

In The
Supreme Court of the United States

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E . A . A . ,
EC E A - H E E , E A .,
Petitioners,

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A . B . ,
Respondent.

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**BRIEF OF THE AMERICAN MILITARY
FORCE AND VETERAN AFFAIRS COMMISSION,
AND THE MILITARY AMERICAN VETERAN
ASSOCIATION, AMICI CURIAE
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICI

The American Muslim Armed Forces and Veterans Council, and the Muslim American Veterans Association, are the two largest organizations comprised exclusively of Muslims who have served in the armed forces of the United States. These amici work actively to promote the welfare of Muslims in the armed forces and of Muslim veterans. They also seek to spread the word to all Americans that there is a patriotic community of Muslim Americans who love their country, and a proportionate share of young Muslim American men and women who serve their country in its military.

These amici are concerned about this case for the simple reason that a memorial to American veterans should be a memorial to all American veterans, not just to Christian veterans. The casual use of the Christian cross to honor our nation's war dead reflects the erroneous assumption that our military is comprised exclusively of Christians, or that the exceptions are not important enough to count. But Muslim soldiers, sailors, marines, and airmen risk their lives and sometimes die for their country, just as Christians do. The VFW can do what it chooses in a wholly private display. But the government cannot sponsor, promote, or facilitate a memorial that honors only Christian veterans. ¹

¹ No one other than the amici and their counsel authored this brief in whole or in part or made a monetary contribution toward its preparation or submission. This brief is filed with the consent of all parties.

SUMMARY OF ARGUMENT

American Muslims have fought in every American war, beginning with the Revolution. They have fought in substantial and increasing numbers in the wars of the last century, from World War I to Iraq and Afghanistan. Meanwhile, the Christian majority in the general population has declined to 76% in the largest surveys.

While the government does not formally argue the constitutionality of a government-sponsored cross, it repeatedly suggests that maybe there was no constitutional violation here. But a government-sponsored cross plainly takes sides between faiths. The cross symbolizes the central Christian story of Jesus's death and resurrection. The cross's secondary meaning to honor the Christian dead is directly derived from, and wholly dependent on, that primary religious meaning. The cross symbolizes a promise of eternal life to Christians, but also a threat of eternal punishment to non-Christians.

To hold that government cannot sponsor an isolated and freestanding cross does not imply the removal of all crosses from government cemeteries. Privately chosen religious symbols on individual headstones are plainly constitutional. Larger crosses would be constitutional if accompanied by comparably prominent symbols to honor deceased veterans of other faiths. And even without that, the symbols of other faiths on individual headstones make larger crosses in cemeteries potentially distinguishable from this case.

The government's obligation to be neutral between competing claims to religious truth is deeply rooted in the original understanding. A

These principles mean that a remedy in this case

For accounts of other Muslim veterans of Iraq who are buried at Arlington, see Shahed Amanullah, (May 30, 2005).⁴

Research on Muslims in the American military is scattered and incomplete, but the basic facts are common ground. The plaintiff, the government, and these amici all agree that Muslims serve in substantial numbers today and that they have served in every American war, beginning with the Revolution. As a State Department publication summarizes, “Muslim Americans have served with distinction in all U.S. wars.” U.S. Dept. of State, Bureau of International Information Programs, 56 (2008).⁵ The known part of the story begins with Peter Salem (or Saleem), a freed slave who fought “in the Battle of Bunker Hill and throughout the American Revolution.” Like many Africans brought to America as slaves, Salem was a Muslim.

A recent search of government records revealed additional Revolutionary soldiers with Muslim surnames, several in the War of 1812, and many more in the Civil War. Amir N. Muhammad, 14–23 (2007). Muhammad found hundreds of Muslim surnames in the draft and enlistment records of World War I, at 24–62, and World War II, at 63–168. There are problems with the documentation and internal consistency of Muhammad’s scholarship; he searched for only 99 surnames, so many Muslims would be omitted; and some of the names he searched for are

⁴ Available at www.altmuslim.com/a/a/b/1986/.

⁵ Available at www.america.gov/media/pdf/books/being-muslim-in-America.pdf.

service academies and on military bases, appointed Muslim chaplains, accommodated Ramadan, and taken other steps to recruit Muslims. Whittle, at note 6. With wars in the Middle East and a battle for the hearts and minds of Muslims, the military needs more men and women who understand Muslim cultures, and more who speak Arabic and other Middle Eastern languages.

