No.

# In the Supreme Court of the United States

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

*v.*

FRANK BUONO

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

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

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

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

## PARTIES TO THE PROCEEDINGS

The petitioners are Dirk Kempthorne, Secretary of the Interior; Jonathan B. Jarvis, Regional Director, Pacific West Region, National Park Service, Department of the Interior; and Dennis Schramm, Superintendent, Mojave National Preserve, National Park Service, Department of the Interior.

The respondent is Frank Buono.

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## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Dirk Kempthorne, Secretary of the Interior, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 54a-85a, 100a-113a) are reported at 527 F.3d 758 and 371 F.3d 543. The opinions of the district court (App., *infra*, 86a-99a, 114a-144a) are reported at 364 F. Supp. 2d 1175 and 212 F. Supp. 2d 1202.

### JURISDICTION

The judgment of the court of appeals was entered on September 6, 2007. The judgment was amended and a petition for rehearing was denied on May 14, 2008 (App., *infra*,

35a-85a). On August 6, 2008, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 11, 2008, and on August 28, 2008, Justice Kennedy further extended the time to and including October 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 147a-149a.

## STATEMENT

1. In 1934, the Veterans of Foreign Wars (VFW) erected a memorial to fallen service members in the form of a wooden cross set atop an outcropping known as Sunrise Rock, which is located on federal land in what is now the Mojave National Preserve (Preserve) in San Bernardino County, California. App., *infra*, 56a, 101a. The cross had a plaque identifying it as a war memorial that read: "The Cross, Erected in Memory of the Dead of All Wars. Erected 1934 by Members of Veterans of Foregin [*sic*] Wars, Death Valley Post 2884." *Id.* at 56a. Private parties have since replaced the cross several times, but there is no longer a plaque at the site. *Ibid.* The current cross is between five and eight feet high and is constructed of four-inch diameter metal pipes that are painted white. *Id.* at 55a.

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

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

In 1999, the National Park Service (NPS) denied a request to erect a Buddhist shrine near the cross and indicated its intention to remove the cross. App., *infra*, 56a-57a. The following year, Congress prohibited the NPS from spending federal funds to remove the cross. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763A-230. One year later, Congress designated the "five-foot-tall white cross first erected by the Veterans of Foreign Wars of the United States in 1934 * * * as well as a limited amount of adjoining Preserve property" as a "national memorial commemorating United States participation in World War I and honoring the American veterans of that war." Department of Defense Appropriations Act, 2002 (2002 Act), Pub. L. No. 107-117, Div. A, § 8137(a), 115 Stat. 2278. That legislation also ordered the Secretary of the Interior to acquire a replica of the original plaque and cross, to install the replica plaque at the memorial, and to determine by survey "[t]he exact acreage and legal description of the property" included in the memorial. § 8137(b) and (c), 115 Stat. 2278-2279.[1]

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

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

that he is offended by the display of a cross on government property that "is not open to groups and individuals to erect other freestanding, permanent displays." 03-55032 C.A. E.R. 14. Respondent claimed that he would avoid the cross on future visits to the Preserve. App., *infra*, 107a.

The district court entered judgment for respondent, App., *infra*, 114a-144a, and permanently enjoined the government from "permitting the display of the * * * cross," *id.* at 146a. The court held that respondent has standing because he was "subjected to an unwelcome religious display, namely the cross," *id.* at 131a, and that the presence of the cross on federal land violates the Establishment Clause because "the primary effect of" a public display of the cross "advances religion," *id.* at 139a.[2]

3. While the government's appeal was pending, Congress enacted legislation ordering the Department of the Interior to convey to the VFW "a parcel of real property consisting of approximately one acre in the Mojave National Preserve and designated (by Section 8137 [of the 2002 Act]) as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war," in exchange for a privately owned, five-acre parcel of land elsewhere in the Preserve. Department of Defense Appropriations Act, 2004 (2004 Act), Pub. L. No. 108-87, § 8121(a) and (b), 117 Stat. 1100. The legislation directed the Department of the Interior to have the properties appraised and to equalize their values through cash payment, if necessary. § 8121(c) and (d), 117 Stat. 1100. Congress further provided that, "[n]otwith-

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[2] The court of appeals stayed the district court's injunction "to the extent that the order required the immediate removal or dismantling of the cross." App., *infra*, 87a. The government subsequently covered the cross with a large plywood box, and the cross remains so covered. See *id.* at 88a.

standing the conveyance of the property * * *, the Secretary shall continue to carry out the responsibilities" set forth in Section 8137 of the 2002 Act—including the installation of a replica plaque—and that, if "the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." § 8121(a) and (e), 117 Stat. 1100.

