a circuit split. Moreover, the court of appeals' initial decision expressly (and correctly) acknowledged the conflict. The court of appeals also impugned Congress's purpose and created, rather than avoided, constitutional difficulties in construing the relevant legislation. Respondent's defense of the decision below rests on equally strained interpretations of the underlying legislation. Respect for

the coordinate legislative branch calls, at a minimum, for plenary review of the Ninth Circuit's decision.

I. THE COURT OF APPEALS' HOLDING ON STANDING WARRANTS REVIEW

At the outset, this case presents a threshold standing ruling that would warrant review even in its own right because it is important, it oversteps judicial bounds in the course of refusing to give effect to an Act of Congress, and the courts of appeals are divided on the correct interpretation of this Court's Establishment Clause standing cases. Pet. 10-18. Respondent asserts (Br. in Opp. 8, 9-10) that his "direct and unwelcome contact" with the cross alone creates standing to bring an Establishment Clause challenge. That is contrary to this Court's precedents, because respondent must demonstrate an *Establishment Clause* injury to pursue an Establishment Clause claim. See Pet. 11-12. And this Court has made clear that, while a person may have a "'spiritual stake' sufficient to confer standing," "the psychological consequence presumably produced by observation of conduct with which one disagrees" does not confer standing, no matter how "firmly committed to the constitutional principle of separation of church and State" the plaintiff might be. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485, 486 & n.22 (1982) (*Valley Forge*) (quoting *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 154 (1970)).

Respondent has failed to show any injury beyond the one that *Valley Forge* held to be inadequate. In contrast to the plaintiffs in all of the cases on which he relies, respondent has testified that he is a practicing Roman Catholic who does *not* "find the cross, itself, offensive,"

and that he objects to the cross at issue here only because it is located on "property that is not open *to others* to place freestanding signs or symbols that express *their* views or beliefs." 03-55032 C.A. E.R. 27, 59 (emphases added). In light of those clear statements, this case does not require the Court to inquire into whether respondent's injury is truly spiritual in nature, see Br. in Opp. 12-13, because respondent has conceded that it is not. Nor does the government assert, as respondent claims (Br. in Opp. 12), that respondent lacks standing simply because he is a Catholic. Instead, respondent lacks standing because he has asserted only an ideological objection concerning *other peoples'* rights to erect *other symbols* in the event that *they* wish to do so. Pet. 12-14.

Significantly, respondent does not appear to defend the court of appeals' rationale for finding standing. Respondent suggests (Br. in Opp. 9) that *Valley Forge* addressed only taxpayer standing. But that contention is manifestly wrong. After finding that the plaintiffs lacked standing as taxpayers, *Valley Forge*, 454 U.S. at 482, the *Valley Forge* Court considered whether they had "alleged any other basis for standing," *ibid.*, and concluded that they lacked standing as citizens because they did not identify an injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees," *id.* at 485; see *id.* at 482-487. As noted, respondent here cannot even point to that "psychological consequence," because he does not find the cross itself offensive.

Unlike respondent, the court of appeals appeared to acknowledge that a plaintiff must identify an additional injury accompanying such a psychological consequence, and it held that respondent had incurred such an injury because, instead of coming into contact with the cross,

he chose to drive on a different road. See Pet. App. 106a-107a. As explained in the petition for a writ of certiorari and not directly disputed by respondent, however, if respondent cannot establish standing by viewing the cross, he certainly cannot establish standing by electing *not* to view the cross. Pet. 15-16. The government's point is not, as respondent claims (Br. in Opp. 9 n.3), that respondent lacks standing because he is free not to view the cross. Instead, the point is that respondent cannot establish standing by choosing to substitute a self-inflicted injury for another injury that is itself inadequate to create standing. Pet. 15-16.

There is, moreover, disagreement among the courts of appeals on the significance of plaintiffs' decisions to alter their behavior to avoid direct contact with a religious symbol. Pet. 16-18. The court of appeals' reliance on respondent's decision to drive along a different route makes those cases relevant. Indeed, the decision below relies on several of the Ninth Circuit decisions that comprise part of the circuit split. See Pet. App. 107a. That only underscores the need for this Court's guidance on the types of injuries that confer standing in Establishment Clause cases. Pet. 18.

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

On the merits of the Establishment Clause question, respondent argues primarily (Br. in Opp. 15-26) that the courts of appeals are not divided on the question presented here. Even if that were correct, and it is not, that would not eliminate the need for this Court's review.

A. The invalidation of an Act of Congress itself is normally sufficient to warrant this Court's review.

Such review is especially important here because tearing down religious symbols can "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden* v. *Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment); see *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Congress's decision to divest itself of the privately erected cross—which has stood in a remote desert location for three-quarters of a century as a memorial to fallen service members—was an eminently sensible way to resolve the Establishment Clause issue without tearing down the cross, which could demonstrate hostility toward religion and callousness toward fallen service members and those who have sought to honor them. Pet. 19-20.