Muslims are only one of many non-Christian religious minority groups comprising many millions of Americans. The best data on the population come from the American Religious Identification Survey, which surveyed enormous numbers of Americans in 1990,⁸ 2001,⁹

than 73 million Americans do not describe themselves as Christians.¹³

B. The Christian Cross Is a Uniquely Sectarian Symbol that Cannot Memorialize Muslim Veterans.

The government has not presented the question whether the cross is constitutional if sponsored by

cross is central symbol of central theological claim of Christianity: that the son of God died on the cross to redeem the sins of human kind, that he rose from the dead, and that those who believe in him will also rise from the dead and have eternal life.

All the secondary meanings to which the Christian cross has been put are derived from, and dependent on, this primary meaning. The secondary meanings would make no sense without the primary meaning. Why does the cross honor deceased Christian soldiers? Because it symbolizes the promise that they will rise from the dead and live forever. To say that the cross honors the Christian dead is not to identify a secular meaning of the cross; it is merely to identify a common application of the religious meaning of the cross.

The cross is not at all like the Ten Commandments. The Ten Commandments are a sacred text, but this text contains prohibitions on murder, theft, perjury, and defamation—secular wrongs that are prohibited in the legal code of every civilization. “Thou shalt not kill” has intelligible secular meaning that does not depend upon the purely religious duties with which it is bracketed or the divine source to which it is attributed.

, 545 U.S. at 690 (plurality opinion); at 701 (Breyer, J., concurring). But the Christian cross has no meaning not derived from its primary religious meaning.

Moreover, the Ten Commandments are sacred to all three of the Abrahamic religions.

, 545 U.S. at 894 (Scalia, J., dissenting). But the cross is sacred only to Christians; it is a symbol only of Christianity.

Justice Scalia has defended government sponsorship of religion as strongly as any Justice, and more strongly than most. Yet twice he has said that this support must be interfaith. It must be confined to what the three Abrahamic faiths have in common, at 893–94; it must exclude “details upon which men and women who believe in a

central point. On any version of Christian theology, some humans get the promise, and other humans get the threat.

To note these things about the cross is not to attack Christianity, but to take it seriously. Muslim teachings on reward and punishment in the afterlife are different in important ways, but similar in insisting on belief in religious truth. Islam predicts

meaning and any text can mean any thing. When a

Congress has been inconsistent about who or what the cross is supposed to memorialize. The original plaque said the cross was “Erected in Memory of the Dead of All Wars.” Pet. App. 56a. Federal legislation directs that this plaque should be restored. Pub. L. No. 107–117, §8137(c), Jt. App. 44. But the same Act says that the cross and surrounding land “are a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.” at §8137(a).

Whether it is all veterans or only those who died, and whether it is all wars or only World War I, the group to be honored and commemorated includes Muslims, believers in many other faiths, and people who believe in no religion. But the symbol chosen

Some of these crosses are constitutionally unobjectionable, even praiseworthy. The crosses on the headstones, or used as headstones, on military

Sunrise Rock is not a cemetery, there are no individual headstones with symbols of many faiths, and the government has refused to permit the symbols of any faith other than Christianity. Pet. App. 4a-5a. There is no way this display can be understood as a neutral recognition of veterans of all faiths.

What is at issue in this case is a large, permanent, and freestanding cross, isolated from the symbol of any other faith and from any secular symbol. For government to sponsor such a cross is for government to promote the Christian story of the cross. And that is inconsistent with the core principles of the Establishment Clause, as this Court unanimously recognized in

Lynch v. Donnelly, 492 U.S. 573 (1989). *Lynch* at 599 (opinion of the Court) (even a temporary cross at Easter on the grand staircase of the courthouse would convey “endorsement of Christianity”); *Allegheny County v. American Family Association*, at 661 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and White and Scalia, JJ.) (“the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall”).

II. Government’s Obligation to Remain Neutral Between Competing Religious Claims Is Deeply Rooted in the Original Understanding.