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

On the merits, the court of appeals held that the case is "squarely controlled" by its prior decision in *Separation of Church & State Committee* v. *City of Eugene*, 93 F.3d 617 (9th Cir. 1996) (per curiam), which held that a cross displayed in a city park violated the Establishment Clause. App., *infra*, 108a. "[E]xpress[ing] no view as to whether a transfer completed under section 8121 [of the 2004 Act] would pass constitutional muster," the court "le[ft] the question for another day." *Id.* at 104a.

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

posed transfer of the subject property can only be viewed as an attempt to keep the * * * cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation." *Id.* at 94a, 97a. As such, the court permanently enjoined the government "from implementing the provisions of Section 8121 of [the 2004 Act]." *Id.* at 99a.

6. a. A panel of the court of appeals affirmed. App., *infra*, 54a-85a. The panel observed that "the Seventh Circuit adopted a presumption that 'a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion' in the absence of 'unusual circumstances.'" *Id.* at 25a n.13 (quoting *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000)). Nonetheless, the panel "decline[d] to adopt such presumption." *Ibid.* Instead, the court determined that the 2004 Act violated the permanent injunction because the land transfer would not cause "government action endorsing religion [to] actually cease[]." *Id.* at 76a. Accordingly, the court held that the land transfer "cannot be validly executed without running afoul of the injunction." *Id.* at 85a.

The court of appeals panel relied in part on what it viewed as "continuing government control" of the property following a land transfer. App., *infra*, 78a. The 2004 Act provides for the land to revert to the government if the Secretary of the Interior determines that the VFW is no longer maintaining a *war memorial* on the site, and the court of appeals construed that provision to require the VFW to maintain a *cross* at the site. *Id.* at 73a-74a, 80a. In the court's view, NPS would also continue to have "general supervisory and managerial responsibilities" and would have an implied easement to enter the property to install a replica of the original plaque pursuant to Section 8137 of the 2002 Act. *Id.* at 78a, 79a.

The court of appeals panel also relied on two other factors: the government's "long-standing efforts to preserve and maintain the cross," App., *infra*, 83a; and the fact that the land exchange was not initiated by NPS pursuant to the procedures that govern agencies' decisions to exchange lands within their jurisdictions, but instead was directed by Congress in an appropriations bill, *id.* at 81a-82a. In the court's view, those factors demonstrated that "the government's purpose in this case is to evade the injunction and keep the cross in place" "without actually curing the continuing Establishment Clause violation." *Id.* at 83a, 84a.[3]

b. After the government filed a petition for rehearing, the court of appeals panel amended its opinion to delete the portion of its decision that expressly acknowledged a conflict with the Seventh Circuit. App., *infra*, 35a-37a. As amended, the opinion now states that, "to the extent [the Seventh Circuit's decision in] *Marshfield* can be read to adopt a presumption of the effectiveness of a land sale to end a constitutional violation, we decline to adopt such a presumption." *Id.* at 36a; see *id.* at 77a n.13.

c. With five judges dissenting, the court of appeals denied en banc review. App., *infra*, 37a-53a. Judge O'Scannlain's dissent, joined by four other judges, explained that "[t]he opinion in this case announces the rule that Congress cannot cure a government agency's Establishment Clause violation by ordering sale of the land upon which a religious symbol previously was situated." *Id.* at 37a. In the dissenters' view, that "novel rule contravenes governing Supreme

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

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

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

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

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

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

**REASONS FOR GRANTING THE PETITION**

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

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

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

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

Standing requirements impose important "constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004) (quoting *Allen* v. *Wright*, 468 U.S. 737, 750 (1984)); see *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 340-342 (2006). They do so in part by ensuring that "the decision to seek review" "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) (quoting *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973)). That is particularly important in the Establishment Clause context, where tearing down longstanding symbols can "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden* v. *Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment); see *id.* at 699.