Respondent contends (Br. in Opp. 28) that the court of appeals' decision does not require removal of the cross because the government could, instead, sell the land to the highest bidder. It is far from clear, however, that the Ninth Circuit's decision would permit that course, especially if the Veterans of Foreign Wars (VFW) or a religious organization were the purchaser. See Pet. App. 31a. Moreover, selling the land to the highest bidder could amount to nothing more than outsourcing the tearing down of the cross. Congress's decision to sell the land for fair value to the VFW—the private organization that erected the memorial in the first place—is a far more tailored remedy than an indiscriminate sale. In any event, it is a choice that Congress was entitled to make.

B. Especially because the application of the Establishment Clause is invariably fact-dependent, see, *e.g.*, *McCreary County* v. *ACLU*, 545 U.S. 844, 867-868 (2005), the absence of a square circuit split would not detract from the need for this Court's review of the im-

portant constitutional question presented. The court of appeals' decision does, however, "squarely contradict[]" decisions of the Seventh Circuit. Pet. App. 41a (O'Scannlain, J., dissenting). That provides all the more reason for this Court's review. As the court of appeals acknowledged in its initial opinion, the Seventh Circuit presumes that the government may sell its property to avoid inappropriate endorsement of religion; the Ninth Circuit does not. *Id.* at 25a n.13.

In a pair of cases—*Freedom from Religion Foundation, Inc.* v. *City of Marshfield*, 203 F.3d 487 (2000), and *Mercier* v. *Fraternal Order of Eagles*, 395 F.3d 693 (2005)—the Seventh Circuit held that "absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion." *City of Marshfield*, 203 F.3d at 491. Respondent argues (Br. in Opp. 17) that the Seventh Circuit's test does not amount to a presumption because "[n]o form of the word presume or presumption appears" in either *City of Marshfield* or *Mercier*. That is just semantics. If the government may transfer property to end an alleged Establishment Clause violation in all but "unusual circumstances," *City of Marshfield*, 203 F.3d at 491, then such transfers are *presumptively* permissible. See *Mercier*, 395 F.3d at 705 ("*Marshfield* makes clear that *in most cases*, a government can remedy a potential Establishment Clause violation by selling the real property where the religious monument sits.") (emphasis added).

Respondent contends (Br. in Opp. 17) that the division between the Seventh and Ninth Circuits "does not reflect any significant difference in the Establishment Clause analysis applied by the two courts," because both courts "engage[] in a fact-specific inquiry to determine

whether the land transfer was sufficient to remedy the Establishment Clause violation." That misses the point. Of course, in determining whether unusual circumstances exist to set aside a land transfer, the Seventh Circuit evaluates each case on its own facts. But the key is that, in evaluating those facts, the Ninth Circuit applies a stricter legal standard than the Seventh Circuit.[1]

C. Moreover, respondent's factual distinctions, like those drawn by the court of appeals, only underscore the need for this Court's review. Pet. 24-28. As Judge O'Scannlain explained, the Ninth Circuit panel "flout-[ed]" basic principles of judicial review by (i) failing to accord any deference to Congress's judgment in this sensitive area, and (ii) reading the relevant statutes in such a way as to create, rather than avoid, constitutional difficulties that do not exist under a straightforward interpretation of the statutes. Pet. App. 45a; see Pet. 23-24.

Respondent makes no attempt to defend the court of appeals' inaccurate characterization of the land transfer as carving out a tiny donut hole in a vast federal area. Pet. App. 85a. Instead, he primarily argues (Br. in Opp. 19) that there would be "continued government entanglement with the cross" because Congress designated

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[1] Respondent misleadingly states (Br. in Opp. 16) that *City of Marshfield* ultimately found an Establishment Clause violation. *City of Marshfield* upheld the transfer of a parcel of land in a public park, 203 F.3d at 493, and remanded for the district court to require measures, such as signs, that would differentiate between the private and public land, *id.* at 497. See Pet. 22 n.9. Here, in contrast, the Ninth Circuit invalidated the land transfer itself. Moreover, Congress expressly required the installation of a plaque making clear that the cross had been erected by the VFW to commemorate the war dead (as opposed to by the government to establish religion), and the Ninth Circuit counted that fact *against* the government. Pet. App. 26a, 31a-32a.

the war memorial as a national memorial. That designation has no legal significance here whatsoever. Congress may declare a national memorial on either federal or private land. See, *e.g.*, Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1031, 118 Stat. 2044 (America's National World War I Museum); National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1080, 110 Stat. 2670 (National D-Day Memorial); Act of Oct. 25, 1972, Pub. L. No. 92-551, 86 Stat. 1164 (Benjamin Franklin National Memorial). Such a declaration, standing alone, does nothing to transfer any regulatory authority over private property to the government. For that reason, respondent is incorrect (Br. in Opp. 23) that the VFW might be required to maintain the cross post-transfer, because the land will no longer be "owned by, or under the jurisdiction of, the Federal Government." 18 U.S.C. 1369(b)(2). Moreover, the National Park Service's limited authority over private inholdings within the boundaries of federal areas, see Br. in Opp. 20-21, is likewise irrelevant. That limited authority would not allow the government to require the VFW to display the cross (or any other symbol) on the VFW's own land, and respondent points to nothing remotely suggesting otherwise. Simply put, once the land is transferred, the cross and the decision whether to display it, modify it, or remove it will be up to the VFW, not the government.