Many of the colonies, and some of the states, had formally established churches, all of which were disestablished over a sixty-year period from the 1770s to 1833. The federal Establishment Clause was the consequence of this movement, not the cause; those who sought disestablishment in their

own states also wanted to prevent any establishment at the federal level. For a detailed historical review of this process of disestablishment, see Carl H. Esbeck,

2004 *BYU L. Rev.* 1385.

The nation was overwhelmingly Protestant in this period, so the debate over disestablishment focused on issues that were controversial among Protestants. First and foremost was how to finance the church. The established churches depended on tax support and sought to keep it. The dissenting churches opposed tax support for churches, and they continued to oppose it even when the established churches offered tax support to all denominations equally, as in the general assessment bill in Virginia. , Thomas E. Buckley,

, at 143, 175 (1977). As the dissenting churches won this battle in state after state, it became settled that government should not financially support the church.

A debate over the government's role in religious doctrine was closely related to the debate over funding. The equality of all denominations implied not only that government should not tax to support its preferred denomination, but also that government should not choose a preferred denomination in the first place.

This much seems to have been universally accepted. The proposals for what became the Establishment Clause would have prohibited establishing "one religious sect or society in preference to others," "any particular denomination of religion in preference to another," or "articles of

faith or a mode of worship.” Douglas Laycock,

, 27 Wm. & Mary L. Rev. 875, 880–81 (1986). And after tax support for churches had been repealed, dissenters continued to object to any sign of government preference for the formerly tax-supported churches. Baptists and Presbyterians denounced the Virginia law incorporating the Episcopal Church as giving that church “Peculiar distinctions” and “the particular sanction of and Direction of your Honourable House.” Douglas Laycock,

, 26 Val.

L. Rev. 37, 43–44 (1991).

What religions should teach, and what individuals should believe, was to be left to churches and individual conscience. The religious dissenters who demanded disestablishment emphasized that true religious faith must be voluntary, not directed by the state. Professor Esbeck summarizes their principle as voluntaryism, a word that was in use at the time. Esbeck, 2004 BYU L. Rev. at 1395–96 & n.24.

But the early generations were slow to apply these principles to generic nonfinancial support of Protestant Christianity. So we find the oft-cited religious rhetoric in the speeches of political leaders. This proves little, because these leaders were of course free to speak in their individual as well as their governmental capacities. Far more telling, we find Protestant religious instruction in the public schools. John C. Jeffries, Jr. & James E. Ryan,

, 100

Mich. L. Rev. 279, 297–305 (2001). In the mid-nineteenth century, we find Catholic children

beaten, or expelled from school, for refusing to read the Protestant translation of the Bible.

, 38 Me. 376 (1854);

, 7 Am. L. Reg. 417 (Boston Police Ct. 1859).

We find blasphemy prosecutions surviving well past the period of formal disestablishment.

, 37 Mass. 206 (1838);

, 2 Harr. (Del.) 553 (1837);

controversies among Protestants. Other faiths were simply not numerous enough, or important enough, to create a controversy that would be taken seriously. Laycock, 27 Wm. & Mary. L. Rev. at 917–18.

This narrower principle has remained the same, but the facts to which the principle applies have changed. The large Catholic immigration, beginning in the second quarter of the nineteenth century, created an enormous controversy over religious instruction in the public schools. Jeffries & Ryan, 100 Mich. L. Rev. at 299–305; Laycock, 26 Val. L. Rev. at 50–53. This controversy produced mob violence and church burnings in Eastern cities, a proposed constitutional amendment, and a major political issue that recurred for decades. at 51–52 (collecting sources). Under changed social conditions, religious instruction in the public schools inflicted precisely “those consequences which the Framers deeply feared.” , 374 U.S. 203, 236 (1963) (Brennan, J., concurring). The principle of keeping government out of religious controversies now meant that government should not teach religion in the public schools.

Deeply rooted anti-Catholicism meant that it took a long time for Americans to recognize this new application of their constitutional principle. But very slowly, beginning in the late nineteenth century, state courts and local boards of education began removing religious observances from the public schools. , 44

III. The Surrounding Law of Injunctions Gives Additional Support to the Rules That Prevent the Government from Relitigating Issues Determined in .