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

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

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

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

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

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

In the Establishment Clause context as in others, that means that an ideological or policy disagreement does not give rise to standing. See *Valley Forge*, 454 U.S. at 485-487. In *School District* v. *Schempp*, 374 U.S. 203 (1963), the Court held that school children and their parents had standing to challenge mandatory Bible readings in school that "directly affected" them. *Id.* at 224 n.9. This Court has explained that *Schempp* stands for the proposition that "[a] person or a family may have a *spiritual* stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause." *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 154 (1970) (emphasis added). In *Valley Forge*, however, the Court confirmed that *ideological* objections do not give rise to standing to bring Establishment Clause challenges. In that case, the United States had transferred a parcel of land to a religious organization. 454 U.S. at 468. The Court held that the plaintiffs lacked standing to challenge the transfer under the Establishment Clause because they had not identified a personal injury "other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. The Court explained that "[i]t is evident that [the plaintiffs] are firmly committed to the constitutional principle of separation of church and State," but in the Establishment Clause context as elsewhere, "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Id.* at 486.

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

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

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

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

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

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

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

The government did not require respondent to drive along a different route when he visits the Preserve; respondent made that decision on his own. And such "self-inflicted" injuries do not establish standing. *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976); accord *McConnell* v. *FEC*, 540 U.S. 93, 228 (2003). Otherwise, the plaintiffs in *Valley Forge* could have conferred standing on themselves by paying to consult a psychiatrist or making some other symbolic sacrifice (or even by relying on the costs of petitioning the government for a redress of their grievances, cf. *Steel Co.*, 523 U.S. at 107-108). See *Harris* v. *City of Zion*, 927 F.2d 1401, 1420 (7th Cir. 1991) (Easterbrook, J., dissenting) ("If offense is not enough, why is a detour attributable to that offense enough?").

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

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

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

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

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

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[6] The doctrine of taxpayer standing does not provide an alternative basis for standing because respondent (who has not asserted taxpayer standing) does not challenge a congressional enactment that rests on the Taxing and Spending Clause. See *Valley Forge*, 454 U.S. at 478-480; see also *Hein* v. *Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2565-2566 & n.5, 2569 (2007) (plurality opinion). Instead, as in *Valley Forge*, the taxpayer-standing doctrine is inapplicable because the land transfer "was an evident exercise of Congress' power under the Property Clause, Art. IV, § 3, cl. 2" of the Constitution. *Valley Forge*, 454 U.S. at 480.

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

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

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

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

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

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

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

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

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

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

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

544 U.S. 709, 719-720 (2005); cf. *International Soc'y for Krishna Consciousness* v. *Lee*, 505 U.S. 672, 699 (1992) (Kennedy, J., concurring) ("In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use."). Because the court of appeals' decision upsets Congress's judgment in this important and sensitive area, and requires the government to tear down a cross that has stood for more than 70 years as a memorial to fallen service members, this Court's review is warranted.[8]

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

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

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

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

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

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

The panel's original opinion candidly acknowledged the conflict by stating that, "[a]lthough the Seventh Circuit adopted a presumption that 'a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion' in the absence of 'unusual circumstances,' we decline to adopt such presumption." App., *infra*, 25a n.13 (citation to *City of Marshfield* omitted). In response to the government's rehearing petition, the panel amended the opinion to state that, "to the extent that *Marshfield* can be read to adopt a presumption of the effectiveness of a land sale to end a constitutional violation, we decline to adopt such a presumption." *Id.* at 36a; accord *id.* at 76a-77a. As the dissenters from the denial of rehearing explained, the panel was correct in its initial opinion that its decision conflicts with decisions of the Seventh Circuit. *Id.* at 37a, 41a. None of the minor amendments to the opinion (see *id.* at 36a-37a) eliminate that conflict.[9]

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

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

The court of appeals rendered the Act of Congress invalid only by departing from well-settled interpretive principles. Because "there is a presumption of legitimacy accorded to the Government's official conduct," *NARA* v. *Favish*, 541 U.S. 157, 174 (2004), "the Court is normally deferential to [the government's] articulation of a secular purpose." *Edwards* v. *Aguillard*, 482 U.S. 578, 586 (1987); see *McCreary*, 545 U.S. at 864. Of course, such deference is not limitless, *id.* at 864-865, but as the dissent observed, "Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden to it." App., *infra*, 44a (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Moreover, as this Court has repeatedly admonished, courts should read statutes to avoid constitutional difficulties, not to create them. *E.g.*, *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