While respondent renews some of the court of appeals' other factual points, the government has addressed most of those points in the petition for a writ of certiorari (at 24-28), and any further elaboration is necessarily reserved for a merits brief, not a petition-stage one. Moreover, as Judge O'Scannlain observed, the court of appeals' reliance on some of those factual issues

cannot be reconciled with the Seventh Circuit's treatment of the same issues in *City of Marshfield* and *Mercier*—a point that further underscores both the circuit split and the need for this Court's review. Pet. App. 51a n.10; see Pet. 24-26.

In any event, the court of appeals' judgment ultimately does not appear to turn on factual matters. Instead, in the end, the court of appeals squarely relied on its prior opinion holding that the presence of the cross on federal land violated the Establishment Clause, Pet. App. 84a—and thereby effectively concluded that, in the Ninth Circuit's view, a land transfer is not a valid means of curing a land transfer. See Pet. 29; Pet. App. 37a (O'Scannlain, J., dissenting).

III. THIS CASE PRESENTS A LIVE CONTROVERSY

Finally, there is no merit to respondent's contention (Br. in Opp. 30) that "changed factual circumstances likely have rendered the parties' dispute over the transfer moot." After the government filed the petition for a writ of certiorari, the Department of California VFW informed the Secretary of the Interior that VFW Post 385E is now defunct, and that pursuant to the VFW's by-laws, the Department of California VFW is now the successor-in-interest to Post 385. Br. in Opp. App. 3a-4a. Thus, while Section 8121 directed that the land be transferred to Post 385E, see Department of Defense Appropriations Act, 2004 (2004 Act), Pub. L. No. 108-87, Div. A, § 8121(a), 117 Stat. 1100, the Department of California VFW, as "the successor in interest of Post 385 * * * will assume ownership of and responsibility for the Property upon lifting of the [district court's] injunction." Br. in Opp. App. 4a. Because the VFW's bylaws call for the Department of California VFW to assume

ownership of Post 385E's property, see *id.* at 13a—and respondent does not appear to contend otherwise—there is no mootness concern.

Indeed, this Court has long held that the dissolution of an organization does not render a case moot where, as in this case, the lawsuit could affect the rights of the dissolved organization's successor in interest. *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 674 (1944); see *United States* v. *Zolin*, 491 U.S. 554, 557 n.3 (1989) (death of a party does not render a case moot when the case could affect a party's estate). Because the California VFW will take possession of the land if the government prevails and the injunction is lifted, this case continues to present a live controversy.

Respondent nonetheless asserts that Post 385E had nothing to pass to the California VFW because "Post 385E never obtained a vested right in the federal land before its charter was revoked." Br. in Opp. 33. Post 385E's right to the land vested, however, when Congress enacted Section 8121, at which point Post 385E was entitled to conveyance of the land, at least provided that Post 385E and the other private parties were ready to meet their statutory obligations. See *Watson* v. *Mercer*, 33 U.S. (8 Pet.) 88, 92 (1834) ("A *vested right* is defined to be the power to * * * possess certain things according to the laws of the land.") (internal quotation marks and citation omitted).

Nor are the statutory obligations imposed on Post 385E and other private parties "conditions precedent that must occur before the land is conveyed." Br. in Opp. 32. Section 8121 specifies that "[i]n exchange for" and "[a]s consideration for" the land from Mr. and Mrs. Sandoz, 2004 Act § 8121(a) and (b), 117 Stat. 1100, "the Secretary of the Interior shall convey" the land at issue

to Post 385E, *id.* § 8121(a), 117 Stat. 1100. It is black-letter law that the "payment of the consideration is not a condition precedent." *Forum Inv. Co.* v. *Cement Stave Silo Co.*, 219 F. 213, 218 (8th Cir. 1914); see 3 Richard A. Lord, *Williston on Contracts* § 7:18 (4th ed. 2008); 13 *id.* § 38:5 (4th ed. 2000). And while Section 8121 requires a cash payment in the event that the exchanged properties are not of equal value, see 2004 Act § 8121(c) and (d), 117 Stat. 1100, that is simply part of the consideration, and the statute does not demand that the payment occur before the sale in any event.[2]

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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[2] In addition, the district court's injunction is the only reason that consideration did not pass earlier. Respondent cannot rely, and jurisdiction should not turn, on the parties' inability to consummate the land transfer sooner when it is the injunction challenged here that blocked the transaction from occurring sooner. Cf. 13 *Williston on Contracts* § 39:3 (parties cannot benefit from preventing other parties from performing conditions precedent).