As explained in plaintiff's brief, plaintiff's standing and the constitutionality of government sponsorship of the cross at Sunrise Rock were determined by a final judgment in 2004. , Pet. App. 100a. Those issues cannot be relitigated now, either on Mr. Buono's motion to enforce the injunction or on the government's implicit motion to modify the injunction on the ground that Congress has provided a complete alternative remedy. Relitigation of either issue is barred by the long-expired time limit on petitions for certiorari, and barred by res judicata. See Resp. Br. 11–18, 33 and cases cited; , 460 U.S. 752, 756–57 (1983).

In addition to these explicit applications of res judicata in injunction cases, the Court unanimously applied res judicata to a permanent injunction entered by consent in , 540 U.S. 431 (2004). Defendants argued that the Eleventh Amendment barred enforcement of the injunction to the extent that it required more than the underlying statutory right on which the injunction was based, and therefore, that they were entitled to relitigate the meaning of their statutory obligation on plaintiff's motion to enforce. The Court disagreed. The Court focused on the Eleventh Amendment and did not mention res judicata, but the res judicata effect of the consent decree was the obvious premise of the Court's holding. The Court's holding is not inconsistent with the principle that explicit res judicata

cases cited in plaintiff's brief, *Wang* holds that a final judgment of injunction cannot be relitigated on a motion to enforce it.

In addition, all the cases on modification of permanent injunctions are based on the premise that a permanent injunction is *res judicata*. If permanent injunctions were not *res judicata*, they could be modified at will. It is only because permanent injunctions are *res judicata* that some change in law or fact is required to support their modification under Rule 60(b)(5). "Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests . . ." *Wang*, 129 S.Ct. 2579, 2593 (2009). "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making." *Wang*, 286 U.S. 106, 119 (1932). "A motion for relief from judgment under Rule 60(b) . . . does not toll the time for appeal from, or affect the finality of, the original judgment." *Wang*, 434

U.S. 257, 263 n.7 (1978).

Rather than a chance to relitigate, Rule 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest.'" *Wang*, 129 S.Ct. at 2593, quoting *Wang*, 502 U.S. 367, 384 (1992); *Wang*,

The government's argument here is functionally equivalent to a motion to modify the injunction in _____, which prohibits it from "permitting the display of the Latin cross in the area of Sunrise Rock . . ." Pet App. 146a. On such a motion, "[t]he party seeking relief bears the burden of establishing that changed circumstances warrant relief." _____, 129 S.Ct. at 2593. The only alleged change is Congress's attempt to privatize the cross.

The question whether that attempt is a sufficient change to justify modifying the original injunction resolves into the question whether Congress has actually remedied the adjudicated constitutional violation. As the Court said in _____, "If petitioners are ultimately granted relief from the judgment, it will be because they have shown that the Nogales School District is doing exactly what this statute requires." 129 S.Ct. at 2607. Similarly here, if Congress has done "exactly what" the Establishment

injunction is res judicata in subsequent civil proceedings to enforce it.

The relevant rules in this case are res judicata and lack of jurisdiction, not the collateral bar rule. Plaintiff seeks to enforce a final judgment, affirmed on appeal in 2004, with respect to which the time for certiorari or rehearing has long since expired. No one should be confused by the more limited reach of the collateral bar rule, which applies to quite different circumstances. The government is barred from relitigating either plaintiff's standing or the unconstitutionality of a government-sponsored cross at Sunrise Rock.

IV. The Plaintiff Has Standing.

A. The Government's Standing Argument Is Based on a Tendentious Distortion of Plaintiff's Declaration.

Plaintiff's sworn Declaration states:

I am a Roman Catholic, attend mass, and obviously have no objection to Christian symbols on private property. However, 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. The presence of the cross on federally owned land in the Preserve deeply offends me and impairs my enjoyment of the Preserve.

Declaration of Frank Buono, ¶20 (Mar. 13, 2002), Jt. App. 64–65.

First, Buono's statement that he does not object to Christian symbols on private property does not deprive him of standing; the central issue to be decided at this stage of the litigation is whether the land has been sufficiently privatized.