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

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

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

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

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

[10] The court of appeals also erred insofar as it framed the question presented as being whether Congress attempted to evade the district court's injunction and whether the land transfer mandated by Congress would be a "violation of the permanent injunction." App., *infra*, 75a (heading); see *id.* at 66a ("We agree that the exchange effectuated by § 8121 violates the injunction."). Indeed, the court even said that it was reviewing the district court's decision effectively invalidating an Act of Congress for abuse of the district court's (as opposed to Congress's) discretion. *Id.* at 65a, 66a. Congress's constitutional authority is not, however, subject to district courts' discretion, and the court of appeals identified no authority for that startling proposition. More fundamentally, the injunction could not divest Congress of its "authority to alter the prospective effect of previously entered injunctions." *Miller* v. *French*, 530 U.S. 327, 344 (2000). Nor could it divest Congress of its authority to legislate a remedy for any Establishment Clause violation. To the extent that the court of appeals believed that the previously issued injunction itself barred the Act of Congress at issue, its decision conflicts with decisions of this Court and warrants review.

conflicting holdings in *Marshfield* and *Mercier*." *Id.* at 51a n.10. In *Mercier*, for example, the Seventh Circuit upheld the sale to the organization that had donated the Ten Commandments monument to the City, in part because doing so "makes practical sense" and recognizes the group's "long-standing and important relationship with the Monument." 395 F.3d at 703; see *City of Marshfield*, 203 F.3d at 492. So too here, the VFW is "the logical purchaser," *Mercier*, 395 F.3d at 705, because it is the nonsectarian organization that erected the cross as a war memorial and its mission is perfectly consistent with the maintenance of a war memorial.

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

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

the United States. App., *infra*, 73a-74a, 80a. Not so. See *id.* at 39a (O'Scannlain, J., dissenting). Congress provided that, if "the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States." 2004 Act § 8121(e), 117 Stat. 1100. While that provision calls for reversion if the VFW does not maintain "a war memorial," *ibid.*, it does not require the VFW to display a cross. The court of appeals correctly noted that the 2002 Act had designated the cross and surrounding land as a war memorial, App., *infra*, 73a, but the 2004 Act only requires the VFW to maintain "a" war memorial, not "the" war memorial that had been designated in the 2002 Act. See 2004 Act § 8121(e), 117 Stat. 1100. Indeed, nothing in the 2004 Act even mentions a cross, much less explicitly directs that VFW must display a cross.

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

c. The court of appeals also asserted that the 2004 Act grants the government "an easement or license over the subject property," App., *infra*, 79a, because it directs the Secretary to "continue to carry out [his] responsibilities * * * under [Section 8137 of the 2002 Act]." 2004 Act § 8121(a), 117 Stat. 1100. Section 8137, in turn, had di-

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

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

2. The court of appeals also objected that "carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with [a] cross atop it—will do nothing to minimize the impermissible governmental endorsement." App., *infra*, 85a. But the land within the Preserve

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

is not entirely federal—approximately 10% is not federally owned, including 86,000 privately owned acres. *Id.* at 55a. Indeed, two private ranches and several corrals are within two miles of the cross. 03-55032 C.A. E.R. 34. And in the American West, it is not unusual for private land to be intermingled with public land. See *Wilkie* v. *Robbins*, 127 S. Ct. 2588, 2593 (2007); *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 672, 677-678 (1979). Under the congressionally mandated land transfer, therefore, Sunrise Rock would be better described as one of many holes in a vast slice of Swiss cheese, not as a tiny donut hole. Even respondent, who worked as an Assistant Superintendent at the Preserve, testified that when he first saw the cross, he did not know whether it was on federal land. 03-55032 C.A. E.R. 53, 54. Instead, respondent explained that, "[e]xcept in those few instances where there are houses or structures, you don't know whether the lands are not federally owned or federally owned." *Id.* at 53. In this respect as well, the court of appeals improperly stretched to invalidate an Act of Congress.[12]

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

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

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

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

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

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

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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