Second, he does say that violation of other people's free speech rights offends him; he says "the presence of the cross on federally owned land in the Preserve deeply offends me." His objection to government "allowing a symbol of one religion on government property that is not open to others" is simply a recognition of the facts of this case and of the meaning of government sponsorship. Government did not itself place the cross; government allowed private citizens to place the cross and it refused to allow other private citizens to place symbols of other faiths. Pet. App. 4a-5a. This preferential treatment is a form of government sponsorship of the cross. If the government had allowed all faiths to place their religious symbols at Sunrise Rock, there would have been a limited public forum instead of a government-sponsored cross. On any reasonable reading of his Declaration, Buono objects to the government-sponsored cross.

B. The Government's Standing Argument Is Inconsistent with the History and Purpose of the Establishment Clause.

Plaintiff does not lack standing either because he is objecting to a symbol of his own faith or because he is objecting to government sponsorship. It is enough that he sincerely objects to a government-sponsored religious symbol to which he is personally exposed. The government's argument to the contrary

313, 392 (Narragansett Edition, 1963 reprint). Dissenting religious leaders in the eighteenth century continued the argument on similar terms. After exhaustively reviewing the process of disestablishment, Professor Esbeck identifies at least eight related arguments:

The arguments supportive of disestablishment, both by prominent religious figures as well as those more devoted to the guidance of reason, were: (1) that to be genuine in one's faith, religious belief and practice must be voluntary; (2) that establishment subordinates the church to the state, thus yielding jurisdiction over religious doctrine and governance for which the civil state is wholly without competence; (3) that establishment has a corrupting effect on the church and its clerics; (4) that as an institution that mediates between the state and the people, the churches presume to sit in judgment over, and thereby help limit, the state and its authoritarian pretensions; (5) that only a free and independent church will successfully exercise its prophetic voice and critique the state, a role important to limiting the state; (6) that a civil government that treats religions unequally will cause jealousy and resentments within the body politic; (7) that religion, if vibrant and respected, can help temper selfish passions and oppressive tendencies and thus protect against harmful swings in popular sentiment to which republics are vulnerable; and (8) that religion, when perverted into a civil religion, collapses

two very different and very powerful allegiances, risking a dangerous confounding of God and country, faith and nationalism.

Esbeck, 2004 *BYU L. Rev.* at 1581. Each of these arguments is fully applicable to government support of one's own faith. Of course Islam has taken a different view in the countries where it is numerically predominant, with very different results. But these were the arguments of the American Christians who successfully worked for disestablishment. The argument developed in this way because the last offer from the supporters of establishment was some form of nonpreferential aid that would include, or could be argued to include, all forms of Christianity. Laycock, 27 *Wm. & Mary L. Rev.* at 895–902 (reviewing proposals for nonpreferential aid in Virginia, Maryland, Georgia, and South Carolina, and local option systems, presented as fair to all denominations, in Massachusetts, Connecticut, New Hampshire, and Vermont). But that last ditch offer failed, because the opponents of establishment were opposed to the establishment of any religion, including their own.

This fear that government support will corrupt religion has motivated religious opponents of establishment throughout American history. So it is no surprise that Establishment Clause plaintiffs often object to support of their own religion.

Resp. Br. 24–25 and cases cited;

, 530 U.S. 290, 294–95 (2000) (Catholic and Mormon families challenged “overtly Christian prayers”).

V. Congress Has Not Remedied the Constitutional Violation, Because It Has Not Fully Privatized the Cross.

Putting the best possible face on the legislation in this case, the government says that Congress attempted to remedy the constitutional violation by directing that the cross and an acre of surrounding land be conveyed to the local VFW. Pet. Br. 20. The government also relies on the settled principle that private speech promoting religion is protected by the Free Speech and Free Exercise Clauses. at 21.

But for religious speech to be private under that principle, government must do nothing to promote or prefer it. “[G]iving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause.”

, 515 U.S. 753, 766 (1995) (plurality opinion of Scalia, J.). Chief Justice Rehnquist, and Justices Kennedy and Thomas, joined this opinion.

This Court has decided several cases in which government maneuvered to promote or arrange for religious speech while attempting to create an appearance of privatization. The Court has rejected all such efforts. A school board does not successfully privatize prayers by delegating the decision to a student election and an elected student speaker, even if the elected speaker can choose whether to pray. , 530 U.S. at 302–05. It does not privatize prayer by inviting student volunteers to lead the prayer, , 455 U.S. 913 (1982), or by inviting a clergyman, , 505 U.S. at 587–88. A state does not privatize

religious displays by inviting citizens to donate copies of the Ten Commandments. *Lee*, 449 U.S. 39, 42 (1980). There was a private speaker in each of these cases, but the dispositive facts were that government encouraged or arranged for the religious speech or gave preferential treatment to the private religious speaker.

The test is not who owns the property, but whether the government plays any role in promoting the religious speech. Privately initiated religious speech that gets no preferential treatment is private for Establishment Clause purposes even on government property.

Allegheny, 533 U.S. 98, 112–20 (2001); *Marsh*, 515 U.S. at 761–70; *Edwards*, 496 U.S. 226, 247–53 (1990). The test is the government’s role in promoting or arranging for the religious speech, and preferential use of government property is only one way to promote religious speech.

Here, we have continuing government sponsorship; we also have an adjudicated constitutional violation. Plaintiff is entitled to a remedy that eliminates the violation and all its consequences, and restores as nearly as possible the situation that would have existed if the violation had never occurred. *Beckwith*, 518 U.S.

515, 547 (1996). As Chief Justice Burger said in a discrimination case, “The remedy is necessarily designed, *Beckwith*, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.” *Beckwith*, 418 U.S. 717, 746 (1974) (emphasis added). “[W]e must continue to . . . afford remedies that eliminate not only the discrimination but its identified consequences.” *Beckwith*,

503 U.S. 467, 506 (1992) (Scalia, J., concurring).
“The judicial remedy for a proven violation of law
will often include commands that the law does not
impose” in the absence of a violation.

, 475 U.S. 292, 309 n.22
(1986).

The violation here includes discrimination—
preferential access for the Christian message of the
cross and for the VFW and the Sandozes. The
violation includes the reality and perception that
government is sponsoring the sectarian message of
the cross by this preferential treatment. The remedy
must end the discrimination and end both the reality
and perception of government sponsorship. The
remedy must end any residual uncertainty about
who sponsors the cross, both because such
uncertainty sustains the perception of government
sponsorship and because such uncertainty is a
consequence of the past violation.

A complete remedy therefore requires several
elements:

**1) The national memorial designation must
be repealed or invalidated.** It is not just the site,
but the cross itself that has been designated as a
national memorial. “The five-foot-tall white cross
[described by history and location] as well as a
limited amount of adjoining

2) The reverter clause must be repealed or invalidated. Even though the reverter clause does not explicitly require a cross, it limits the use of the land to a narrow category that includes the existing cross. By eliminating most other options, it creates pressure to retain the cross. Together with the national memorial designation and the name of the memorial, the reverter clause serves as an obvious signal about the intended use of the land. The VFW would not feel entirely free to remove the white cross from the “White Cross World War I Memorial.”

The reverter clause, and the name of the Memorial, are like the restrictions on the student speaker in *Lee*, which did not explicitly require prayer but sharply limited the speaker’s options and pressed in the direction of prayer. *Lee*, 530 U.S. at 306–07. Government cannot press for a religious display, especially when it is responsible for curing an adjudicated violation.

3) The transfer of the cross must be made visible on the ground. Fencing and signage must make it readily apparent to all observers that the government’s sponsorship of the cross has ended. Signage indicating that the cross is privately owned must be visible on Cima Road to drivers in each direction; these drivers are the primary audience for this cross. A plaque at the base of the cross helps little; it will be visible only to those few persons who park and brave a steep ascent on bare rock to reach the cross. Brief of Amici Curiae Veterans of Foreign Wars *et al.*, App. 13a (photograph of Sunrise Rock showing both the relative inaccessibility and the high visibility of the cross).

4) Any other interested persons must be given a fair opportunity to acquire the land in

open bidding. A preferential sale to the VFW and the Sandozes, even at appraised value, is no remedy at all for the longstanding preferential access given to the VFW and the Sandozes.

The judgment below, enjoining transfer of the property on the terms enacted by Congress, is necessary to make possible the fourth element of this remedy. The other three parts of an effective remedy could be implemented on remand, or on further motion in the district court, even if the land were transferred in the meantime.

CONCLUSION

The judgment below should be affirmed. The case should be remanded to the district court for implementation and enforcement of a complete remedy, either by removing the cross or by completely, publicly, and visibly privatizing the cross.

Respectfully submitted,

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